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COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**BRIEF OF LAW AND ARGUMENT OF ARENA INVESTORS LP**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors Suite 3400, 350 7 Avenue SW Calgary Alberta T2P 3N9 Attention: Jessica Cameron/Anthony Mersich Phone: (403) 261-9468/(587) 233-4124 Email: jcameron@fasken.com/amersich@fasken.com

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BENCH BRIEF OF ARENA INVESTORS LP

APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE BOURQUE

November 8, 2024

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I. INTRODUCTION:

1. Arena Investors LP ("**Arena**") submits this brief in opposition to the application of Razor Energy Corp. ("**Razor Energy**"), Razor Holdings GP Corp. ("**Razor Holdings**"), and Blade Energy Services Corp. ("**Blade**", Razor Energy, Blade, and Razor Holdings, are collectively referred to as, the "**Applicants**"), seeking, among other things, approval of a transaction by way of a reverse vesting order ("**RVO**") whereby Texcal Energy Canada Inc. ("**Texcal**") would acquire all of Razor Energy's issued and outstanding shares (the "**Corporate Transaction**").

2. When considering the equities of the parties and the Corporate Transaction as a whole, the RVO should not be approved.

3. Texcal is a newly formed entity of the same corporate group as Solidarity Holdings Inc. ("**Solidarity**").

4. Beginning in the spring of 2024, Solidarity expressed interest in concluding a transaction for the purchase of one hundred percent of the equity in Razor Energy. Since April 2024, Solidarity expressed that the purchase price it would pay to conclude such a transaction would include the assumption of the first ranking secured indebtedness owing by certain of the Applicants and Razor Royalties Limited Partnership ("**Razor Royalties LP**") to the Arena Lenders (the "**Arena Indebtedness**"), together with an assumption of certain gross overriding royalty interests ("**GORRs**") that had been assigned to Arena as part of the loan transaction. On that basis, Arena supported the Applicants throughout these proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**" and such proceedings being the "**CCAA Proceedings**").

5. Arena has incurred significant legal costs in supporting the Applicants throughout these CCAA Proceedings. Further, the Applicants have benefited significantly from Arena's support, and accordingly, Texcal and Solidarity stand to benefit from same, should the RVO be granted.

6. On October 22, 2024, Arena was advised, for the first time, that the Corporate Transaction no longer contemplated an assumption of the Arena Indebtedness, and further, that the

Corporate Transaction contemplated vesting out assignment agreements in respect of the GORRs (the "**Assignment Agreements**"), but not the GORRs themselves.

7. The Corporate Transaction also contemplates payments to subordinate and unsecured creditors of the Applicants, while the secured indebtedness owing to Arena would be left unpaid. Arena submits it would be inequitable for this Court to sanction a transaction that includes preferential payments.

8. Not only does the Corporate Transaction contemplate such preferential payments, it also provides for the conveyance of Razor Royalties LP's only valuable asset (the GORR) free and clear of the interests of its only secured creditor, being Arena, to Texcal in circumstances where Arena receives nothing. Conversely, the sale proceeds are being utilized to pay *Razor Energy's* creditors, not Razor Royalties LP's. Through this structure, no value is being ascribed to an interest that generates significant royalty revenues.

9. The Applicants, Solidarity and Texcal have failed to act in good faith by leading Arena to believe that its interests would be preserved in the Corporate Transaction, in order to obtain Arena's support throughout the CCAA Proceedings, only to pull the rug out from under Arena at the eleventh hour, and after Arena had already provided the support that the Applicants and Solidarity needed in order to get to this point.

10. The Applicants assert that this is the only viable option and they are running out of liquidity to effect any further transactions. The Applicants and Solidarity are asking this Court to endorse a game of "regulatory chicken", whereby the purchaser has waited until the debtors have no liquidity remaining and fundamentally altered the terms of the transaction at the last minute in an attempt to predetermine this Court's outcome on the matter.

11. Neither the approval of a transaction containing preferential payments nor such high-handed conduct on the part of the Applicants and proposed purchaser should be endorsed by this Court, and accordingly, Arena asks the Court to dismiss the Applicant's request for approval of the Corporate Transaction and granting of the RVO.

II. FACTS

12. The facts relevant to Arena's opposition to approval of the Corporate Transaction are largely set out in the Affidavit of Greg White, sworn November 5, 2024 (the "**White Affidavit**"). All capitalized terms used but not otherwise defined herein have the meanings given to them in the White Affidavit.

III. ISSUES:

13. Arena respectfully submits that the issues before the Court is:

    (a) Whether it is appropriate to grant the RVO, which contemplates vesting out the Arena Indebtedness and the Assignment Agreements?

14. Arena respectfully submits that the answer to this question is no.

IV. LAW & ANALYSIS:

<u>The GORR is an interest in land and should not be vested out</u>

15. When vesting out the interests of third parties through a sale process in an insolvency proceeding, the court must consider - in addition to the factors provided at CCAA s. 36(3) and those in *Royal Bank v. Soundair Corp*[1] - factors identified by the Ontario Court of Appeal in *Third Eye Capital Corporation v. Dianor Resources Inc.*[2], which are as follows:

    (a) first, the nature and strength of the interest that is proposed to be extinguished;

    (b) second, 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; and

    (c) third, if the first two steps proved to be ambiguous or inconclusive, a consideration of the equities to determine if a vesting order is appropriate in the circumstances,

    (collectively, the "***Dianor* Factors**").

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[1] 1991 CarswellOnt 205, [1991] O.J. No. 1137 at para 16 [***Soundair***] [**TAB 1**].

[2] 2019 ONCA 508 [***Dianor***] [**TAB 2**].

16. The Corporate Transaction seeks to vest out Arena's interest in the GORRs, which Arena submits is an interest in the Royalty Lands, and not merely a contractual interest.

17. In *Dianor,* the Ontario Court of Appeal held that an interest in land, such as a gross over-riding royalty, should not be vested out without the consent of the royalty holder, irrespective of any consideration of the equities.[3]

Arena's interest in the GORRs is an interest in land

18. In order to determine whether a royalty is truly an interest in land, the court must examine the intentions of the parties and consider "the agreement as a whole, along with the surrounding circumstances."[4]

19. Where a royalty agreement expressly states that the royalty in question constitutes an interest in land, such language creates a strong, but rebuttable presumption that the royalty is indeed an interest in land.[5] The Royalty Agreements themselves provide that the royalties granted thereby are intended to be "interests in land",[6] and accordingly, they establish the rebuttable presumption that the GORRs are indeed an interest in land.

20. In addition, however, the circumstances surrounding the Loan Agreement, and the nature of the loan and security agreements, when considered as a whole, clearly demonstrate that the Royalty Agreements were intended to create an interest in land *in favour of the Arena Lenders*.

21. In that regard, the Arena Lenders made available to the Razor Borrowers three senior secured term loan facilities in the initial maximum principal amounts of USD$11,042,617, USD$8,833,922, and USD$11,042,403 (collectively the "**Loan**"), pursuant to the Loan Agreement.[7] The Loan was guaranteed by Razor Energy Corp.[8]

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[3] *Dianor* at para 115 [**TAB 2**].

[4] *Bank of Montreal v Enchant Resources Ltd.*, 1999 ABCA 363 at para 73, aff'd 2002 SCC 7 [**TAB 3]**.

[5] *Prairiesky Royalty Ltd v Yangarra Resources Ltd*, 2023 ABKB 11 at para 63 [**TAB 4]**.

[6] Affidavit of Greg White, sworn November 5, 2024, at Exhibits "E" and "F" [**White Affidavit**].

[7] White Affidavit at para 7.

[8] White Affidavit at para 8.

22. As part and parcel of the Arena Lender's overall agreement to enter into the Loan Agreement, the parties agreed to grant the Arena Lender's a gross overriding royalty (i.e., the GORRs) in respect of Razor Energy's oil and gas production from certain oil and gas mineral leases in Alberta.[9]

23. Initially, the GORRs were going to be purchased from Razor Energy by Arena for its own account and no credit facility was contemplated; however, the tax implications of that arrangement were so onerous, the parties agreed to modify the transaction structure. This resulted in the parties agreeing that a limited partnership (Razor Royalties LP) would be established for the purposes of borrowing funds from Arena to purchase the GORR from Razor Energy, and then subsequently assigning the GORR to Arena.[10]

24. Notwithstanding this structure, at all material times the Arena Lenders intended that the GORR and subsequent assignment of it to the Agent would constitute an interest in land in favour of the Arena Lenders.[11]

25. In order to facilitate the desired transaction in a tax efficient manner, Razor Energy sold the GORRs to Razor Royalties LP utilizing the proceeds from funds advanced by the Arena Lenders under the Loan Agreement.[12] Simultaneously, Razor Royalties LP assigned its interest in the Royalty Agreements to the Agent. [13]

26. That the GORRs were always intended to be an interest in land is further supported by the following facts:

    (a) the granting of the GORR was critical to the Arena Lenders' overall willingness to enter into the Loan Agreement, as it formed the basis for Arena's entire valuation of the Loan Agreement. Arena underwrote the Loan Agreement on the basis of the anticipated revenue to be generated from the properties subject to the GORR;[14] and

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[9] White Affidavit at para 9.
[10] White Affidavit at para 10.
[11] White Affidavit at para 11.
[12] White Affidavit at paras 12-13.
[13] White Affidavit at paras 14-15.
[14] White Affidavit at para 18.

(b) Razor Energy's Chief Executive Officer, Mr. Bailey, also considered the arrangement between the parties to create an interest in land in favour of Arena (through the Agent), referring to the GORR as Arena's "hammer" in the event Solidarity attempted to renege on its offer to assume the indebtedness outstanding under the Loan.[15]

27. In summary, the structure of the royalty grant through the Royalty Agreements and the Assignment Agreements was implemented as a result of tax implications that would arise if Razor Energy was to grant a GORR directly in favour of the Arena Lenders,[16] the Loan payments were tied to Razor Energy's production, and the anticipated revenue from the GORR formed the basis for Arena's valuation of the Loan Agreement. Arena submits that when considering the entire loan transaction as a whole, the Royalty Agreements were intended to create an interest in land in favour of the Arena Lenders.

Arena did not consent to vesting out the GORRs

28. Contrary to the Applicants' assertions, Arena has never consented to the vesting out of its interest in the GORRs, implicitly or otherwise.[17] The Applicants advance this argument on a misplaced analogy between Arena's position with respect to the GORRs and that of a subordinate mortgagee. However Arena's interest is not subordinate to anyone's, so the Applicants' analogy is inapplicable in these circumstances.

29. A subordinate ranking mortgagee agrees to take its security knowing the full risk that the mortgaged property may be foreclosed upon or judicially sold with insufficient proceeds to pay out the higher ranking mortgagee, leaving the subordinate mortgagee with nothing. A first ranking mortgagee does not accept this risk when taking its security. To the contrary, a first ranking mortgagee's expectation in the event of a default by its borrower would be that it would recover the secured obligations owing to it by enforcing against the property, and then it would commence an *in personam* claim against the borrower for any deficiency.

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[15] White Affidavit at para 50.

[16] White Affidavit at para 10.

[17] Bench Brief of Razor Energy Corp., Razor Holdings GP Corp. and Blade Energy Services Corp. filed on October 30, 2024 at para 168(a) [***Applicants' Brief***].

30. The Corporate Transaction contemplates vesting out Arena's first ranking interest in the GORRs with no consideration being provided in return. Arena did not consent to this arrangement, implicitly or explicitly.

31. In light of the fact that Arena's interest in the GORRs is an interest in land, combined with the absence of Arena's consent to have its interest vested out, Arena respectfully submits that this Court should follow the reasons of the Ontario Court of Appeal in *Dianor* and refuse to vest out the Royalty Agreements and the Assignment Agreements as part of the Corporate Transaction, which provide for Arena's interest in the Royalty Lands.

32. In the alternative, if Arena's interest in the GORRs is not an interest in land and akin to a security interest, this Court must still consider and weigh the *Dianor* factors in determining whether to vest out those interests.[18] For the reasons that follow, when considering the balance of the *Dianor* factors, this Court should decline to grant the RVO extinguishing the Arena Indebtedness and Assignment Agreement.

The Corporate Transaction offends fundamental principles of priority distribution

33. In addition and in the alternative to Arena's submissions above, the Court should refuse approval of the Corporate Transaction because it contemplates allocating portions of its purchase price in priority to the secured indebtedness owing to Arena under the Loan Agreement, as an improper preference.

34. Arena is a senior secured creditor of Razor Energy, potentially with a first-ranking priority position depending upon the determination of potential statutory priority claims.[19] Additionally, Arena is Razor Royalties LP only secured creditor. Accordingly, no subordinate ranking creditor of Razor Energy or Razor Royalties LP, such as an unsecured creditor, may receive any distribution from the proceeds of the Corporate Transaction, until the Arena Indebtedness is repaid in full.[20] Contrary to this basic principle of secured

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[18] *In the Matter of the Companies' Creditors Arrangement Act And In the Matter of CannaPiece Group Inc*., 2023 ONSC 841 at para 68 [***CannaPiece***] [**TAB 5**].

[19] Affidavit #1 of Doug Bailey, sworn February 20, 2024 at Exhibits "N" to "Q" [**First Bailey Affidavit**].

[20] *Windsor Machine & Stamping Ltd., Re*, 2009 CarswellOnt 4471, [2009] O.J. No. 3195 at para 46 [**TAB 6**].

lending, the Corporate Transaction contemplates paying three unsecured "Regulatory Payments" totalling over $1.5 million ahead of Arena's secured claim.

35. First, the Corporate Transaction proposes to pay the respective administrative levies owed to the Alberta Energy Regulator ("**AER**") and the Orphan Well Association ("**OWA**") for the 2024 calendar year. Unlike the regulator's non-provable claim in relation to Razor Energy's end of life ARO, these are purely monetary amounts that constitute provable claims in insolvency.[21] They are therefore subject to the insolvency priority regime.

36. While the *Oil and Gas Conservation Act* purports to grant the Regulator (being the AER), a super-priority lien in respect of any debts owing to it[22], it is subject to the requirements of s. 39 of the CCAA and the general priority regime of provable claims in insolvency. Exercises of provincial power that have the effect of altering bankruptcy priorities are inoperative as they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime.[23]

37. Section 39 of the CCAA in effect provides that the Crown and provinces cannot legislate their own priorities in insolvency proceedings. It states that:

> **Statutory Crown securities**
>
> 39 (1) In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.
>
> **Effect of security**

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[21] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*] [**TAB 7**].

[22] *Oil and Gas Conservation Act*, RSA 2000, c O-6, ss. 69(2), 103(2) **[*OGCA*]** [**TAB 8**].

[23] *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67, at para. 19 [**TAB 9**]; *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at para. 32 [**TAB 10**].

> (2) A security referred to in subsection (1) that is registered in accordance with that subsection
>
> > (a) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and
> >
> > (b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.[24]

38. The AER is a creature of statute, being incorporated pursuant to the *Responsible Energy Development Act*.[25] Pursuant to *REDA*, it is expressly stated that the AER is not an agent of the Crown.[26] However, the AER is also recognized as a "public agency" responsible for the "efficient, safe, orderly and environmentally responsible development of energy resources and mineral resources in Alberta".[27] It has also been recognized as an agent of the Crown by this Court, in a priority dispute concerning unpaid municipal property taxes, where it was advantageous to be the "Crown" in defeating the municipalities' competing priority claim.[28] As a result, Arena submits that any legislated security interest in favour of the AER is subject to s. 39 of the CCAA.

39. As at the commencement of the Applicants' insolvency proceedings, the AER did not have any security interests registered at the Alberta Personal Property Registry.[29] While Arena is not aware of any subsequent registrations having been made by the AER, even if they were, those registrations would be subordinate to Arena's prior ranking security interests by virtue of s. 39(2) of the CCAA. Consequently, the Regulatory Payments contemplated to be made to the AER ahead of repayment of the secured Arena Indebtedness would invert priorities and therefore cannot be sanctioned by this Court.

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[24] Companies Creditors Arrangement Act, RSC 1985, c C-36, as amended [CCAA], s. 39 [**TAB 11].**

[25] *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*] [**TAB 12**].

[26] *REDA*, *supra* s. 4 [**TAB 12**].

[27] *REDA*, *supra* s. 2(1)(a) [**TAB 12**]; *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5, s. 1(1)(i)(i) [**TAB 13**].

[28] *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 at paras 57 and 64 [**TAB 14**].

[29] First Bailey Affidavit, *supra* at Exhibit "N" [**First Bailey Affidavit**].

40. Additionally, the Regulatory Payments also contemplate payment in full, the unsecured claim of the Alberta Petroleum Marketing Commission ("**APMC**") in the amount of $480,390.36, as compensation for Razor's under-delivery of the Crown's royalty share from its production for the month of January 2024 (the "**January Royalty Share**").

41. The Applicants justify this payment on the basis that "this Court has recently held that the withheld royalty share constituted property of APMC, until it was disposed of by Razor Energy."[30] However, as noted by Justice Burns in her reasons in dismissing the APMC's application (the "**Burns Decision**"), the January Royalty Share was likely transferred to third party marketers, in violation of section 11 of the *Mines and Mineral Act*, and as a result, the APMC cannot exercise its *in rem* rights with respect to the January Royalty Share.[31]

42. In this regard, Burns, J. has characterized the APMC's claim as an action in conversion, which gives rise to a claim for damages.[32] Accordingly, the APMC is in no different position than any other judgment creditor with a provable claim arising from litigation.

43. The APMC's claim is an unsecured claim, and therefore cannot be paid in priority to the Arena Indebtedness, which is a secured claim.

44. The proposed payment to the APMC of its unsecured claim is particularly troubling to Arena in circumstances where the APMC has sought leave to appeal the Burns Decision, which dismissed its application to compel Razor to deliver the under-delivered balance in kind.[33] This is not a "Regulatory Payment" as the Applicants have attempted to disguise it as; rather, this is a preferential settlement payment to dispose of the APMC's leave to appeal application. Arena was added as a Respondent to the APMC's leave to appeal application in order to aid the Applicants in their opposition to that motion mere weeks ago.[34] Arena was not made aware of this settlement payment until reviewing the

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[30] Affidavit #11 of Doug Bailey, sworn October 28, 2024 at para 54(c) [**Eleventh Bailey Affidavit**].

[31] *Razor Energy Corp., v Companies' Creditors Arrangement Act,* 2024 ABKB 534 at para 26 [***Burns Decision***] [**TAB 15**]

[32] Philip Osborne, *The Law of Torts*, 6th ed (Irwin Law, Toronto: 2020) at 328 [**TAB 16**].

[33] Sixth Report of the Monitor, dated September 10, 2024 at para 6.

[34] White Affidavit at para 57.

Applicants' materials with respect to this Application and does not consent to such preferential payment.

45. In addition, Razor Royalties LP has no creditors other than Arena. Notwithstanding this fact, the Corporate Transaction contemplates vesting out the obligations owing by Razor Royalties LP to Arena while providing Arena with no consideration or compensation in return. Instead, the Corporate Transaction contemplates making the Regulatory Payments to each of the AER, OWA and APMC, which are obligations owed by *Razor Energy, not Razor Royalties LP.*[35] Similarly, the Corporate Transaction also contemplates making payment of *Razor Energy's* post-filing municipal tax obligations, obligations not owed by Razor Royalties LP.

46. The effect of this payment structure is to convey Razor Royalties LP's only valuable asset (i.e. the GORR) free and clear of Arena's interest, to Texcal (through its acquisition of Razor Energy), while using the proceeds derived from that conveyance to pay Razor Energy's creditors while leaving Razor Royalty LP's sole creditor with nothing. No value is being ascribed to an interest that generates royalties of approximately 230 boe/day of hydrocarbon production.[36]

47. In this regard, the Corporate Transaction is merely a disguised fraudulent conveyance, since it transfers Razor Royalties LP's only valuable asset to a third party for no consideration. This is a further reason to deny the relief sought by the Applicants.

<u>The Court must consider the equities of the parties</u>

48. Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These factors largely correspond to the principles articulated in *Royal Bank v Soundair Corp*[37], for the approval of the sale of assets in an insolvency scenario. Each of these factors are set out in the Applicants' brief at paragraphs 69-70.

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[35] Cross-Examination of Doug Bailey, held November 4, 2024, at 29:1-19, 30:20-26, 31:1 – 32:9 [**Bailey Transcripts**].

[36] White Affidavit at para 74. See also Bailey Transcripts at 26:26 – 27:8.

[37] *Soundair* at para 16 [**TAB 1**].

49. The factors identified by CCAA s. 36(3) as well as those set out in *Soundair* contemplate that any proposed sale must take into consideration the interests of other stakeholders,[38] and in particular, other creditors.[39]

50. The Applicants have completely failed in this regard with respect to the Corporate Transaction. The Applicants have not only failed to consult Arena, but they actually concealed the true nature of the Corporate Transaction from Arena for over a month.[40] The Applicants only disclosed the true terms of the Corporate Transaction to Arena after Arena requested to see the definitive documents for the Corporate Transaction.[41] Those definitive documents were only provided to Arena on October 22, 2024,[42] notwithstanding that the Applicants had revised the Corporate Transaction to exclude Arena's interests in mid-September, 2024.[43] This revision would also have been known by the Applicants when they scheduled this Application on September 30, 2024, yet nothing was said about such a significant change in the transaction structure.[44]

51. Accordingly, Arena respectfully submits that the Applicants have failed to meet the statutory and common law test for approval of a transaction in a CCAA proceeding, since they failed to consult, at all, with their senior secured creditor that supported them and assisted them throughout these CCAA Proceedings. The Applicants' relief for approval of the Corporate Transaction should also be refused on this basis.

52. In addition to the factors provided in CCAA s. 36(3) and *Soundair*, Penny, J. of the Ontario Superior Court of Justice in *Harte Gold Corp. (Re)*, set out four additional criteria that must be considered when determining whether a transaction by way of reverse vesting order is appropriate, as compared to a traditional asset sale approval and vesting order. Those factors are as follows:[45]

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[38] *Soundair* at para 16 [**TAB 1**].
[39] CCAA, *supra* at s 36(3)(d)-(e) [**TAB 11**].
[40] Bailey Transcript at 19:2-11.
[41] White Affidavit at para 67.
[42] White Affidavit at para 68.
[43] Bailey Transcript at 19:2-11.
[44] White Affidavit at para 66.
[45] 2022 ONSC 653 at para 38 [**TAB 17**].

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

(collectively, the "***Harte Gold* Factors**").

53. The Corporate Transaction fails to satisfy the third *Harte Gold* Factor because Arena is worse off if the GORRs are sold through the RVO structure than through a traditional asset sale.

54. Arena would be much better off if it were permitted to either purchase the GORRs for itself through a credit bid against the Arena Indebtedness, or if the GORRs were sold through a traditional asset sale and vesting order to a third-party. In such circumstances, Arena would either obtain the GORRs for itself, or would be entitled to the proceeds of the sale up to the amount of the Arena Indebtedness.

55. Unfortunately, despite the ample amount of time that the Applicants and Solidarity had to prepare the subscription agreement for the Corporate Transaction, the subscription agreement does not provide any details as to how the purchase price is allocated to the Applicants' various assets. Given the complexity of security interests held by a multitude of parties in the various assets that are to be transferred to ResidualCo as part of the Corporate Transaction, it is impossible for any party to determine, at this time, how much it will recover, if any, from the pool of cash that will be transferred to ResidualCo.

56. In order to attempt to ascertain what, if anything, it stands to benefit from supporting the Corporate Transaction, Arena requested a waterfall analysis from the Applicants on October 25, 2024.[46] As at the time of filing this brief, one still had not been provided to

[46] White Affidavit at para 71 and Exhibit "CC".

Arena, although Mr. Bailey confirmed it does exist in draft form during his cross-examinations on November 4, 2024.[47]

57. What is clear, though, is that the Arena Indebtedness exceeds the $2.8 million that is proposed to be transferred to ResidualCo.[48] As a result, even if Arena receives one-hundred precent of the proceeds from ResidualCo, it will still experience a significant shortfall. However, if the GORRs are sold via an asset sale to either Arena (through a credit bid) or to a third party, then Arena will either take possession of the GORRs or will obtain the proceeds of sale. In the first scenario, this is a more favourable outcome for Arena than what is proposed under the Corporate Transaction. Without any purchase price allocations, Arena has no way of determining what valuation has been placed on the GORRs.

58. To the extent that the Applicants argue that the Corporate Transaction satisfies the *Harte Gold* Factors because there is no viable alternative transaction currently before the court that addresses all of Razor Energy's abandonment and reclamation obligations, this is only true because the Applicants and Solidarity waited until the debtors have no liquidity remaining, and then fundamentally altered the terms of the Corporate Transaction at the last minute in an attempt to predetermine this Court's outcome on the matter.

59. The Applicants and Solidarity are attempting to reap the benefits arising from a problem that they created, themselves. They should not be permitted to do so.

60. If this Court nonetheless determines that the Applicants have satisfied the criteria provided by CCAA s. 36(3) and *Soundair*, and that the *Harte Gold* factors have been satisfied, then as noted above, the Court must also consider the *Dianor* Factors when vesting out the interests of third parties. The equities in this case, clearly weigh heavily against vesting out Arena's interest.

61. The third *Dianor* Factor (consideration of equities) is consistent with the general principle that courts must review equitable considerations supporting the respective positions of the

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[47] Bailey Transcripts at 38:10-16.

[48] White Affidavit at para 64; Applicants' Brief at para 4(e).

parties when determining whether to issue a vesting order that terminates the interests of others.[49]

62. The *Dianor* Factors must be taken into consideration even when the interest being vested out is an interest such as a security interest. That is, the *Dianor* Factors do not apply solely in respect of an application to vest out an interest in land.[50] As such, even if this Court determines that Arena's interest in the GORRs constitutes a security interest, it must still consider whether it is appropriate to approve the Corporate Transaction including the vesting out of Arena's interest in the Assignment Agreements.

63. In that regard, Arena has not consented to the vesting out of its interest in the GORRs. To the contrary. Until just one week before the Applicants filed their materials on this motion, Arena understood based on representations made by the Applicants and Solidarity, that the Arena Indebtedness and Arena's interest in the GORRs provided by the Assignment Agreements would be assumed by the purchaser under the Corporate Transaction.

64. When reviewing the equities of the parties, it is clear that they weigh heavily against approving vesting out Arena's interest in the GORRs provided by the Assignment Agreements. Specifically,

    (a) Since March or April of 2024, Solidarity represented that it was interested in purchasing a one-hundred percent equity interest in Razor Energy for a purchase price that included the "assumption of the secured obligations owing by Razor Royalties LP and guaranteed by Razor, to Arena Holdings LP, in the approximate amount of CDN$6.5 million";[51]

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[49] *Firm Capital Mortgage Fund Inc. v 2012241 Ontario Ltd.*, 2012 ONSC 4816 [**TAB 18**]; see also *Romspen Investment Corp. v Woods Property Development Inc.*, 2011 ONCA 817 at para 25 [**TAB 19**]; see also *Quest University Canada (Re)*, 2020 BCSC 1883 at para 62 in the context of a CCAA proceeding where RVO was at issue [**TAB 20**].

[50] *CannaPiece* at para 68 [**TAB 5**].

[51] White Affidavit at para 36.

(b) On or around May 3, 2024, Arena provided Solidarity with copies of its loan agreement and security documentation for the Arena Indebtedness and the GORRs so that Solidarity could consider them in developing the Corporate Transaction;[52]

(c) The Applicants, Solidarity and Arena, through their respective legal counsel, engaged in numerous discussions regarding the structure of the Corporate Transaction beginning in May of 2024, and which continued well into the autumn of 2024. Throughout that period, the Applicants and Solidarity represented, and Arena understood, that the Arena Indebtedness and Arena's interests in the GORRs would be preserved;[53]

(d) Arena has supported the Applicants in respect of numerous applications before the Court, including actively participating in two contested applications.[54] The Applicants greatly benefited from Arena's support, as the Applicants were able to resist certain relief that was sought by the APMC and Conifer Energy Inc. ("**Conifer**"), in part due to submissions made by Arena. Had APMC's or Conifer's applications succeeded, the Applicants' restructuring efforts would likely have collapsed;[55]

(e) Texcal, as the proposed purchaser, stands to greatly benefit from Arena's support in those contested applications, if the Corporate Transaction is approved;

(f) The Applicants have also conducted two asset sales during these CCAA Proceedings, described in the Bailey Affidavit as the HWN Transaction and the FutEra Transaction, which were approved by this Court on July 17, 2024. Arena declined to take distributions from the proceeds of these transactions on the basis so that those proceeds could be applied to the continuation of these CCAA Proceedings, which was necessary to effect the Applicants' proposed Corporate

[52] White Affidavit at paras 35-36, 40.
[53] White Affidavit at paras 44, 46-47 and 50-51.
[54] White Affidavit at para 52.
[55] White Affidavit at para 56.

Transaction[56]. Arena is now at risk of receiving no repayment of the indebtedness due and owing

(g) As late as mid-October of 2024, Arena requested that the APMC add Arena as a respondent so that it may oppose the APMC's application for leave to appeal the Burns Decision.[57] Clearly, by requesting to be added as a *respondent* to oppose the application for leave to appeal, Arena continued to understand that it would receive a benefit from such opposition and pursuit of the Corporate Transaction more generally. By this time, a month had passed since the Applicants had revised the Corporate Transaction to exclude any benefit being conferred on Arena;[58]

(h) Arena committed significant time and resources to drafting the responding memorandum for the application for leave to appeal the Burns Decision, before being advised that the Corporate Transaction contemplated vesting out the Arena Indebtedness and Arena's security interest in the GORRs;[59]

(i) Arena has incurred approximately $175,000 USD in legal fees in these CCAA Proceedings, in order to support the Applicants' pursuit of the Corporate Transaction;[60]

(j) Arena provided its support to the Applicants on the understanding that (a) the purchase price payable by Solidarity pursuant to the Corporate Transaction would include a full assumption of the Arena Indebtedness; and (b) as part of the debt assumption, Solidarity would be assuming the GORRs;[61] and, lastly,

(k) On October 22, 2024, <u>for the first time</u>, the Applicants advised Arena, through their respective legal counsel, that, contrary to all prior representations that have been made to Arena, the Corporate Transaction with Solidarity would not include an

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[56] White Affidavit at para 34.
[57] White Affidavit at para 57.
[58] Bailey Transcript at 19:2-11.
[59] White Affidavit at para 58.
[60] White Affidavit at para 65.
[61] White Affidavit at para 63.

assumption of the Arena Indebtedness, and further still, the parties intended to seek a form of vesting order that would vest out all of Arena's interests pertaining to the GORRs.[62]

65. Arena was led by Solidarity and the Applicants to believe that the eventual Corporate Transaction would preserve Arena's rights. At the eleventh hour, however, and after Arena had already committed significant resources to supporting the Applicants through these proceedings, Solidarity and the Applicants have reneged on their prior commitments, and now propose a deal in which Arena receives nothing.

66. These facts are similar to those in *CannaPiece.* In that case, the debtor had entered restructuring proceedings under the CCAA, and was seeking approval of a stalking horse sale and investment solicitation process ("**SISP**"). The debtor's first ranking secured creditor (the "**Senior Creditor**") withdrew its opposition to the debtor's application only when the stalking horse bidder agreed to assume the Senior Creditor's first ranking secured debt as part of its stalking horse bid.

67. At the conclusion of the SISP, another bidder had submitted a bid (the "**Superior Bid**") that was for a higher dollar value, but did not include an assumption of the Senior Creditor's secured debt. The court considered the *Dianor* Factors and determined that, in the circumstances, it was inequitable to approve the transaction for the purported Superior Bid without an assumption of the Senior Creditor's secured debt.

68. The court held that the expectation had always been that whatever transaction emerged from the SISP would include an assumption of the Senior Creditor's secured debt[63]. The Superior Bid did not contemplate an assumption of the Senior Creditor's secured debt, and instead included payments to other creditors that were not included in the stalking horse bid. These facts bear striking similarity to the Corporate Transaction, which contemplates the payment of the APMC's unsecured claim ahead of the Arena Indebtedness, which is secured debt, as well as the other Regulatory Payments and municipal property taxes owing

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[62] White Affidavit at para 68

[63] *CannaPiece* at para 98 [**TAB 5**].

by Razor Energy, not Razor Royalties LP. The court in *CannaPiece* determined that this outcome was inequitable, and accordingly, it declined to approve the transaction.

69. As was the case in *CannaPiece*, Arena supported the Applicants throughout these CCAA Proceedings on the reasonable expectation of receiving a benefit from such support. Arena submits that it would be inequitable for the Applicants and Solidarity, through its nominee Texcal, to now receive the benefit of approval of the Corporate Transaction through the RVO, in circumstances where Arena stands to receive no benefit. Accordingly, the application should be dismissed on this basis as well.

Razor and Solidarity have not acted in good faith

70. Interested parties participating in restructuring proceedings are required to act in good faith with respect to those proceedings. The *Bankruptcy and Insolvency Act*[64] ("**BIA**") and the CCAA were amended in 2019 to codify the pre-existing duty of good faith imposed upon interested parties in insolvency proceedings. The debtor and the court officer already have obligations to act in good faith, thus these amendments were aimed at imposing the same obligation on creditors and other parties participating in proceedings under the BIA.[65]

71. The provisions in each of the BIA and the CCAA are identical, and provide as follows:

> **Good faith**
>
> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

72. The language of this section of the CCAA makes clear that the duty of good faith applies to all interested parties in insolvency proceedings, not just the debtor company.

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[64] RSC 1985, c B-3 [**TAB 21**].

[65] The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition § 1:68. Requirement to Act in Good Faith [**TAB 22**].

Accordingly, Solidarity, as the beneficial owner of the proposed purchaser under the Corporate Transaction, is an interested party, along with the Applicants, and therefore is required to act in good faith in respect of these CCAA Proceedings.

73. The Supreme Court of Canada in *Century Services Inc. v Canada (Attorney General)* stated that the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority.[66] Although there is no statutory definition of good faith under either the BIA or CCAA, recent case law has drawn upon the common law doctrine of good faith in contract performance, as set out by the Supreme Court of Canada's decisions in *Bhasin v Hrynew*[67] and *CM Callow Inc v Zollinger*[68] in order to inform the scope of the duty of good faith in insolvency proceedings.

74. In that regard, Justice Mah in *CWB Maxium Financial Inc v 2026998 Alberta Ltd*[69] conducted a thorough analysis of the existing case law that had addressed the duty of good faith in considering the application of the duty in the context of BIA s. 4.2 (which is identical to CCAA s. 18.6).

75. Mah, J. summarized his analysis by providing several observations about the application of the duty of good faith in insolvency proceedings. Those that are relevant to this Application are as follows (underline added):[70]

    (a) Interested persons in proceedings under the BIA [or CCAA] are statutorily required to act in good faith with respect to those proceedings.

    (b) Since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in section 4.2 of the BIA [CCAA s. 18.6].

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[66] 2010 SCC 60 [**TAB 23**].
[67] 2014 SCC 71 [**TAB 24**].
[68] 2020 SCC 45 [***Callow***] [**TAB 25**].
[69] 2021 ABQB 137 [***CWM Maxium***] [**TAB 26]**.
[70] *CWB Maxium* at para 59 [**TAB 26**].

(c) The duty of good faith requires the parties not to lie to or mislead the other. It does not impose a duty of loyalty or disclosure, or require the subordination of one's own interests to the other, and falls short of a fiduciary duty.

(d) Whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence.

(e) The conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the BIA [or CCAA].

76. The summary provided by Mah, J. in *CWB Maxium* is consistent with the comments from Romaine, J. in *Bellatrix Exploration Ltd (Re)*[71], where she cited an article authored by Dr. Janis Sarra with approval, noting that (underline added):

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.[72]

77. In both *Bellatrix* and *CWB Maxium*, the courts noted that misleading another party about matters relating to insolvency can amount to a breach of good faith. Further, in *CWB Maxium*, relying on *Callow*, the court noted that misleading another party by means of omission or silence can also amount to a breach of the duty of good faith.[73]

78. In *Callow*, the plaintiff, who ran a snow removal company, was led into believing its snow removal contract would be renewed by the defendant condominium corporation, when in actuality the decision had been made months earlier to terminate it. By making the plaintiff believe that the contract would be renewed, the defendants induced the plaintiff to provide

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[71] 2020 ABQB 809 [***Bellatrix***] [**TAB 27**].

[72] *Bellatrix* at para 105 [**TAB 27**].

[73] *CWB Maxium* at para 53 [**TAB 26**].

an entire summer season of free services as an incentive for renewal. The Supreme Court of Canada held that the condominium's silence and failure to correct the plaintiff's misapprehension amounted to a breach of the duty of good faith.[74]

79. The facts in *Callow* are similar to those in the matter at hand. The Applicants and Solidarity knowingly misled Arena to believe from as early as August 23, 2024, to no later than mid-September 2024, that Solidarity would assume the Arena Indebtedness and preserve Arena's interests in the GORR as part of the Corporate Transaction.[75] During that time, Arena continued to support the Applicants in these proceedings on the understanding that the Corporate Transaction would preserve its rights and interests.

80. The Bailey Affidavit states that following receipt of a letter from the Alberta Energy Regulator dated August 23, 2024 "it became apparent that the form of Corporate Transaction contemplated by the Original Draft Subscription Agreement could not be completed."[76] Notwithstanding this, Arena was not notified at that time about any change to the Corporate Transaction that would affect its interests and continued to support the Applicants in furthering these CCAA Proceedings on the understanding that it would receive a benefit from the Corporate Transaction.

81. Arena's support subsequent to August 23, 2024 included:

(a) With the Applicants' knowledge and consent, engaging in without prejudice settlement discussions with Conifer in an effort to resolve the Conifer Application. As evident from the confidential settlement offer made by Arena to Conifer, Arena still understood its debt and interest in the GORRs was being assumed at that time, as otherwise, it never would have made the offer it did as that would have prejudiced Arena's interests;[77]

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[74] *Callow* at para 101 [**TAB 25**].

[75] Bailey Transcript at 19:2-11. Eleventh Bailey Affidavit at para 34-35.

[76] Eleventh Bailey Affidavit at para 35.

[77] White Affidavit at para 52(b), Confidential Exhibit "2".

(b) When those settlement discussions did not resolve the matter, Arena supported the Applicants in opposing the Conifer Application, which support appears to have had a meaningful impact on the dismissal of the Conifer Application based on Mah J.'s decision;[78]

(c) On October 9, 2024, Arena requested to be added as a respondent to the APMC's leave to appeal application, again clearly still operating on the understanding that there would be a benefit to opposing that motion;[79] and

(d) On October 15, 2024, the APMC, through counsel, wrote to the Alberta Court of Appeal requesting that Arena be added as a respondent to its appeal proceedings, correspondence on which the Applicants' were copied.[80] This correspondence was sent over two weeks after the Applicants' advised Arena that they had booked this application[81], and over a month after the Applicants had apparently been working on a revised form of subscription agreement that did not contemplate the assumption of the Arena Indebtedness or interest in the GORRs.[82]

82. Given all of this support being extended by Arena, the Applicants and Solidarity would surely have known about Arena's misapprehension regarding the true treatment of Arena's interests under the Corporate Transaction, but failed to correct that misapprehension until October 22, 2024.[83] This was only one week before the Applicants were due to file their materials in support of this Application.

83. It is also notable that Arena's misapprehension was only corrected after its legal counsel requested a copy of the definitive subscription agreement so that it may review the proposed treatment of the Arena debt assumption.[84] As in *Callow*, the Applicants' and Solidarity's silence constitutes a breach of their duty of good faith in insolvency

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[78] White Affidavit at paras 59-61, Exhibit "Z".
[79] White Affidavit at para 57, Exhibit "X".
[80] White Affidavit at para 57, Exhibit "Y".
[81] White Affidavit at para 66.
[82] Bailey Transcript at 19:2-11.
[83] White Affidavit at para 68.
[84] White Affidavit at para 67, Exhibit "BB".

proceedings. Furthermore, in the words of Romaine J., the Applicants have failed to act "candidly, honestly, forthrightly and reasonably in their dealings with" Arena, and as such, this is a further breach of their duty of good faith and basis upon which this Court should deny the relief sought on the Applicants' motion.

84. The Applicants' approach is also concerning, because it contravenes strong advice that the insolvency bar repeatedly receives from judges on commercial list benches across Canada, being that parties should not come to court with an application that is so time sensitive the Court's outcome is almost predetermined.

85. The Applicants state that the Corporate Transaction is the only viable transaction,[85] that they are about to run out of liquidity,[86] and if the Corporate Transaction is not approved, over $115 million to $123 million of environmental obligations will be transferred to the OWA, rather than to the purchaser. [87]

86. The urgency of this situation is a problem of the Applicants' own making. Effectively, the Applicants are telling this Court, "approve this transaction, or else…", an approach which has been repeatedly admonished by Canadian courts.

87. This issue was recently addressed by the Supreme Court of Nova Scotia in *Atlantic Sea Cucumber Limited (Re)*[88], wherein the Court refused to grant a stay extension for a BIA proposal proceeding because the debtor failed to act in good faith. In making this finding, the Court noted (underline added):

> 26 At all Court stages of this and the CCAA proceeding, <u>there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result."</u> It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). <u>The CCAA materials make the point that if the initial CCAA order</u>

[85] Eleventh Bailey Affidavit at para 9.

[86] Eleventh Bailey Affidavit at para 10.

[87] Eleventh Bailey Affidavit at para 9.

[88] 2023 NSSC 238 [**TAB 28**].

> was not granted, a disastrous bankruptcy would follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).
>
> 27 I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

88. Where a Court finds that a party has not acted in good faith in proceedings under the CCAA, s. 18.6 gives the Court the authority to fashion any remedy it sees fit.[89] As such, should this Court approve the Corporate Transaction notwithstanding the Applicants' lack of good faith, Arena submits it should only do so if the Arena Indebtedness and interests in the GORRs are preserved and not vested out as part of the RVO.

V. CONCLUSION:

89. The Applicants seek this Court's approval of the Corporate Transaction, which contemplates vesting out the Arena Indebtedness as well as Arena's interests in the GORRs to a residual corporation that will have insufficient assets to satisfy the claims against it. The GORRs are an interest in land in favour of the Arena Lenders. Accordingly, they should not be vested out.

90. In addition, the equities of the parties strongly weigh against approving the Corporate Transaction in circumstances where Arena's interests are vested out. The Corporate Transaction contemplates preferential payments to subordinate and unsecured creditors of Razor Energy. On this basis alone it should be refused, as it contravenes a fundamental principle of secured lending by sanctioning preferential payments.

91. Furthermore, the Applicants and Solidarity misled Arena to believe, for months, that the Arena Indebtedness as well as Arena's interests in the GORRs would be assumed as part of the Corporate Transaction. On that belief, Arena spent significant resources supporting the Applicants throughout these CCAA Proceedings. Misleading your senior secured creditor, by your silence or otherwise, does not constitute appropriate "creditor

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[89] CCAA at s 18.6 [**TAB 11**].

consultation" to justify the relief sought under s. 36(3) of the CCAA. Furthermore, the Applicants have failed to meet the test required to obtain a vesting order, a form of equitable relief.

92. Lastly, and perhaps most importantly, the Applicants and Solidarity have failed to act in good faith in respect of these CCAA Proceedings, as is required by s. 18.6 of the CCAA. Having failed to do so, they cannot now reap the benefits of their improper conduct and obtain approval of the Corporate Transaction and RVO.

93. As a result, Arena respectfully requests that the Applicants' request to vest out the Arena Indebtedness and Assignment Agreements, representing the Arena Lender's interests in the GORRs, be refused. Alternatively, Arena submits that the application for approval of the Corporate Transaction by way of the RVO and ancillary forms of order be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5TH DAY OF NOVEMBER, 2024.

FASKEN MARTINEAU DUMOULIN LLP

Per: _____
Jessica L. Cameron/Anthony Mersich
Solicitor for the Applicants

LIST OF AUTHORITIES

1. *Royal Bank of Canada v Soundair Corp.,* 1991 CarswellOnt 205, [1991] O.J. No. 1137.
2. *Third Eye Capital Corporation v Dianor Resources Inc.,* 2019 ONCA 508.
3. *Bank of Montreal v Enchant Resources Ltd*., 1999 ABCA 363.
4. *Prairiesky Royalty Ltd v Yangarra Resources Ltd*, 2023 ABKB 11.
5. *In the Matter of the Companies' Creditors Arrangement Act And In the Matter of CannaPiece Group Inc*., 2023 ONSC 841.
6. *Windsor Machine & Stamping Ltd., Re*, 2009 CarswellOnt 4471, [2009] O.J. No. 3195.
7. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.
8. *Oil and Gas Conservation Act*, RSA 2000, c O-6.
9. *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67.
10. *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453.
11. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
12. *Responsible Energy Development Act*, SA 2012, c R-17.3.
13. *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5.
14. *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839.
15. *Razor Energy Corp., v Companies' Creditors Arrangement Act*, 2024 ABKB 534
16. Philip Osborne, *The Law of Torts*, 6th ed (Irwin Law, Toronto: 2020).
17. *Harte Gold Corp. (Re)*, 2022 ONSC 653.
18. *Firm Capital Mortgage Fund Inc. v 2012241 Ontario Ltd.,* 2012 ONSC 4816.
19. *Romspen Investment Corp. v Woods Property Development Inc*., 2011 ONCA 817.
20. *Quest University Canada (Re),* 2020 BCSC 1883.
21. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
22. The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition § 1:68. Requirement to Act in Good Faith.

23. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60.

24. *Bhasin v Hrynew*, 2014 SCC 71.

25. *CM Callow Inc v Zollinger*, 2020 SCC 45.

26. *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137.

27. *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809.

28. *Atlantic Sea Cucumber Limited (Re),* 2023 NSSC 238.

TAB 1

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

TAB 2

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.ii Time for appeal
Natural resources
II Mines and minerals
II.5 Remedies
II.5.f Vesting orders
Personal property security
X Statutory liens
X.6 Miscellaneous

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

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.

TAB 3

1999 ABCA 363
Alberta Court of Appeal

Bank of Montreal v. Dynex Petroleum Ltd.

1999 CarswellAlta 1271, 1999 ABCA 363, [1999] A.J. No. 1463, [2000] 2 W.W.R. 693, [2000] A.W.L.D. 151, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 179, 182 D.L.R. (4th) 640, 220 W.A.C. 116, 255 A.R. 116, 2 B.L.R. (3d) 58, 2 B.L.R. (3d) 59, 74 Alta. L.R. (3d) 219, 93 A.C.W.S. (3d) 950

Bank of Montreal, Respondent (Plaintiff) and Enchant Resources Ltd., and D.S. Willness, Appellants (Defendants) and Dynex Petroleum Ltd., Alberta Energy Company Ltd., Ardmore Investments Ltd., Transcanada Pipelines Ltd., Amoco Canada Petroleum Ltd., Atcor Ltd., Crestar Energy Inc., Dana Distributors Ltd., Vimyview Ltd., Col-Syb Holdings Ltd., Hexam Holdings Ltd., Davids Investments Ltd., Edward W. Hadway, Estate of Harry Veiner, Victor Sopkiw, Nancy Oil & Gas Ltd., Staniloff Oil & Gas Ltd., Cory Oils Ltd., Doran Investments Ltd., Encor Energy Corporation Inc., Epic Resources Ltd., Kirriemuir Resources Ltd., Meridian Oil Inc., North Canadian Oils Limited, Odessa Natural Corporation, Precambrian Shield Resources Limited, Star Oil and Gas Ltd., Suncor Inc., Earl Gordon, Antelope Land Serves Ltd., Brannigan Resources Canada (1992) Ltd., Jim Bruce Consultants, Saskatchewan Oil and Gas Corporation, Sask Oil Resources Inc., Landsea Oil & Gas Ltd., Intensity Resources Ltd., Deane Enterprises Ltd., Shell Canada Resources Ltd., Channel Lake Petroleum Ltd., and Enron Oil Canada Ltd., Defendants not Party to the Appeal

Bank of Montreal, Appellant (Plaintiff) and Meridian Oil Inc., Odessa Natural Corporation, Enchant Resources Ltd., and D.S. Willness, (Respondents) Defendants and Dynex Petroleum Ltd., Alberta Energy Company Ltd., Ardmore Investments Ltd., Transcanada Pipelines Ltd., Amoco Canada Petroleum Ltd., Atcor Ltd., Crestar Energy Inc., Dana Distributors Ltd., Vimyview Ltd., Col-Syb Holdings Ltd., Hexam Holdings Ltd., Davids Investments Ltd., Edward W. Hadway, Estate of Harry Veiner, Victor Sopkiw, Nancy Oil & Gas Ltd., Staniloff Oil & Gas Ltd., Cory Oils Ltd., Doran Investments Ltd., Encor Energy Corporation Inc., Epic Resources Ltd., Kirriemuir Resources Ltd., North Canadian Oils Limited, Precambrian Shield Resources Limited, Star Oil and Gas Ltd., Suncor Inc., Earl Gordon, Antelope Land Services Ltd., Brannigan Resources Canada (1992) Ltd., Jim Bruce Consultants, Saskatchewan Oil and Gas Corporation, Sask Oil Resources Inc., Landsea Oil & Gas Ltd., Intensity Resources Ltd., Deane Enterprises Ltd., Shell Canada Resources Ltd., Enron Oil Canada Ltd. and Channel Lake Petroleum Ltd., Defendants

Bank of Montreal, Appellant (Plaintiff) and Meridian Oil Inc., Odessa Natural Corporation, Enchant Resources Ltd., and D.S. Willness, (Respondents) Defendants and Dynex Petroleum Ltd., Alberta Energy Company Ltd., Ardmore Investments Ltd., Transcanada Pipelines Ltd., Amoco Canada Petroleum Ltd., Atcor Ltd., Crestar Energy Inc., Dana Distributors Ltd., Vimyview Ltd., Col-Syb Holdings Ltd., Hexam Holdings Ltd., Davids Investments Ltd., Edward W. Hadway, Estate of Harry Veiner, Victor Sopkiw, Nancy Oil & Gas Ltd., Staniloff Oil & Gas Ltd., Cory Oils Ltd., Doran Investments Ltd., Encor Energy Corporation Inc., Epic Resources Ltd., Kirriemuir Resources Ltd., North Canadian Oils Limited, Precambrian Shield Resources Limited, Star Oil and Gas Ltd., Suncor Inc., Earl Gordon, Antelope Land Services Ltd., Brannigan Resources Canada (1992) Ltd., Jim Bruce Consultants, Saskatchewan Oil and Gas Corporation, Sask Oil Resources Inc., Landsea Oil & Gas Ltd., Intensity Resources Ltd., Deane Enterprises Ltd., Shell Canada Resources Ltd., Enron Oil Canada Ltd. and Channel Lake Petroleum Ltd., Defendants (Not Parties to this Appeal)

Foisy, Berger, Sulatycky JJ.A.

Heard: November 30, December 1 and 2, 1998
Judgment: December 17, 1999

69 Similarly, as observed earlier, in *Scurry-Rainbow*, Hunt J. concluded at p. 474 "that the lessor's royalty under the Rio Bravo lease *can* be considered an interest in land... Whether that was the intention of the parties ... remains to be determined." [Emphasis in original] She held at p. 488 that in the context of the agreements, "a literal approach should not be followed if it would bring about an unrealistic result not contemplated in the commercial context of the times." In contemplating the essential nature of the oil and gas lease transaction, she held that regard should be given to what the parties are actually doing.

70 *Canco Oil & Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37 (Sask. Q.B.) (Q.B.) also supports the proposition that royalties generally can be interests in land if the parties intend to create an interest in land. In that case, the parties' intentions were determined from the words of the grant.

71 The registered owner of the mines and mineral interests assigned a gross royalty on substances produced, saved and sold from certain lands. The royalty agreement in *Canco* contained three important clauses. Clause 1 provided that the grantor "hereby grant, assign, transfer and convey to the grantee a gross royalty of 3% of all petroleum, natural gas and related hydrocarbons (except coal) . . . produced, saved and sold from those certain parcels of land." Clause 3 explicitly stated that the parties intended to create an interest in land. Clause 7 reserved operating rights to the grantor. (This can be read to imply that such rights may have normally passed under the royalty agreement.)

72 N. Bankes and Bennett Jones, *Canadian Oil and Gas*, 2d ed. (Toronto: Butterworths, looseleaf) at Dig-877, suggest that the following factors in *Canco* led to the characterization of the royalty as an interest in land:

> (1) the royalty was carved out of what was clearly an interest in land (fee simple interest);
>
> (2) clause 3 and the language of grant in clause 1 indicated that it was the intention of the parties that the royalty be an interest in land;
>
> (3) if it was a necessary condition of an interest in land that it also grant operating rights, clause 7 indicated that these rights might have been an incident of the grant and had been relinquished.

73 The approach of both Matheson J. in *Canco* and Hunt J. in *Scurry-Rainbow* was to examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words. Matheson J. stated at p. 47:

> ... the principal questions are whether Farmers Mutual was capable of granting an interest in the lands and whether it intended to do so and whether it accomplished that intention. As owner of a designated interest in mines and minerals in fee simple, Farmers Mutual clearly possessed an interest in the lands, and the wording of the Royalty Agreement permits of no other conclusion but that Farmers Mutual intended that the grant of the 3% gross royalty should constitute an interest in the lands. The fact that Farmers Mutual did not utilize all of the wording, or type of wording considered by some persons as perhaps essential, can surely not detract from an otherwise clearly manifested intention to create an interest in the lands.

And according to Hunt J. in *Scurry-Rainbow, supra*, at p. 474:

> There is in my view an unreality about placing too heavy an emphasis upon fine distinctions as the selection of words such as "in" rather than "on". Notwithstanding the significance that the courts have sometimes attached to these word choices, I doubt that parties who signed leases... should be taken to have intended to create an interest in land as opposed to a contractual right, as a result of such minuscule differences in language.... Rather, it is more appropriate to consider the substance of the transaction (namely, what were the parties actually trying to achieve?) and to regard the words they have used from that perspective.

United States Authorities

TAB 4

2023 ABKB 11
Alberta Court of King's Bench

Prairiesky Royalty Ltd v. Yangarra Resources Ltd

2023 CarswellAlta 30, 2023 ABKB 11, [2023] 11 W.W.R. 672, [2023] A.W.L.D. 1142, 16 P.P.S.A.C. (4th) 17, 2023 A.C.W.S. 115, 59 Alta. L.R. (7th) 386

Prairiesky Royalty Ltd. (Plaintiff) and Yangarra Resources Ltd. (Defendant)

M.H. Bourque J.

Heard: March 28-31, April 1, June 17, 2022
Judgment: January 6, 2023
Docket: Calgary 1701-08362

Counsel: Laura M. Poppel, Emma Morgan, for PrairieSky Royalty Ltd.
Warren Foley, Ram Sankaran, for Yangarra Resources Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Natural Resources; Property; Public

Related Abridgment Classifications

Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.a Royalty agreement
III.6.a.iii Miscellaneous

Headnote

Natural resources --- Oil and gas — Exploration and operating agreements — Royalty agreement — Miscellaneous

Plaintiff was successor to original grantee's interest in royalty agreement under which 8 per cent overriding royalty was granted in respect of oil and gas recovered under Crown petroleum and natural gas lease — Purchaser acquired Crown lease — Plaintiff brought action for declaration that purchaser was bound by eight per cent royalty, and monetary judgment against purchaser for outstanding royalty payments plus interest — Action allowed — Royalty and purchaser's interest in Crown lease were both legal interests — Plaintiff's eight per cent royalty was first in time and therefore, had priority over purchaser's subsequent legal interest in Crown lease — Royalty was binding on purchaser — Where royalty agreement expressly states that royalty in question constitutes interest in land, is to be construed as interest in land, or runs with lands subject to royalty or underlying interest in land, such language creates strong, but rebuttable presumption that royalty is interest in land — Interest in Land Clause in agreement that creates royalty capable of lasting for duration of underlying interest in land may be sufficient to satisfy relevant test — Crown Lease out of which royalty was carved was working interest or profit à prendre and, therefore, interest in land capable of satisfying applicable test — Carving gross overriding royalty out of mineral lease does not offend nemo dat principle, nor does that principle elevate gross overriding royalty to working interest on par with underlying leasehold interest — Whether parties intended eight per cent royalty to constitute interest in land, predecessors intended for it to constitute interest in land that ran with and bound lands subject to Crown lease — As there were no public registries where predecessors in title could have registered notice of royalty against Crown lands, priority to be determined by rules of priority of competing interests at common law and in equity — Even if royalty were merely equitable interest contingent on future production at time royalty agreement was executed, it would have crystallized as legal interest as soon as petroleum substances were produced — As current lessee, purchaser held rights and interests provided under Crown lease, despite nominal purchase price under agreement not being paid — If royalties were extinguishable upon underlying interest changing hands without subsequent acquiror's knowledge of royalty, there would be no point in labelling them interests in land — Defence of bona fide purchaser for value did not apply Mines and Minerals Act [Repealed], R.S.A. 1980, c. M-15, s 91(1)(b).

59 As the Court of Appeal stated in *Dynex ABCA*, the approach to examining the intention of the parties to establish an interest in land must consider "the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words" (at para 73, aff'd 2002 SCC 7; see also *Dianor* at para 63; *Accel* at para 16).

60 The role of the reviewing court is to ascertain the interpretation of the royalty agreement that promotes or advances the true intention of the parties at the time of contracting. This must be done on an objective basis, focused on what a reasonable person would infer from the ordinary grammatical meaning of the terms of the agreement, "consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (Creston Moly Corp v Sattva Capital Corp, 2014 SCC 53 at paras 47-49 [Sattva]; IFP Technologies (Canada) Inc v EnCana Midstream and Marketing, 2017 ABCA 157 at para 79, leave to appeal to SCC refused 37712 (5 April 2018) [*IFP Technologies*]). "[T]he words of one provision must not be read in isolation but should be considered in harmony with the rest of the agreement and in light of its purposes and commercial context" (Tercon Contractors Ltd v British Columbia (Minister of Transportation and Highways), 2010 SCC 4 at paras 64-65; *IFP Technologies* at paras 79, 81-84).

61 With respect to the surrounding circumstances, courts must consider the facts that were known, or ought to have been known, by the parties at the time of contracting (*Sattva* at paras 58, 60; *IFP Technologies* at para 83). This necessarily includes the genesis, aim, or purpose of the agreement; the nature of the relationship created by the agreement; and the nature or custom of the particular industry (*Sattva* at para 48; *IFP Technologies* at para 83, Nexxtep Resources v Talisman Energy Inc, 2013 ABCA 40 at para 33 [Nexxtep Resources]). By extension, courts must interpret royalty agreements according to sound commercial principles and business sense to avoid results that are unrealistic, absurd, or unreasonable with respect to the commercial realities of the industry (*IFP Technologies* at para 88; *Nexxtep Resources* at para 35).

62 Subjective evidence of the parties' intentions such as post-contract conduct is presumptively inadmissible (*IFP Technologies* at para 87; Alberta Union of Provincial Employees v Alberta Health Services, 2020 ABCA 4 at para 44; *Accel* at para 28). With respect to royalty agreements pertaining to freehold minerals, this includes the practice of registering a caveat with the land titles office or a security interest with the Personal Property Registry in relation to the royalty. Such post-contract conduct is only admissible where the words of an agreement "can be reasonably interpreted to have more than one meaning", resulting in ambiguity as to whether the parties intended for the royalty to be an interest in land (*Accel* at para 28).

b) The core indicia of an interest in land

63 Where a royalty agreement expressly states that the royalty in question constitutes an interest in land, is to be construed as an interest in land, or runs with the lands subject to the royalty or the underlying interest in land (an "Interest in Land Clause"), I find the foregoing jurisprudence suggests that such language creates a strong, but rebuttable presumption that the royalty is indeed an interest in land. After all, it is a cardinal principle of contract interpretation that the parties intend what they have said (Canlin Resources Partnership v Husky Oil Operations Limited, 2018 ABQB 24 at para 38, citing Ventas Inc v Sunrise Senior Living Real Estate Investment Trust, 2007 ONCA 205 at para 24).

64 A common thread since *Dynex ABCA* has been an emphasis on whether the royalty interest can last for the duration of the underlying estate (*Dynex ABCA* at para 84; *Manitok* at para 24; *Accel* at para 51). If a royalty is drafted to extinguish before the underlying interest in land out of which the royalty was carved, it may rebut a presumption that the royalty itself is an interest in land. Conversely, if the royalty is drafted to run with the underlying interest in land in perpetuity, it will reinforce the nature of the royalty as an interest in land.

65 Therefore, where the *Dynex* test distinguishes an interest in land from "a contractual right to a portion of the oil and gas substances recovered from the land", the distinction is between an interest in the produced resource that continues in perpetuity versus a contractual right to a portion of the produced resource as security for payment or performance of an obligation (see *Accel* at para 3). Whereas the former is capable of lasting for the duration of the underlying estate, a contractual right to security for payment or performance would extinguish upon repayment of the debt or performance of the obligation. This interpretation is supported by the policy reasons for upholding GORs as interests in land articulated in *Dynex ABCA* (at paras 35-36): a

TAB 5

2023 ONSC 841
Ontario Superior Court of Justice [Commercial List]

In the Matter of the Companies' Creditors Arrangement Act And In the Matter of CannaPiece Group Inc.

2023 CarswellOnt 1354, 2023 ONSC 841, 2023 A.C.W.S. 445, 5 C.B.R. (7th) 297

In the Matter of the Companies' Creditors Arrangement Act

And In the Matter of CannaPiece Group Inc. et al

Osborne J.

Heard: January 31, 2023
Judgment: February 2, 2023
Docket: CV-22-689631

Counsel: David S. Ward, Larry Ellis, Sam Massie, Monica Faheim, for Applicants
Clifton Prophet, Heather Fisher, Haddon Murray, for 2125028 Ontario Inc.
David Preger, Lisa S. Corne, David Seifer, for Carmela Marzilli and 1000420548 Ontario Inc.
Jeremy Dacks, for Dream Industrial (GP) Inc.
Edward Park — Ministry of Finance
Robert Kennedy, Daniel Loberto — Monitor
Rory McGovern, for Cardinal Advisory Services Limited

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Creditor numbered company had first position security interest over its equipment collateral but nothing else, while creditor CM had first position security interest over effectively all other assets — Applicants sought received protection under Companies' Creditors Arrangement Act, and in following week, order was granted approving sales and investment solicitation process (SISP), and granting C, as stalking horse bidder, priority charge — Monitor, as authorized and directed by order, then set about to implement SISP — Creditor CM made qualified bid which contained terms that creditor numbered company's bid would not be assumed by purchaser, it would be transferred to RCo — Monitor selected creditor CM's bid as successful bid — Applicants brought motion for reverse vesting order — Motion granted in part — Motion was dismissed, save for requested stay extension — Court declined to grant proposed reverse vesting order, vesting assets of applicants in creditor CM's purchaser entity and transferring creditor numbered company's debt to RCo — Considering both process by which creditor CM's bid was ultimately selected, as well as original priority of creditor numbered company's security interest, it could not be concluded that it was equitable in all circumstances to approve this asset sale pursuant to reverse vesting order — First, nature and strength of creditor numbered company's interest was significant, although limited to equipment to which its security interest applied — Second, numbered company had not consented to vesting out of its interest either in insolvency process itself or in agreements reached prior to insolvency.

Table of Authorities

Cases considered by *Osborne J.*:

Harte Gold Corp. (Re) (2022), 2022 ONSC 653, 2022 CarswellOnt 1698, 97 C.B.R. (6th) 202 (Ont. S.C.J. [Commercial List]) — considered

67 First, the nature and strength of 212's interest is significant, although limited to the equipment to which its security interest applies. It ranks in first position. The PPSA registration is first in time as compared to the registration of the security for the Marzilli debt, although the two interests are not competing in the sense that the latter carves out the former.

68 I recognize that the 212 interest that would be vested out is a security interest, and further one that is limited only to certain assets, unlike the interests in land being considered by the Court of Appeal in *Third Eye* (mineral rights and surface rights). However, in my view, the same analysis applies since a third party interest is being extinguished. It cannot be that the *Third Eye* factors apply only to an interest in land or another proprietary right: the nature and quality of the right sought to be extinguished is exactly the first of the three factors to be considered.

69 Moreover, I reject the submission of the Applicants that the rights of 212 are not being extinguished, as occurred in *Third Eye* , but rather they are merely being transferred to Residualco. For the reasons noted above in respect of the evidence before me as to the assets in that entity, it cannot be argued on this motion that the rights of 212 are not being extinguished but rather continue on albeit through a new entity. That is not the practical reality here.

70 Second, 212 has not consented to the vesting out of its interest either in the insolvency process itself or in agreements reached prior to the insolvency. It is urged upon me by the Applicants and those parties who support them that by ultimately not opposing approval of the SISP process, 212 accepted and agreed to the vesting out of its interest in the event that the Successful Bid did not include an assumption of its debt.

71 They submit that the Assumption Agreement entered into between 212 and Cardinal as the Stalking Horse Bidder was a bilateral agreement between those two parties that effectively amounted to a wager on the part of 212 that the stalking horse bid would ultimately be the Successful Bid. It follows, they say, that since the Assumption Agreement was conditional upon the stalking horse bid being the Successful Bid, it was of no effect if that did not occur.

72 The Applicants, Marzilli and Cardinal all disagree with 212 that, fundamentally, the assumption of the 212 debt became an Assumed Liability as contemplated in the Stalking Horse SPA with the result that it became one component of the floor or minimum that other bids would be evaluated against.

73 I do not accept this submission. The SISP process was predicated on the Stalking Horse SPA. When both of those were approved on November 10, 2022, the ultimate value represented by the Stalking Horse SPA was not yet determined. It had a minimum value of $3.5 million (and other terms) but the Assumed Liabilities had not yet been agreed by Cardinal. The relevant schedule in the Stalking Horse SPA was blank.

74 The timetable of key milestones in the SISP process recognized this and set a deadline of November 30 for the finalization of the quantum of Assumed Liabilities if any. Accordingly, I find that all stakeholders and potential bidders knew that the ultimate value of that Stalking Horse Bid could not be determined until the time.

75 Cardinal, as the Stalking Horse Bidder, agreed on November 10, 2022 to assume the 212 debt. I do not find persuasive the submission by the Applicants to the effect that this commitment is irrelevant since it was of no force or effect if Cardinal was ultimately not the Successful Bidder. That is an accurate statement, considering the terms of the Assumption Agreement. However, it does not advance the analysis at all since, naturally, Cardinal had no obligation to close the transaction at all unless and until it was determined to be the Successful Bidder.

76 I do not have to address the hypothetical issue of whether the intended objections of 212 to the approval of the SISP in November would have been successful or whether the SISP would have been approved in any event. It was approved, and the Assumption Agreement was entered into.

77 Moreover, the chronology of how the SISP process in fact unfolded over the subsequent weeks supports, in my view, the position of 212 that the assumption of its debt became a component of the Stalking Horse Bid.

90 I find that the process here was fair and reasonable, and indeed the Monitor did the best it could in a shifting landscape to maintain the integrity of the process but yield the best recovery for stakeholders. The process was fair and reasonable, however, only if it is understood that the assumption of the 212 debt is part of the consideration payable pursuant to the Stalking Horse Bid.

91 In the Second Report, the Monitor sets out the key terms of each of the Stalking Horse Bid and the Marzilli Bid and summarizes the differences between the two, ultimately recommending approval of the Marzilli Bid. It recognizes the fact that the Marzilli Bid contemplates an additional $500,000 as part of the Purchase Price as against the $3.5 million amount contemplated in the Stalking Horse Bid.

92 However, there is no real analysis of whether and how that compares to the consideration payable pursuant to the Stalking Horse Bid enhanced by the assumption of the $3.5 million value of the 212 debt. This makes the conclusion that the Marzilli Bid is a Superior Bid, challenging in the circumstances.

93 Finally, it was urged upon me that the overall equities of the situation, and indeed the best interests of the stakeholders, favour approval of the Marzilli Bid since it represents an outcome materially more favourable for all stakeholders than a bankruptcy with the consequent loss of all that is dependent upon the Applicants continuing as a going concern. Consideration of the benefits of an asset sale as against the alternative of a bankruptcy is one of the factors specifically enumerated in s.36(3).

94 I reject this submission also. Bankruptcy is not the alternative here. It was precisely to guard against this potential (catastrophic) outcome that the SISP process included the Stalking Horse Bid. As recognized throughout - by the Applicants, by Penny J. in his November 10, 2022 endorsement approving the Stalking Horse SPA, and by the Monitor as reaffirmed in its Second Report, the whole point of the Stalking Horse SPA was to provide a minimum outcome for stakeholders.

95 The SISP was conducted against the backdrop of that minimum. Stakeholders knew that even if the SISP yielded no bids, they had the certainty of the knowledge that at least there would be a going concern through completion of the stalking horse transaction.

96 Similarly, other potential bidders knew that the consideration in the Stalking Horse SPA (which, as I have found, included the assumption of the 212 debt), was the minimum against which there potential bids would be measured and evaluated as part of the overall economics of any proposed transaction. Clearly, the quantum of consideration was not the only factor to be considered but it certainly was a significant factor.

97 Cardinal provided interim DIP financing. It was entitled to a break fee in the event that it was not the Successful Bidder.

98 The entire premise of the SISP process, and the expectation of this Court as well as the stakeholders, was and is that if no other bid is determined to be the Successful Bid, Cardinal will complete and perform the Stalking Horse SPA.

99 Accordingly, the stakeholders ought not to be left with the only alternative being a bankruptcy.

100 Considering both the process by which the Marzilli Bid was ultimately selected, as well as the original priority of the 212 security interest, all of which is referred to above, I cannot conclude that it is equitable in all the circumstances to approve this asset sale pursuant to a reverse vesting order.

101 For all of the above reasons, I decline to grant the proposed reverse vesting order vesting the assets of the Applicants in the Marzilli purchaser entity (548) and transferring the 212 debt to Residualco.

102 The motion is dismissed, save for the requested stay extension which as noted above is granted on the consent of all parties.

103 If the parties are unable to agree on the costs of this motion, any party seeking costs may provide to the other parties and to me written submissions not exceeding two pages in length within five days. Responding submissions, also not exceeding two pages in length, will be due five days thereafter.

Motion granted in part.

TAB 6

2009 CarswellOnt 4471
Ontario Superior Court of Justice [Commercial List]

Windsor Machine & Stamping Ltd., Re

2009 CarswellOnt 4471, [2009] O.J. No. 3195, 179 A.C.W.S. (3d) 611, 55 C.B.R. (5th) 241

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED (Applicants)

Morawetz J.

Heard: March 6, 10, 2009
Judgment: July 27, 2009
Docket: CV-08-7672-00CL

Counsel: Andrew Hatnay, Andrea McKinnon for United Auto Workers Local 251
Daniel Dowdall, Jane Dietrich for Bank of Montreal
Joseph Marin for Applicants
Tony Reyes for Monitor, RSM Richter Inc.
Raong Phalavong for Saginaw Pattern

Subject: Insolvency; Employment; Public
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Proceedings subject to stay
Labour and employment law
III Employment standards legislation
III.13 Termination of employment
III.13.d Exemptions to entitlement to statutory termination or severance pay
III.13.d.vi Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Termination and severance pay — Union represented employees at P Ltd. and T Ltd. — Applicants, including T Ltd. and P Ltd., were granted protection under Companies' Creditors Arrangement Act ("CCAA") — Operations at T Ltd. and P Ltd. were subsequently shut down — Employees did not receive termination or severance pay — Union brought motion for order requiring applicants to pay termination and severance pay due and owing to employees of T Ltd. and P Ltd. under Employment Standards Act ("ESA") — Motion was opposed by bank and applicants — Motion dismissed — Conclusions from recent Superior Court case on same issue were adopted — Priority of secured creditors must be recognised — There was no basis for argument that absence of statutory distribution scheme entitled unsecured creditors to obtain enhanced priority over secured

CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.

44 Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *1231640 Ontario Inc., Re* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.

45 Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

46 In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank pari passu with other unsecured creditors and subordinate to the interests of the secured creditors. (See also Indalex Limited CV-09-8122-00CL - July 24, 2009 on this point.)

47 I acknowledge that the situation facing the employees is unfortunate and that in Nortel, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

48 Counsel to the Union also submitted that paragraph 11(d) of the Amended and Restated Initial Order only allows the company to terminate employees on terms agreed to by the employees or "to deal with the consequences thereof in the plan". Counsel to the Union submits that there is no agreement in this case and there is no plan and consequently paragraph 11(d) does not authorize the company not to pay termination pay and severance pay.

49 In my view, the Applicants provide a complete response to this argument in their submission summarized at [15] which I accept and at paragraph 32 of their factum by noting that the Applicants could have proposed a Plan that would not have seen value paid to the unsecured creditors and that could have effected the Proposed Sale through a Plan, and to require that the Applicants propose a Plan in order to effect the sale would be an overly technical requirement inconsistent with the CCAA's remedial objective. I also accept these submissions. In my view, this is not a case where the Applicants have used the CCAA to avoid termination and severance pay obligations under the ESA. The fact that these claims will not be paid is a result of legal priorities as opposed to any specific action of the Applicants.

50 I also note the CCAA proceedings are ongoing and the Applicants have brought forth a motion to propose a plan directed only at the secured creditors, but such a plan has been accepted in other cases. (See *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.)) This motion has yet to be heard.

Disposition

TAB 7

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

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

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

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

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

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

Counsel: Ken Lenz, Q.C., Patricia Johnston, Q.C., Keely R. Cameron, Brad Gilmour, Michael W. Selnes, for Appellants
Kelly J. Bourassa, Jeffrey Oliver, Tom Cumming, Ryan Zahara, Danielle Maréchal, Brendan MacArthur-Stevens, Chris Nyberg, for Respondents
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Gareth Morley, Aaron Welch, Barbara Thomson, for Intervener, Attorney General of British Columbia
Richard James Fyfe, for Intervener, Attorney General of Saskatchewan
Robert Normey, Vivienne Ball, for Intervener, Attorney General of Alberta
Adrian Scotchmer, for Intervener, Ecojustice Canada Society
Lewis Manning, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers
Nader R. Hasan, Lindsay Board, for Intervener, Greenpeace Canada
Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
Caireen E. Hanert, Adam Maerov, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

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

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

Headnote

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

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

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

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

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

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Held: The appeal was allowed.

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

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

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

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

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

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

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

Arrêt: Le pourvoi a été accueilli.

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

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

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

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

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

résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

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TAB 8

Alberta Statutes
Oil and Gas Conservation Act

R.S.A. 2000, c. O-6

Currency

R.S.A. 2000, c. O-6, as am. R.S.A. 2000, c. I-3, s. 867; R.S.A. 2000, c. 24 (Supp.), ss. 1-4 [Not in force at date of publication. Repealed 2013, c. S-19.3, s. 3.] [s. 4 amended 2012, c. R-17.3, s. 98.]; S.A. 2002, c. 12, s. 5; 2006, c. 23, s. 60; 2007, c. A-37.2, s. 82(20); 2008, c. 7, s. 5; 2009, c. A-26.8, s. 85; 2009, c. 20, s. 7; 2009, c. 53, s. 123; 2010, c. 14, s. 3; 2011, c. 11, s. 5; 2012, c. R-17.3, s. 97; 2017, c. 14; 2020, c. G-5.5, s. 32; 2020, c. L-2.3, s. 33; 2020, c. 4, s. 1; 2021, c. M-16.8, s. 59; 2021, c. 13, s. 9; Alta. Reg. 217/2022, s. 165; 2022, c. 21, s. 59; 2023, c. 9, s. 21.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

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Alberta Statutes
Oil and Gas Conservation Act
Part 11 — Orphan Fund (ss. 68-77)

R.S.A. 2000, c. O-6, s. 69

s 69. Fund continued

Currency

69.Fund continued

69(1) The abandonment fund is hereby continued as the orphan fund.

69(2) The orphan fund is to be retained and administered by the Regulator in accordance with this Part.

Amendment History

2012, c. R-17.3, s. 97(31)

Currency

Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

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Alberta Statutes
Oil and Gas Conservation Act
Part 15 — Provisions of General Application (ss. 96-112)

R.S.A. 2000, c. O-6, s. 103

s 103. Enforcement of lien

Currency

103.Enforcement of lien
103(1) In this section,

(a) **"debtor"** means a person who is indebted to the Regulator for any costs, levy, fee, penalty, deposit or other form of security or other amount;

(b) **"payor"** means

(i) a purchaser, operator or other person who owes money to or holds or receives money on behalf of a debtor as a result of a sale of the debtor's proportionate share of any gas, oil or other hydrocarbon produced from a well or facility, and

(ii) a person who holds or receives revenue owing to the debtor resulting

(A) from the use of a well or facility by another person, or

(B) from the provision of services by the debtor.

103(2) The Regulator has a lien in respect of a debtor's debt on the debtor's interest in any wells, facilities and pipelines, land or interests in land, including mines and minerals, equipment and petroleum substances, and when it arises, the lien has priority over all other liens, charges, rights of set-off, mortgages and other security interests.

103(3) The Regulator's lien arises when the debtor fails to satisfy the debt when due, and expires on full satisfaction of the debt.

103(4) The Regulator may enforce its lien by serving on the debtor and the payor a notice of garnishment in the form prescribed by the regulations or rules.

103(5) On receipt of a notice of garnishment, the payor shall forward to the Regulator for payment on account of the debt owing to the Regulator all money and revenue referred to in subsection (1)(b) that is then owing or later becomes owing to the debtor.

103(6) The obligation to make payments under subsection (5) continues until the Regulator advises the payor that the debt has been paid in full.

103(7) Any payment to the Regulator on the account of the debtor under this section is deemed to be a payment to the debtor and releases the payor from liability in debt to the debtor to the extent of the payment.

103(8) A payor who fails to comply with a notice of garnishment is guilty of an offence.

103(9) A payor who fails to comply with a notice of garnishment or makes payment to a debtor in contravention of the notice of garnishment is indebted to the Regulator for an amount equal to the amount the payor is required to pay pursuant to the notice of garnishment or the amount of the payment made to the debtor, whichever is less.

Amendment History
2012, c. R-17.3, s. 97(31)-(33); 2020, c. 4, s. 1(18)

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

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TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Nortel Networks Corp., Re | 2013 ONCA 599, 2013 CarswellOnt 13651, 311 O.A.C. 101, 368 D.L.R. (4th) 122, 6 C.B.R. (6th) 159, 235 A.C.W.S. (3d) 391, 78 C.E.L.R. (3d) 43, [2013] O.J. No. 4458 | (Ont. C.A., Oct 3, 2013)

2012 SCC 67
Supreme Court of Canada

AbitibiBowater Inc., Re

2012 CarswellQue 12490, 2012 CarswellQue 12491, 2012 SCC 67, [2012] 3 S.C.R. 443, [2012] A.C.S. No. 67, [2012] S.C.J. No. 67, 221 A.C.W.S. (3d) 264, 352 D.L.R. (4th) 399, 438 N.R. 134, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, J.E. 2012-2270

Her Majesty the Queen in Right of the Province of Newfoundland and Labrador, Appellant and AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders), Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty the Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada, Interveners

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: November 16, 2011
Judgment: December 7, 2012
Docket: 33797

Proceedings: affirmed *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965, Chamberland J.A. (C.A. Que.); refused leave to appealdemande d'autorisation d'en appeler refusée *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812, Clément Gascon J.C.S (C.S. Que.)

Counsel: David R. Wingfield, Paul D. Guy, Philip Osborne, for Appellant
Sean F. Dunphy, Nicholas McHaffie, Joseph Reynaud, Marc B. Barbeau, for Respondents
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R. Richard M. Butler, for Intervener, Attorney General of British Columbia
Roderick Wiltshire, for Intervener, Attorney General of Alberta
Elizabeth J. Rowbotham, for Intervener, Her Majesty The Queen in Right of British Columbia
Robert I. Thornton, John T. Porter, Rachelle F. Moncur, for Intervener, Ernst & Young Inc., as Monitor
William A. Amos, Anastasia M. Lintner, Hugh S. Wilkins, R. Graham Phoenix, for Intervener, Friends of the Earth Canada

Subject: Insolvency; Environmental

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — Contingent claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to

14 The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the EPA Orders" (A.F., at para. 32).

15 Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

16 At the Province's request, the Chief Justice stated the following constitutional questions:

> 1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
>
> 2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
>
> 3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

17 I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*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, s. 65) ("2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

18 Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

19 What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process.

Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims under the CCAA

20 Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

21 One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

22 Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

> [Definition of "claim"]
>
> **12.** (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> [Determination of amount of claim]
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (*a*) the amount of an unsecured claim shall be the amount
>
> . . .
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and ...

23 Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

> "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor.

24 This definition is completed by s. 121 of the *BIA*:

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

TAB 10

1995 CarswellSask 739
Supreme Court of Canada

Husky Oil Operations Ltd. v. Minister of National Revenue

1995 CarswellSask 740, 1995 CarswellSask 739, [1995] 10 W.W.R. 161, [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, 107 W.A.C. 81, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 58 A.C.W.S. (3d) 182, J.E. 95-1945, EYB 1995-67967

WORKERS' COMPENSATION BOARD v. HUSKY OIL OPERATIONS LTD., R. IN RIGHT OF CANADA, as represented by MINISTER OF NATIONAL REVENUE, R. IN RIGHT OF PROVINCE OF SASKATCHEWAN, as represented by MINISTER OF HUMAN RESOURCES, LABOUR AND EMPLOYMENT, R. IN RIGHT OF PROVINCE OF SASKATCHEWAN, as represented by MINISTER OF FINANCE, BANK OF MONTREAL, ERIC ZIMMERMAN, GARTH PRICE, TREVOR BROWN, ARTHUR GINGRAS, KELLY HOUSTON, DARCY KUZIO, HANS BOHLE, CHARLES PSHEBENICKI, TERRY SAPERGIA, SBW-WRIGHT CONSTRUCTION INC., CAMPBELL WEST (1991) LTD., FULLER AUSTIN INSULATION INC., UNITED INDUSTRIAL EQUIPMENT RENTALS LTD., ATCO ENTERPRISES LTD. and DELOITTE & TOUCHE INC., as Trustee in Bankruptcy of Estate of METAL FABRICATING & CONSTRUCTION LTD., ATTORNEY GENERAL FOR SASKATCHEWAN

ATTORNEY GENERAL FOR ONTARIO, ATTORNEY GENERAL FOR NEW BRUNSWICK, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR ALBERTA, WORKERS' COMPENSATION BOARD OF ONTARIO, WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA, WORKERS' COMPENSATION BOARD OF ALBERTA and YUKON WORKERS' COMPENSATION HEALTH AND SAFETY BOARD (Intervenors)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: January 25, 1995
Judgment: October 19, 1995
Docket: Doc. No 23936

Counsel: *Robert G. Richards* and *Evan L. Bennett*, for appellant.
James S. Ehmann and *Paul J. Harasen*, for respondent.
Edward R. Sojonky, Q.C., and *Gordon Berscheid*, for respondent Attorney General of Canada.
Thomson Irvine, for respondent Attorney General for Saskatchewan.
Brian J. Scherman, for respondent Bank of Montreal.
Hart Schwartz, for intervenor Attorney General for Ontario.
Cedric L. Haines, for intervenor Attorney General for New Brunswick.
R. Richard M. Butler, for intervenor Attorney General of British Columbia.
Written submission only by/argumentation écrite seulement par *Nolan D. Steed*, for intervenor Attorney General for Alberta.
Written submission only by *Elizabeth Kosmidis*, for intervenor Workers' Compensation Board of Ontario.
Written submission only by *Gerald W. Massing*, for intervenor Workers' Compensation Board of British Columbia.
Written submission only by *Douglas R. Mah*, for intervenor Workers' Compensation Board of Alberta.
Written submission only by *Bruce L. Willis, Q.C.*, for intervenor Workers' Compensation Health and Safety Board of Yukon.

31 However, even rejecting the simplistic "bottom line" approach, I do not agree that the quartet stands for the sole proposition that the provinces cannot "jump the queue". In my opinion, the quartet embodies a consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements. That philosophy cannot be captured in the pithy but limited proposition that the provinces cannot "jump the queue".

32 The quartet is better stated, in my view, as standing for a number of related propositions which are themselves part of a consistent philosophy. In their lucid and thorough study of the quartet, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992) 71 Can. Bar Rev. 77, at pp. 78-79, Andrew J. Roman and M. Jasmine Sweatman state that the quartet stands for the following four propositions:

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and
>
> (4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act. [Footnote omitted.]

33 See also for concurrence with Roman and Sweatman's general conclusions drawn from the quartet, Jacob S. Ziegel, "Personal Property Security and Bankruptcy: There Is No War! — A Reply to Roman and Sweatman" (1993) 72 Can. Bar Rev. 44, at p. 45.

34 My colleague Iacobucci J. states at para. 141 that the quartet "stands for the position that only those provincial laws which *directly* improve the priority of a claim upon the actual property of the bankrupt over that accorded by the *Bankruptcy Act* are inoperative" (emphasis added). This statement falls within Roman and Sweatman's proposition (1). However, as my summary of those cases has hopefully indicated, the quartet is clearly not limited to provincial "laws which directly improve the priority of a claim". To quote Roman and Sweatman, at p. 78:

> ... the reasoning in [the quartet] is not limited to trusts, nor to situations of colourable legislation attempting to give an artificial preference to government. Rather, these rulings are broad enough to encompass any potential area of conflict between provincial power to legislate in the area of property and civil rights, and exclusive federal jurisdiction over bankruptcy and insolvency.

In a similar vein these authors add at p. 81:

> The Supreme Court of Canada's quartet of decisions, although dealing with provincial statutory trusts which affected priorities in bankruptcy, has progressively and finally provided a definite ruling on the relationship between priorities under the Bankruptcy Act and *any* other provincial statute which directly or indirectly affects priorities. (Emphasis in original.) [Footnote omitted.]

Importantly, they conclude at p. 105:

> The law, in our opinion, is settled by these four judgments of the Supreme Court of Canada. In all four cases the issues were not whether the provinces could directly and blatantly attempt to alter the scheme of interests of secured and other creditors under what is now section 136(1) of the Bankruptcy Act. Rather, the issue was whether a province could indirectly influence priorities under the Bankruptcy Act. Even in this weaker version of influence, the Supreme Court of Canada has held that the provinces could not.

TAB 11

Canada Federal Statutes
Companies' Creditors Arrangement Act

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

Currency

An Act to facilitate compromises and arrangements between companies and their creditors

R.S.C. 1985, c. C-36, as am. R.S.C. 1985, c. 27 (2nd Supp.), ss. 10 (Sched., item 3), 11; S.C. 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d), (2); 1997, c. 12, ss. 120-127; 1998, c. 19, s. 260; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2000, c. 30, ss. 156-158; 2001, c. 9, ss. 575-577; 2001, c. 34, s. 33; 2002, c. 7, ss. 133-135; 2004, c. 25, ss. 193-195; 2005, c. 3, ss. 15, 16; 2005, c. 47, ss. 124-131 [ss. 124, 126 amended 2007, c. 36, ss. 105, 106.]; 2007, c. 29, ss. 104-109; 2007, c. 36, ss. 61(1), (2), (3) (Fr.), (4), 62 (Fr.), 63-73, 74(1), (2) (Fr.), 75-82, 112(17), (20), (23) [s. 63 repealed 2007, c. 36, s. 112(15).]; 2009, c. 33, ss. 27-29; 2012, c. 16, s. 82; 2012, c. 31, ss. 419-421; 2015, c. 3, s. 37; 2017, c. 26, s. 14; 2018, c. 10, s. 89; 2018, c. 27, s. 269; 2019, c. 29, ss. 136-140; 2023, c. 6, s. 5; 2024, c. 15, s. 274 [To come into force June 20, 2026.].

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

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R.S.C. 1985, c. C-36, s. 18.6

s 18.6

Currency

18.6

18.6(1)Good faith

Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

18.6(2)Good faith — powers of court

If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

Amendment History

2019, c. 29, s. 140

Currency

Federal English Statutes reflect amendments current to June 19, 2024
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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Obligations and Prohibitions [Heading added 2005, c. 47, s. 131.]

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

s 36.

Currency

36.

36(1)Restriction on disposition of business assets

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2)Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3)Factors to be considered

In deciding whether to grant the authorization, the court is to 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 or disposition;

(c) whether the monitor filed with the court a report stating that in their 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 the creditors were consulted;

(e) the effects of the proposed sale or disposition 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.

36(4)Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5)Related persons

For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

36(6)Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or 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.

36(7)Restriction — employers
The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

36(8)Restriction — intellectual property
If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History
2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269

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Federal English Statutes reflect amendments current to June 19, 2024
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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Her Majesty [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 39

s 39.

Currency

39.

39(1)Statutory Crown securities

In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

39(2)Effect of security

A security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 79

Currency

Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

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TAB 12

Alberta Statutes
Responsible Energy Development Act

S.A. 2012, c. R-17.3

Currency

S.A. 2012, c. R-17.3, as am. S.A. 2014, c. 13, s. 40; 2020, c. G-5.5, s. 34; 2020, c. 16; 2021, c. M-16.8, s. 61, s. 61; Alta. Reg. 217/2022, s. 221.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

End of Document

Alberta Statutes
Responsible Energy Development Act

S.A. 2012, c. R-17.3, s. 2

s 2. Mandate of Regulator

Currency

2.Mandate of Regulator

2(1) The mandate of the Regulator is

(a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources and mineral resources in Alberta through the Regulator's regulatory activities, and

(b) in respect of energy resource activities, to regulate

(i) the disposition and management of public lands,

(ii) the protection of the environment, and

(iii) the conservation and management of water, including the wise allocation and use of water,

in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments.

2(2) The mandate of the Regulator is to be carried out through the exercise of its powers, duties and functions under energy resource enactments and, pursuant to this Act and the regulations, under specified enactments, including, without limitation, the following powers, duties and functions:

(a) to consider and decide applications and other matters under energy resource enactments in respect of pipelines, wells, processing plants, mines and other facilities and operations for the recovery and processing of energy resources and mineral resources;

(b) to consider and decide applications and other matters under the *Public Lands Act* for the use of land in respect of energy resource activities, including approving energy resource activities on public land;

(c) to consider and decide applications and other matters under the *Environmental Protection and Enhancement Act* in respect of energy resource activities;

(d) to consider and decide applications and other matters under the *Water Act* in respect of energy resource activities;

(e) to consider and decide applications and other matters under Part 8 of the *Mines and Minerals Act* in respect of the exploration for energy resources and mineral resources;

(f) to monitor and enforce safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of energy resources and mineral resources;

(g) to oversee the abandonment and closure of pipelines, wells, processing plants, mines and other facilities and operations in respect of energy resource activities at the end of their life cycle in accordance with energy resource enactments;

(h) to regulate the remediation and reclamation of pipelines, wells, processing plants, mines and other facilities and operations in respect of energy resource activities in accordance with the *Environmental Protection and Enhancement Act*;

(i) to monitor energy resource activity site conditions and the effects of energy resource activities on the environment;

(j) to monitor and enforce compliance with energy resource enactments and specified enactments in respect of energy resource activities.

Amendment History
2021, c. M-16.8, s. 61(3)

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End of Document

S.A. 2012, c. R-17.3, s. 4

s 4. Not a Crown agent

Currency

4.Not a Crown agent
The Regulator is not an agent of the Crown.

Currency
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TAB 13

Alberta Statutes
Alberta Public Agencies Governance Act

S.A. 2009, c. A-31.5

Currency

S.A. 2009, c. A-31.5 [ss. 53, 64, 73 not in force at date of publication. Repealed 2013, c. S-19.3, s. 3.], as am. S.A. 2011, c. 8, s. 7; 2011, c. 20, s. 7(4); 2012, c. R-17.3, s. 85; 2013, c. F-14.5, s. 20; 2016, c. R-8.5, s. 24; 2017, c. 20, s. 2; Alta. Reg. 75/2023, s. 8; 2023, c. 12, s. 13; 2024, c. 10, s. 4.

Preamble

WHEREAS Ministers of the Crown are accountable to the public for the activities and performance of public agencies in their ministries;

WHEREAS public agencies are responsible for their activities and for the fulfilment of their mandates, and are accountable to their responsible Minister respecting their activities, successes and failures;

WHEREAS public agencies require varying degrees of authority to fulfil their mandates; and

WHEREAS clear communication and transparency are desirable with respect to the governance, mandates and activities of public agencies;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

End of Document

Alberta Statutes
Alberta Public Agencies Governance Act
Interpretation

S.A. 2009, c. A-31.5, s. 1

s 1. Definitions and application of Act

Currency

1.Definitions and application of Act

1(1) In this Act,

(a) **"adjudicative function"**, in respect of a public agency, means

(i) a function assigned or authorized to be performed by the public agency under an enactment, the performance of which includes

(A) the making of binding decisions in respect of applications, if the enactment authorizes the public agency to hold hearings respecting the applications,

(B) the making of binding decisions in respect of disputes, other than disputes respecting applications, or

(C) the hearing of reviews or appeals and the making of binding decisions in respect of those reviews or appeals,

(ii) any alternative dispute resolution process that is ancillary to a function described in subclause (i), and

(iii) a function specified in the regulations;

(b) **"application"** means an application made under an Act for a permit, licence, approval or other benefit;

(c) **"advisory agency"** means a public agency that performs advisory functions only and that does not administer a budget;

(d) **"chief executive officer"** means the highest-ranking executive of a public agency who has primary responsibility for overseeing the day-to-day operations of the public agency, but does not include the chair of an advisory agency or of a public agency that performs only adjudicative functions and any educational or administrative functions ancillary to them;

(e) **"department"** means a department established under the *Government Organization Act*;

(f) **"establishing enactment"**, in respect of a public agency, means the Act or regulation that establishes or continues the public agency, but does not include a regulation made by a Minister;

(g) **"Mandate and Roles Document"** means a Mandate and Roles Document described in section 3;

(h) **"member"** means

(i) in respect of a public agency that is an unincorporated body, one of the members of the public agency, and

(ii) in respect of a public agency that is a corporation, one of the members of the public agency or its board, council or other governing body;

(i) **"public agency"** means

(i) a corporation, other than a corporation incorporated by or under a local or private Act, all or a majority of whose members or directors are appointed or designated, either by their personal names or by their names of office, by an Act of the Legislature or regulations under an Act of the Legislature, by an order of the Lieutenant Governor in Council or of a Minister of the Crown or by any combination of those methods,

(ii) a corporation all of whose issued voting shares of every class are owned by the Crown or held in trust for the Crown or are partly owned by the Crown and partly held in trust for the Crown,

(iii) an unincorporated board, commission, council or other body that is not a department or part of a department, all or a majority of whose members are appointed or designated, either by their personal names or by their names of office, by an Act of the Legislature or regulations under an Act of the Legislature, by an order of the Lieutenant Governor in Council or of a Minister of the Crown or by any combination of those methods, and

(iv) a body that is specified in, or that meets the criteria set out in, the regulations;

(j) **"regulation"** means a regulation as defined in section 1(1)(c) of the *Interpretation Act*, but does not include any instrument, whether of a legislative nature or not, that is made by a body other than the Lieutenant Governor in Council or a Minister;

(k) **"remuneration"** means any consideration, compensation or benefit, regardless of its nature or form, that is given by the Government of Alberta or a public agency to a member or a chief executive officer in respect of services provided to a public agency, and includes honorariums.

1(2) In this Act, a reference to the responsible Minister in respect of a public agency or to the Minister who is responsible for a public agency is a reference to

(a) the Minister to whom the public agency reports, or

(b) the Minister determined under subsection (3).

1(3) The Lieutenant Governor in Council may by order decide, in respect of any particular public agency,

(a) any question that arises as to which Minister is the responsible Minister for the purposes of subsection (2)(a), and

(b) which Minister is the responsible Minister, if the public agency is not required to report to a Minister.

1(4) This Act does not apply to the following:

(a) the Alberta Court of Justice;

(b) a body all of whose members are elected officials;

(c) a body excluded by the regulations.

1(5) Subject to the regulations, this Act does not apply to the following:

(a) a subsidiary health corporation under the *Provincial Health Agencies Act*;

(b) an advisory agency whose members receive no remuneration other than payment of or reimbursement for travelling, living or other expenses incurred while away from their ordinary places of residence and in the course of their duties as members;

(c) a body established or continued by or under an Act of Canada;

(d) a body established or continued by an enactment or instrument under which the body will expire or be dissolved or disestablished within one year of its establishment or continuation;

(e) a body

(i) that is not empowered to perform any adjudicative functions,

(ii) that is chaired by, or whose board, council or other governing body is chaired by, a Minister or an employee of the Government of Alberta, and

(iii) all or a majority of whose members are Ministers or employees of the Government of Alberta.

Amendment History
2013, c. F-14.5, s. 20(a), (b); Alta. Reg. 75/2023, s. 8(2); 2024, c. 10, s. 4(2)

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

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TAB 14

Court of King's Bench of Alberta

Citation: Orphan Well Association v Trident Exploration Corp, 2022 ABKB 839

Date: 20221213
Docket: 1901 06244
Registry: Calgary

Between:

Orphan Well Association

Applicant

- and -

Trident Exploration Corp., Trident Exploration (WX) Corp., Trident Exploration (Alberta) Corp., Trident Limited Partnership, Trident Exploration (Aurora) Limited Partnership I, Trident Exploration (2006) Limited Partnership I, and Fenergy Corp.

Respondents

Reasons for Decision
of the
Honourable Justice R.A. Neufeld

I. The Trident Insolvency

[1] Trident is a group of privately-owned oil and gas exploration and production companies and partnerships. As of May 2019, it held interests in approximately 4500 petroleum and natural gas wells across Alberta, of which 3700 were licenced to Trident as operator.

[2] On April 30, 2019, Trident issued a press release which advised that:

1) It had been engaged in discussions with the Alberta Energy Regulator (AER) and its lenders regarding restructuring, but without success;

in this proceeding do not do so. Nor do they dispute the fundamental finding in ***Redwater***: that the ARO must be addressed by a Receiver to the extent reasonably possible and this must be done before distributions can be made. (Hence the term "super priority").

[54] Rather, the Municipalities argue that the remaining funds should be shared with them because:

1. This case involves competing entitlements to proceeds by entities having non-provable claims, the AER claim pursuant to ***Redwater*** and the Municipalities claim for unpaid post-insolvency taxes under the *MGA*, with both claimants having a public interest mandate and neither having priority over the other. Hence, the benefits should be shared.
2. The Receiver was obligated to pay property tax on Trident's assets from its appointment to the date of sale or transfer back to the AER, as a Receivership expense. As an officer of the Court, the Receiver is bound to pay those as they accrue during the receivership.
3. Receivers are appointed pursuant to the *Judicature Act*, so the court may order an equitable division of remaining proceeds in the proportions it sees fit.

[55] The AER/OWA do not dispute that the municipal taxes continued to accrue post-insolvency. Rather, the AER/OWA argue that the Receiver is not required to pay the municipal taxes outside of the priority scheme because:

1. The AER/OWA do not compete with the municipal taxes for priority. ARO is paid in priority because it is a non-monetary regulatory order, not a non-provable claim. Municipal taxes, as a non-provable claim, are subject to the priority sequence.
2. The Receiver is not liable to pay the municipal taxes because they are not "necessary costs of preservation" as the assets were not operated and payment of the taxes would not be for the benefit of all parties. And in any event, it is too late for the Municipalities complain that economic assets were sold without adjustment for municipal taxes. The time for such complaints was when the sales process was presented to the Court for approval.
3. Fairness and equity are not justifications to disregard clear and established principles which govern insolvency.

A. Does the Obligation to Pay Municipal Taxes Post-Receivership Confer a Priority on Municipal Governments that is Parallel to the Super Priority of the AER/OWA?

[56] The municipal taxes owed by Trident may be considered in three categories based upon when the taxes arise. The taxes arise either pre-insolvency, post-insolvency, or post-sale of the assessed assets.

[57] The Municipalities acknowledge that the municipal taxes owing when the Receiver was appointed constitute debts that would need to be proved. As there will be no proceeds available for provable claims, the Municipalities would receive nothing for these claims, even though they

have statutory priority against creditors other than the Crown (which includes the AER) under the *MGA*: s. 348(c).

[58] Similarly, the Municipalities also recognize that the post-sale municipal taxes constitute debts payable by the purchasers of Trident's assets. A claim for those taxes in bankruptcy, if it was ever to arise, would likely also constitute a provable claim against the purchaser subject to the priority scheme.

[59] However, in the interim period, bookended by periods of taxes as provable claims, the Municipalities argue that post-insolvency municipal taxes become non-provable claims subject to a super priority similar to ARO. This is because both the AER/OWA and the Municipalities have a public interest mandate and the Receiver has an obligation to pay municipal taxes, particularly for assets whose operation is simply suspended pending sale rather than destined for abandonment. Therefore, the municipal taxes should similarly be paid outside and in advance of the insolvency regime. The Municipalities point to the ***Manitok*** insolvency as an example of such payments being made pursuant to the sales process presented to and approved by the court.

[60] There is no doubt that municipal governments provide necessary and valuable services to their communities. Many would argue that municipal government is the most efficient and valuable level of all. All community members bear responsibility to support their municipal government by paying property taxes, service levies and the like. But it is not as clear that the payment of municipal property taxes has any higher public interest component than obligations such as paying a farmer surface lease rentals for an expropriated wellsite or pipeline right-or-way post-insolvency, paying trade creditors for pre-insolvency debts, or even paying municipalities for outstanding pre-insolvency municipal taxes.

[61] I agree with the OWA that the assertion of a parallel priority based on the public interest as between two holders of non-provable claims is based on a flawed interpretation of ***Redwater***, which makes it clear that the OWA's entitlement to the proceeds of sale is not a claim on the estate that is subject to a determination of priorities. That is the essence of a "super priority" as that term has evolved.

[62] The OWA's entitlement is addressed outside of the insolvency regime because it is a non-monetary obligation which cannot be not reduced to a provable claim through the test in ***Abitibi***, not because it is non-provable. Producers, like Trident, have a legal obligation to ensure their wells are safely abandoned and reclaimed. The OWA acts as a safety net to ensure that those obligations are satisfied by ensuring that reclamation work is ultimately performed. Of course, a dollar figure can be put on end-of-life obligations, but that cost is what is necessary to satisfy the obligations of producers and ensure that wells are safely abandoned and reclaimed. The cost is not levied to generate revenue for the program. That is why the OWA entitlements "define the contours of the bankrupt estate available for distribution": ***Redwater*** at para 160.

[63] Municipal taxes, on the other hand, are neither a non-monetary obligation nor incompatible with the ***Abitibi*** test. The purpose of municipal taxes is to generate revenue for the municipality: ***Smoky River Coal Ltd, Re***, 2001 ABCA 209 at para 32. The only obligation on the taxpayer is to pay tax. There is no other corresponding regulatory obligation. And, indeed, the *MGA* makes clear that taxes "are recoverable as a debt due to the municipality" and that a taxpayer is a debtor: s. 348, s. 348.1. Taxes are evidently a monetary obligation.

[64] Even if I accepted that this case described a competition between claims, the legislation provides instruction about the order in which claims are to be paid. The Municipalities' claims "take priority over the claims of every person except the Crown": *MGA*, s. 348(c). On a plain reading of the *MGA*, the legislature has contemplated where the claims of the Municipalities rank in the priority scheme. And that is second to the Crown.

[65] There are those who might characterize the outcome of ***Redwater*** as shifting liability for environmental remediation in the oil and gas industry from "polluter-pay" to "lender-pay." I disagree.

[66] In my view, ***Redwater*** shifts liability from "polluter-pay" to "everyone pays," starting with all of those who have suffered financial losses in dealing with the insolvent company, and ending with the OWA, which spreads remaining losses between the Province of Alberta and industry. This includes secured creditors who have lent money to the insolvent entity in good faith, trade creditors who have provided goods or services and remain unpaid, landowners who have hosted the wells, pipelines and production facilities, and municipal governments who are owed taxes dating back to pre-insolvency, among many others. The essence of the AER super priority is that it is not subject to prioritization because the obligation must be met before a distribution can be made to anyone else. It defines the contours of the funds that may be available for distribution.

[67] I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in ***Manitok*** to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

B. Are Post Insolvency Municipal Taxes a Necessary Cost of Preservation of Assets?

[68] The Municipalities argue that municipal taxes can and should be paid by a Receiver as part as "necessary cost of preservation of assets," and the public interest: See ***Toronto Dominion Bank v Usarco Ltd* (1997)**, 50 CBR (3d) 127, 1997 CanLII 12417*;* ***Hamilton Wentworth Credit Union Ltd v Courtcliffe Parks Ltd* (1995)**, 23 OR (3d) 781, 1995 CanLII 7059; ***Robert F Kowal Investments Ltd et al v Deeder Electric Ltd* (1975)**, 9 OR (2d) 84, 59 DLR (3d) 492 [***Kowal Investments***]. The Municipalities conclude that:

> The unique difficulty here is that because both unpaid post-insolvency taxes and unfunded ARO constitute non-provable claims, we essentially have a priorities contest involving two interests that dwell outside the priorities scheme.
>
> The Municipalities agree with the Receiver that there is no legislation nor reported court decisions which give guidance as to how these non-provable claims should be treated as against each other. This makes allocating funds between these claims, which are not "provable claims", a somewhat novel exercise.

[69] The AER/OWA dispute that the payment of post-insolvency municipal taxes was a necessary cost of preservation of estate assets. They say that such costs were not necessary to allow assets to be operated, as the Receiver chose not to operate any of the assets—whether

TAB 15

Court of King's Bench of Alberta

Citation: Razor Energy Corp., v Companies' Creditors Arrangement Act, 2024 ABKB 534

Date:20240906
Docket: 2401 02680
Registry: Calgary

In the Matter of the Companies Creditors Arrangement Act, RSC 1985, c C-36

Between:

Razor Energy Corp., Razor Holdings Gp Corp, Blade Energy Services Corp.

Applicants

- and -

Companies' Creditors Arrangement Act

Respondents

Corrected judgment: A corrigendum was issued on September 12, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on September 9, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of
Honourable Justice M.E. Burns

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[1] Razor is in the business of the development and production of oil and gas.

[2] Alberta (the "Crown") owns and holds legal title to most mines and minerals and natural resources in the province and enters into agreements under the *Mines and Minerals Act,* RSA c

M-17 (the "*Act*") that grants rights in respect of minerals, which includes petroleum and oils as provided in Section 1(1)(p)(i) and section 16 of the *Act*.

[3] The *Act* provides that a royalty determined under the *Act* is reserved to the Crown on a mineral recovered pursuant to an agreement. The royalty is prescribed from time to time by the Lieutenant Governor in Council (section 34).

[4] The Alberta Petroleum Marketing Commission ("APMC") was created and appointed to act as the Crown's agent to receive and market crude oil royalty volumes and includes tasks related to crude oil royalty forecasting, deliveries, and settlement of Crown oil royalties under the *Petroleum Marketing Act* and its' regulations.

[5] Razor has entered into approximately 321 "Petroleum and Natural Gas Leases" with the Crown. Each of the agreements are substantially identical other than the location and "leased substance." As a result, Razor is obligated to deliver to the Crown a royalty share of the leased substance produced by delivering such share to APMC.

[6] The royalty owing to the Crown in respect of the leased substance produced by Razor in January 2024 was not delivered to the APMC by Razor.

[7] On January 30, 2024, Razor commenced insolvency proceedings by filing notices of intention to make proposals to their creditors pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), consequently there was a stay of proceedings respecting Razor and its property.

[8] On February 28, 2024, Razor converted its proposal proceedings to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"), with an ("initial order") being granted the same day. Amongst other things, a Monitor was appointed and the stay of proceedings under the proposal continued with respect to preventing parties from commencing or continuing proceedings or exercising any rights or remedies against Razor.

[9] On February 28th, APMC notified the Monitor and Razor Energy of the Crown's ownership and title to royalty oil, including the January royalty deficiency volumes (estimated to be 934.8 m^3 of crude oil). AMPC advised Razor Energy it was in a bailment and trust relationship with respect to the Crown's royalty share of crude oil production, and there was no right to seize and convert the Crown's property for the use of Razor Energy and its creditors and the royalty oil could not form part of the property of Razor Energy.

[10] On March 1, 2024, the APMC directed Razor Energy ("the Direction"), pursuant to section 12(1) of the *Petroleum Marketing Regulation*, to deliver, in kind, to APMC, as part of the February 2024 royalty deliveries, crude oil of an equal quantity and like quality to the January 2024 royalty deficiency volumes that were not delivered.

[11] The Monitor's position, as stated in its First Report, was that as the Direction from APMC was directly related to the January royalty amounts, it appeared to the Monitor that the Direction was in breach of the prohibition on the exercise of rights and remedies contained in paragraph 15 of the Initial Order.

[12] APMC, on behalf of the Crown, argues that it has a proprietary right in the oil that it reserves as royalties. This right applies to the monthly oil royalty and the oil it directs to be paid under section 12(1) of the *Act*. APMC argues that the Crown does not become a creditor when a royalty is not paid – it has a proprietary right that it may seek over subsequent oil production.

AMPC is not seeking the enforcement of a payment, it is seeking to have the Crown's royalty share delivered to it.

[13] Razor, and its primary creditor, Arena Investors LP, argue that while the Crown may have a proprietary right to the oil in the month the royalties are due, if the oil is not provided, the Crown becomes a creditor with respect to the outstanding royalty deficiency volumes and the usual priorities will apply to the Crown in the context of the bankruptcy. The fact that APMC is directing Razor's pre-filing obligations be paid in kind rather than cash is still enforcing a missed payment – an outstanding liability to a creditor.

What is the scope of the stay?

[14] The Initial Order, as amended and extended, contains provisions mandating a stay. It provides, in part, that:

> **NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**
>
> 14. Until and including March 8, 2024, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court […]

[15] Razor asserts that all financial and payment obligations relating to the pre-filing period are stayed under the *CCAA* and failure to pay a pre-filing royalty deficiency volume does not give rise to an enforceable remedy during the applicable stay period. The *CCAA* is clear that it is binding upon the Crown. It is also clear that the *CCAA* applies with respect to the debtor's assets and does not permit a debtor to take and use that which they do not own.

Is this a deemed trust?

[16] Razor argues that while the *Mines and Minerals Act* uses language of "ownership," APMC's claim is akin to or in fact a statutory deemed trust. Section 37(1) of the *CCAA* provides:

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

[17] Razor argues that the Crown's royalty share of the mineral produced in a given month is commingled with all the produced minerals which are property of Razor Energy. Razor asserts that section 3(b) of the *Marketing Regulation* implicitly recognizes this and states that "when crude oil recovered pursuant to an agreement is delivered to a field delivery point during a delivery month, the Crown's royalty share of that crude oil is deemed to be delivered first". Presumably, Razor's position is that the Crown's oil, deemed to be delivered first, would then engage the protection of s 37(1) of the *CCAA*.

[18] The Crown's position is that this is different because here there is no question that the Crown holds the propriety interest in all of the crude subject to Razor's interest. Razor's interest is governed by a contract and the provisions of the *Act*. Section 37 applies to "property of a debtor company" being held in trust for Her Majesty. The Crown's royalty share is not and never was the "property of the debtor" which was deemed by statute to be held for the Crown. It was always the property of the Crown. At most, Razor is "a trustee or agent" in respect of the Crown royalty share. This is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share.

[19] The Alberta Court of Appeal considered the *Act* and the Crown's interest in the mineral production in the decision of ***Excel Energy Inc v Alberta***, 1997 ABCA 24 at paragraphs 6 and 7, where the court noted:

> ... under Alberta law, the Crown royalty is an *in rem* right. To establish the required statutory obligation, Excel relied upon provisions in the *Mines and Minerals Act,* RSA 1980, c M-15, s 34 provides that "A royalty … is reserved to the Crown in right of Alberta on any mineral recovered pursuant to an agreement." S. 35(3) provided that the royalty interest was deliverable in kind. S. 36 provides that title remains in Alberta even though the royalty is commingled during the extraction and refining process, and indeed remains until the Alberta interest is "disposed of by or on behalf of the Crown". If then, the producer ever sells the royalty it can only do so as agent for Alberta.
>
> It first must be said that this attempt by Canada to treat an obligation as income is, of course, the creation of a fiction. Nobody but Alberta ever in fact had that royalty or received a penny by way of proceeds from it. Alberta held an *in rem* interest in the hydrocarbons as they came out of the ground, and, when they were sold, the proceeds, under the scheme of the Alberta *Act*, went straight to Alberta. The producer could never be anything more than a trustee or agent.

[20] Consequently, this is not a case such as ***British Columbia v. Henfrey Samson Belair Ltd.,*** [1989] 2 S.C.R. 24, where a person collects a tax (cash or similar), and the legislation deems a trust over the tax collector's property for the amount of the tax collected.

[21] Further, in ***Canada v. Canada North Group Inc***., 2021 SCC 30, the question was whether a deemed trust created by statute had a priority over priming (administrative) charges in the context of the *CCAA*. The SCC found that the deemed trust did not create a beneficial interest that could be considered a proprietary interest and did not give the Crown a property interest as a common law trust would, reasoning that the trust lacked the quality that allowed a court to refer to a beneficiary as a beneficial owner.

[22] Here, the Court of Appeal recognized the *in rem* ownership interest in the hydrocarbons. Razor's relationship to the Crown's royalty share as a trustee or agent is not a deemed trust

created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share. No deemed trust is necessary or has been created. There is already a proprietary interest. Razor does not hold the oil in a "trust" as one would find in a deemed trust. Razor is holding onto the Crown's oil. The Initial Order applies to creditors and to Razor's property, not the Crown's property.

But does the Crown become a creditor when a royalty is not delivered?

[23] Given the decision in *Excel*, it is clear that the Crown's rights to the royalty share are *in rem*. Razor never owned and was never entitled to own the Crown's royalty share of production. Neither the *BIA* nor the *CCAA* give Razor any ownership interest in the Crown's royalty share.

[24] The Crown argues that Alberta is not acting as a creditor, but the steward of natural resources owned by and for the benefit of all Albertans, which it develops in the public interest, but in the context of oil that was not provided when required, is the Crown then a creditor with respect to the non-delivered amount? And if so, is it the type of "claim" covered by the Initial Order or the statutes?

[25] Arena argues that APMC is fundamentally seeking relief in relation to a pre-filing claim which has been stayed by virtue of the Initial Order. The APMC is utilizing the enforcement mechanisms available to it under provincial legislation to seek recovery of the January 2024 royalty shares.

[26] The reality is that the royalty is a tangible, physical quantity of oil but Razor no longer possesses the January 2024 royalty shares volume because it was likely transferred to third party oil marketers back in the beginning of the year (albeit in violation of section 11 of the *Act*) and the tangible assets are unrecoverable. As a result, the APMC cannot enforce its *in rem* rights with respect to that particular oil.

Can AMPC demand the royalty under s 12?

[27] Section 12(1) of the Petroleum Marketing Regulation provides:

> 12(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance
>
> (a) in the month in which the direction is given,
> (b) in a particular subsequent month, or
> (c) in instalments in 2 or more particular subsequent months,
>
> whichever is specified in the direction (emphasis added).

[28] Section 12 is a statutory enforcement clause/remedy. Section 15 of the Initial Order is specific in providing that all rights and remedies of a government body, whether judicial or extra-judicial, statutory, or non-statutory, against or in respect of the Razor Entities, or affecting the Business or Property, are stayed.

[29] Whether APMC could exercise its rights under section 13 (seeking a monetary amount) is irrelevant to this determination.

[30] Further, there is no paramountcy issue here. There is no conflict between the Act and *Petroleum Marketing Regulation* and the *CCAA* or *BIA*. The Initial Order was made within the power, authority, and jurisdiction of the Court. The Crown is bound by it.

[31] At its crux, even though the oil was wrongfully taken in January, and the Crown has title to any and all subsequent oil, subject to the terms of the leases, and even though the oil was held in a true trust, not a deemed trust, the act allows, and the Initial Order provides, that all attempts at remedying the taken oil were stayed. Using the power in Section 12 is a remedial step that is stayed.

[32] APMC's application is dismissed.

Heard on the 10 day of April, 2024.
Dated at the City of Calgary, Alberta this 6th day of September, 2024.

M.E. Burns
J.C.K.B.A.

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Corrigendum of the Reasons for Decision
of
The Honourable Justice M.E. Burns Honourable Justice M.E. Burns

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A corrigendum was issued to correct Honourable Justice M.E. Burns title on the cover page.

Corrigendum of the Reasons for Decision
of
M.E. Burns M.E. Burns, Registrar in Bankruptcy

A Corrigendum was issued to correct one counsel's law firm.

TAB 16

THE LAW OF TORTS

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Philip H. Osborne

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CANADIAN LAW

THE LAW OF TORTS

SIXTH EDITION

PHILIP H. OSBORNE

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a trespass subject to a privilege of reasonable and legitimate flight.[204] This approach requires a balance to be drawn between the interests of the surface owner and the use of the incumbent airspace by others. Most recreational, military, and commercial flight would be privileged but flight for the purpose of photographing private property, spraying a powerful insecticide over an urban area, testing military weapons, advertising products or services, or conducting surveillance may give rise to some difficult issues.[205] The third view, which probably represents the current Canadian position,[206] is that trespassory remedies are available only for intrusion by aircraft within the surface owner's zone of *effective possession*. Effective possession is an elusive concept but the general idea is that it extends to a height necessary to protect the plaintiff's current or future enjoyment, comfort, or use of land. The zone of effective possession will in most cases be no more than a few hundred feet above the ground. Above that, the remedy must be sought in negligence or nuisance.[207]

E. INTENTIONAL INTERFERENCE WITH CHATTELS

There are four nominate intentional torts protecting interests in chattels:[208] trespass to chattels, detinue, conversion, and the action on the case to protect an owner's reversionary interest. Each has a discrete, though overlapping, role in the protection of interests in chattels. In *practice* each tort is commonly associated with a different form of interference with chattels. The typical case of trespass to chattels is that of intentional damage to a chattel in the physical control of the plaintiff. Detinue typically applies where the defendant refuses to return the plaintiff's chattel to her. Conversion commonly applies where the defendant has taken the plaintiff's chattel. The action on the case to protect the

---

204 There is some support for this view in *Atlantic Aviation Ltd v Nova Scotia Light & Power Co* (1965), 55 DLR (2d) 554 (NSSC).

205 This approach, which seeks to balance the interests of the surface possessor with those of others who seek to use the airspace, echoes the approach of Laskin CJC in *Harrison*.

206 See *Didow*, above note 199.

207 For a subterranean trespass to land, see *Austin v Rescon Construction (1984) Ltd* (1987), 45 DLR (4th) 559 (BCSC), var'd as to damages (1989), 57 DLR (4th) 591 (BCCA). See also *Star Energy Weald Basin Limited v Bocardo SA*, [2010] UKSC 35, dealing with drilling for oil under the claimant's land.

208 Chattels include all property other than land.

owner's reversionary interest applies to permanent damage to the plaintiff's chattel which occurred when the chattel was in the possession of someone else. These are, however, gross generalizations and the definition of each tort is not restricted to these typical situations. Moreover, a single fact situation may give rise to a number of causes of action. The plaintiff may choose the most advantageous remedy. These nominate torts are supplemented by replevin and the recaption of chattels, which are procedures designed to secure the timely return of chattels that have been wrongly taken or detained by another person.

1) Trespass to Chattels

Trespass to chattels is the oldest of the torts of intentional interference with chattels. It applies where the defendant directly and intentionally (or negligently[209]) interferes with a chattel in the possession of the plaintiff. Trespass to chattels protects possession rather than ownership. Indeed, a person in wrongful possession may bring an action in trespass against anyone except an owner with a right to immediate possession. This emphasis on possession reflects the fact that the main priority of the early common law was to minimize violence. The law sought to prevent violent confrontations over the possession of chattels where title lay in the hands of an owner out of possession who was not exercising his ownership rights. The solution was found in protecting the person who had physical control (possession) of the chattel. An owner out of possession such as a bailor of a chattel for a fixed term cannot, therefore, sue in trespass.[210]

Any direct interference with a chattel is actionable, including damage, destruction, taking, or movement of it. In practice, trespass is most commonly used where a chattel has been damaged or where there has been some minor unauthorized use or movement of the chattel. The destruction or taking of chattels is usually remedied by the tort of conversion or the tort of negligence. Knowledge that the interference is wrongful is not required. Mistake is no defence.

It is not clear if trespass to chattels continues to be actionable without proof of damage. One view is that the traditional rule plays a useful role in preventing people from touching valuable art and museum pieces

209 The burden of proof is on the defendant to prove an absence of intention and negligence. In practice the tort of negligence will be used to remedy damage caused by a direct negligent act.

210 This rule is, however, qualified by the concept of vicarious possession. This allows an owner to sue when his employee, agent, or bailee at will has possession of his chattel.

and in providing a remedy for the unauthorized moving or temporary use of chattels. The other view is that unless goods are taken, damage should be an essential element of liability since there is no pressing policy need to protect a dignitary interest in the inviolability of chattels.

The remedy for trespass to chattels is an award of damages. The measure of damages for a damaged chattel is the reduction in its market value or the cost of repairs where that is less. The market value of the chattel is the appropriate measure for the taking or destruction of a chattel.

Canadian courts have yet to determine how trespass to chattels applies to computer systems. A number of issues will arise, including the precise definition of chattels, the novelty of intangible interference with chattels, and whether the tort should continue to be actionable without proof of harm. Some of the issues were, however, raised in *Century 21 Canada Ltd Partnership v Rogers Communications Inc.*[211] In that case the website of the plaintiff realtor was located on the server of a third party. The plaintiff had no possessory interest in the server. The defendant electronically scraped information from the plaintiff's website and used the information on its own realty-related website. The plaintiff claimed that the defendant was liable in trespass to chattels for its taking and using of its electronic information. The court doubted that interference by electronic signals satisfies the conventional view that interference to support a trespass action must be physical. Moreover, in the court's view, trespass requires an interference with a *physical* object. Consequently, it was the third party, who owned the server, that would have had a stronger claim in trespass. That issue was, however, moot because the third party was not a party to the litigation. The action of the plaintiff was dismissed.

The American courts have also begun to grapple with these issues. An illustrative American case is *Intel Corp v Hamidi*.[212] In that case the defendant was a disgruntled former employee of the plaintiff corporation. He sent mass emails that were critical of the plaintiff to thousands of the plaintiff's employees. The plaintiff sought an injunction to put a stop to this on the grounds that the defendant's unauthorized use of its server was a trespass to chattels. An injunction was granted both on summary judgment and on appeal but the California Supreme Court reversed these decisions. It held that direct harm to the chattel was an essential element of trespass to chattels in California. In *Hamidi*, therefore, no tort was committed because there was no evidence that there was any *significant* impairment in the operation, value, or processing capacity of the plaintiff's server. The nature and degree of harm

211 2011 BCSC 1196.

212 71 P3d 296 (Ca Sup Ct 2003).

sufficient to complete the tort was not fully resolved but the Court did not favour earlier decisions where injunctions had been issued to prevent the use of the plaintiff's server for sending bulk email[213] and to prevent the accessing of information that was available to the public from the plaintiff's website[214] on the basis of minimal harm to the plaintiff's computing system and/or indirect harm to business interests. The *Hamidi* decision may be seen, therefore, as one that favours freedom of access and use of online systems and diminishes the protection of the operators of those systems unless there is a substantial degradation in their storage or processing capacity. *Hamidi* also challenges the wisdom of the view that trespass to chattels is actionable *per se*. If harm is not needed to maintain online trespass in Canada, some form of privilege of reasonable access or implied consent to the use of computer systems will need to be developed.[215]

2) Detinue

An action in detinue is available where a person with a right to the immediate possession of a chattel has requested[216] its return from a defendant who has possession of the chattel or who had possession of it but lost it as a result of a wrongful act.[217] The tort protects the plaintiff's right to the chattel and focuses on the defendant's denial of the plaintiff's rights by refusing to return it. A demand for the chattel by the plaintiff and a refusal by the defendant to return it are normally essential components of the cause of action. The demand alerts the defendant to the plaintiff's claim to the chattel and provides an opportunity for the defendant to return it to its rightful owner and, thereby, avoid liability. It is probably not necessary to make a demand if it is clear that the defendant is determined to keep the chattel, thereby making a request futile.

Unlike trespass and conversion, detinue may be remedied by an order for the return of the chattel. The most common remedy for

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213 *Compuserv Inc v Cyber Promotions Inc*, 962 F Supp 1015 (SD Ohio 1997).

214 *eBay Inc v Bidder's Edge Inc*, 100 F Supp 2d 1085 (ND Cal 2000).

215 For a very useful discussion of some of these issues see W Adams, "There Is No There There: *Intel Corp v Hamidi* and the Creation of New Common Law Property Rights Online" (2004) 40 Can Bus LJ 87.

216 The unauthorized possession of another's chattel, in itself, is not wrongful. It becomes wrongful when the defendant denies the plaintiff's right to it. Consequently, a bailee who merely continues in possession after the term of a bailment has expired is not acting wrongfully until he denies the bailor's right to it.

217 For example, a bailee who lost possession of the chattel as a consequence of an intentional or negligent act.

detinue is a judicial order that the defendant *either* give up the chattel *or* pay for its value and pay damages for its detention. Alternatively, a court may award damages for the value of the chattel and damages for its detention. Less commonly, an order may be made for the return of the chattel with damages for its detention.[218] This order is appropriate where the chattel is not easily replaceable, such as an heirloom, jewellery, or unique industrial or commercial equipment or machinery.

Since the essence of the tort is the refusal to return the chattel, an action may be defeated by the defendant returning the chattel before judgment is given. Furthermore, since the tort is a continuing one arising out of the persistent failure of the defendant to comply with the request to return the chattel, damages for the value of the chattel are assessed at the time of judgment rather than the date of the initial refusal to return it. This may be contrasted with the general rule in conversion that damages are assessed at the time of the conversion.

3) Conversion

Conversion is the most recent of the three main torts providing protection against the intentional interference with chattels. Nevertheless, it has proved to be an expansionary and flexible concept that now encompasses many situations that, at an earlier time, were the predominant preserve of trespass to chattels or detinue. There are three central elements to the tort of conversion. First, it protects persons who are in possession of chattels or who have a right to the immediate possession of chattels. Second, it is restricted to the intentional interference and dealing with chattels. Conversion is not, for example, available for the negligent damage or destruction of chattels. Third, an act of conversion is one that so seriously interferes with the plaintiff's rights to the chattel that the defendant may, in fairness, be required to pay its full value.[219] The payment of damages equivalent to the full value of the chattel is said to effect a forced judicial sale of the chattel to the defendant. This explains why orders for the return of the chattel are not made in a conversion action. The defendant is treated as if he had bought the chattel and he can keep it.

The concept of a forced sale is also the safest guide in the multitude of marginal cases where a determination must be made if the interference with a chattel is sufficiently serious to be a conversion. A good

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218 The three forms of the remedy for detinue are set out in *General & Finance Facilities Ltd v Cooks Cars (Romford) Ltd*, [1963] 1 WLR 644 (CA).

219 C Sappideen & P Vines, eds, *Fleming's Law of Torts*, 10th ed (Sydney: Law Book Co, 2011) at 66–67 [Fleming].

rule of thumb is to consider the degree of interference with the chattel and assess whether or not it is fair and reasonable that the defendant be forced to pay the full market value for it.

Chattels may be converted in a number of ways. The most frequent form of conversion is probably the taking of chattels in the course of criminal activity such as break and entry, shoplifting, and car theft. For obvious reasons, criminal taking rarely gives rise to tort litigation. The intentional *destruction* of a chattel is also clearly a conversion. The unauthorized *disposition* of another's chattel by way of sale or pledge is a conversion. The intentional disposition of chattels is made at one's peril. Mistake is no defence to conversion. Consequently, both an innocent seller of stolen goods and the innocent purchaser to whom they are transferred are both liable in conversion. There are some exceptions to this rule, the most important of which include some commercial situations where a non-owner of goods is empowered to transfer a good title to an innocent purchaser.[220] Nevertheless, the transferor remains liable in conversion. Certain ministerial dealings with goods by those who are not principals to a transaction affecting rights in the goods are also protected. For example, persons packing, storing, or carrying goods for another in ignorance of that person's lack of title and with no knowledge that they are participating in a transaction involving the unauthorized transfer of title to the goods are not liable in conversion.[221] An involuntary bailee who surrenders a chattel to a non-owner is also protected from liability in conversion if reasonable care is taken and an honest belief is held that the transferee is the true owner. A great deal of difficulty is encountered in deciding if the *temporary taking*, *movement*, or *use* of a chattel is a conversion. All the surrounding circumstances must be considered, including the duration of the interference, the kind of interference, the purpose of the interference, and the amount of damage inflicted. The most useful test is whether or not the interference is sufficiently serious to warrant a forced sale of the chattel to the defendant. The classic case on this point is *Fouldes v Willoughby*.[222] In that case, the plaintiff and two of his horses boarded the defendant's ferry. Before it departed, a dispute arose and the defendant asked the plaintiff to remove himself and his horses from the ferry. When the plaintiff refused, the defendant led the horses off

220 The most common examples are the doctrines of apparent authority and apparent ownership, sale or pledge by a mercantile agent under the Factors legislation, and the power of sellers and buyers in possession to pass good title under sale of goods legislation.

221 *Hollins v Fowler* (1875), LR 7 HL 757 (HL).

222 (1841), 8 M & W 540, 151 ER 1153 (Ex Ct).

the ferry and turned them loose. The court held that the defendant was not liable in conversion. The interference with the plaintiff's rights was not of sufficient seriousness to require the defendant to pay for the horses. At most there had been a trespass to chattels. A similar issue arises where another person's umbrella is used to run an errand in the rain, where a motor vehicle that is blocking an entrance is pushed out of the way, or where a person reads another's newspaper or uses a neighbour's tools or sports equipment. If the interference is of short duration and the chattel is returned unharmed, it is unlikely to be held to be a conversion.

Conversion may also be committed by *refusing to comply with a request to return* a chattel to its rightful owner. It is in this situation that conversion intrudes on the traditional domain of detinue. However, in conversion, unlike detinue, a single cause of action arises when the defendant refuses to return the chattel, damages are calculated at the time of the conversion, and the only remedy is an award of damages. The plaintiff may choose the more advantageous action. There are also some situations, such as where a bailee has *negligently* lost the chattel, where the owner has no claim in conversion and must sue in detinue or negligence.

There is some debate about the assessment of damages in conversion and detinue. The theory behind each tort leads to a different date of assessment of the market value of the chattel. The act of conversion obliges the defendant to pay for the chattel. Consequently, when the act of conversion occurs, the plaintiff must mitigate his loss by promptly replacing it. Damages are assessed, therefore, at the time of the conversion or, at the latest, when the plaintiff is aware of the conversion. Detinue is a continuing wrong and the cause of action may be defeated by a return of the chattel at any time before judgment. Damages are thus assessed at the date of the trial. This disparity in valuation dates has led to the guideline that detinue is the tort of choice on a rising market and conversion is preferable on a falling market. There has been some support for bridging the gap by awarding in conversion any increase in the value of the goods as consequential damages or by awarding the plaintiff the highest value of the converted goods between the time of conversion and the trial. This would lessen the evil of having remedies dependent on procedural technicalities, and it would assist plaintiffs who cannot afford to replace chattels at the time of the conversion.

In this century there has been some debate about the scope of the tort of conversion. The accepted position in Canada is that it only applies to tangible personal property such as goods. It does not apply to intangible property such as contractual rights or other choses in

action.[223] This is subject to an exception known as the "document cases." It has long been held that negotiable instruments, such as promissory notes and share certificates, both of which evidence intangible property rights, may be converted. The converted document (tangible property) is fictitiously assigned the value of the rights it represents. The conventional position was upheld by a majority of the House of Lords in its 2007 decision in *OBG Ltd v Allan*.[224] It held that a receiver of a corporation could not be held liable in conversion for the unauthorized dealing of the corporation's debts and contractual rights (intangible property). A minority of the Court rejected, as historic and anomalous, the distinction between intangibles evidenced in a written document and those that are not. This dichotomy was, in its view, unprincipled and poor policy in a computerized world of electronic records and digital information. In contrast, some American decisions reflect the minority view and have applied conversion to intangible property such as a domain name[225] and electronic records.[226] No authoritative Canadian court has addressed this issue.

4) The Action on the Case to Protect the Owner's Reversionary Interest

The emphasis in trespass to chattels, detinue, and conversion on the protection of possession or the right to immediate possession fails to address the interest of an owner without either possession or a right to immediate possession. That situation arises most frequently in respect of an unexpired bailment for a fixed term. In that situation, the bailor has neither possession nor a right to immediate possession. The action on the case to protect the owner's reversionary interest arises where the chattel has been destroyed or permanently damaged by the intentional or negligent act of the defendant. The classic authority is *Mears v London & South Western Ry Co*,[227] where the defendant negligently caused serious damage to a barge that was owned by the plaintiff but leased to a third party. The plaintiff succeeded on proof of permanent damage to the plaintiff's reversionary interest. This action is rarely used in Canada because permanent damage or destruction most commonly

223 A chose in action is a personal right, incapable of possession but enforceable through legal action, such as contractual rights, the right to money in a bank account, and tortious causes of action.

224 [2007] UKHL 21.

225 *Kemen v Cohen*, 337 F 3d 1024 (9th Cir 2003).

226 *Thyroff v Nationwide Mutual Insurance Co*, 8 NY 3d 283 (NY 2007).

227 (1862), 11 CBNS 850, 142 ER 1029 (CP).

TAB 17

2022 ONSC 653
Ontario Superior Court of Justice [Commercial List]

Harte Gold Corp. (Re)

2022 CarswellOnt 1698, 2022 ONSC 653, 343 A.C.W.S. (3d) 284, 97 C.B.R. (6th) 202

THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (Applicant) and A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP. (Applicant)

Penny J.

Heard: January 28, 2022
Judgment: February 4, 2022
Docket: CV-21-00673304-00CL

Counsel: Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais, for Applicant
Joseph Pasquariello, Chris Armstrong, Andrew Harmes, for Court appointed Monitor
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Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji, for 1000025833 Ontario Inc.
Stuart Brotman, Daniel Richer, for BNP Paribas
Sean Collins, Walker W. MacLeod, Natasha Rambaran, for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited
David Bish, for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates
Orlando M. Rosa, Gordon P. Acton, for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)
Timothy Jones, for Attorney General of Ontario

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

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Liquidation or sale of assets

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court
Company operated gold mine — Company encountered growing liquidity problem — Company developed plan to attract new capital through potential sale — No binding offers were received — Further sale and investment solicitation process led to two competing proposals from its primary secured creditors — One of creditors had winning bid and proposed purchase was structured as reverse vesting order — Company brought motion for orders approving creditor transaction, including reverse vesting order structure, extending stay and expanding monitor's powers — Motion granted — Section 11 of Companies Creditors Arrangement Act clearly provided court with jurisdiction to issue reverse vesting order, provided discretion available under s. 11 of Act was exercised in accordance with objects and purposes of Act — Reverse vesting order should continue to be

37 I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

38 Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

39 With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

40 Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

41 Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

42 Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

TAB 18

2012 ONSC 4816
Ontario Superior Court of Justice [Commercial List]

Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.

2012 CarswellOnt 10743, 2012 ONSC 4816, 222 A.C.W.S. (3d) 938, 99 C.B.R. (5th) 120

Firm Capital Mortgage Fund Inc. Applicant and 2012241 Ontario Limited Respondent

Morawetz J.

Heard: July 23, 26, 2012
Judgment: August 30, 2012
Docket: CV-11-9456-00CL

Counsel: J.D. Marshall for Deloitte & Touche Inc., Receiver
J. Finnigan, A. McEwan for Firm Capital Mortgage Fund Inc.
R. D. Howell, D. Schatzkev for G. Gill et al.
S. Dewart for LawPro

Subject: Property; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Real property
VIII Mortgages
VIII.14 Priorities
VIII.14.c Determining priorities between types of creditors
VIII.14.c.xii Multiple parties
Headnote
Real property --- Mortgages — Priorities — Between types of creditors — Multiple parties
Mortgagee versus subsequent purchasers and lessees — Debtor defaulted on first mortgage while developing commercial property (property) — First mortgagee on property appointed receiver and assigned its position to F Inc. — Receiver sought to sell property, which required "vesting out" of purchase agreements and leases that debtor had already entered into for units on property — Receiver brought motion for order approving sale and authorizing vesting out of purchase agreements and leases — Motion granted — Position of F Inc. took legal priority over interests of purchasers and lessees — Purchase agreements and leases were not registered and were all dated after date that mortgage was registered — In addition, purchase agreements and leases contained express clauses subordinating interests thereunder to first mortgagee — Neither F Inc. nor receiver had obligations to purchasers under ss. 78 and 79 of Condominium Act — Equities did not favour purchasers — Purchasers either had remedy to receive back their original deposits or, alternatively, they were responsible for any losses over and above that amount.
Table of Authorities
Cases considered by *Morawetz J.*:
Counsel Holdings Canada Ltd. v. Chanel Club Ltd. (1997), 1997 CarswellOnt 1163, 33 O.R. (3d) 285, 29 O.T.C. 193 (Ont. Gen. Div.) — referred to
1565397 Ontario Inc., Re (2009), 2009 CarswellOnt 3614, 54 C.B.R. (5th) 262, 81 R.P.R. (4th) 214 (Ont. S.C.J.) — followed
Statutes considered:
Condominium Act, 1998, S.O. 1998, c. 19
Generally — referred to

s. 78 — considered

s. 79 — considered
Land Titles Act, R.S.O. 1990, c. L.5
s. 44(1) ¶ 4 — considered

s. 93(3) — referred to

MOTION by receiver for orders approving sale of debtor's commercial property and authorizing vesting out of purchase agreements and leases for units on property.

***Morawetz J.*:**

1 The Receiver brings this motion for an order (i) approving the Receiver's proposed marketing and sales process in respect of the Respondent's commercial property in Brampton, Ontario (the "Property"); and (ii) authorizing the Receiver to terminate and obtain an order vesting out certain unit purchase agreements and leases with respect to certain units in the Property, such vesting order to be issued in the event that the Receiver receives an acceptable offer to purchase the Property which requires vacant possession.

2 The Receiver takes the position that the only practical approach to maximizing recovery for the stakeholders is to market and sell the Property as a whole (in accordance with the process outlined in the First Report) to the widest of possible market which would include (i) potential purchasers prepared to complete the project as a registered condominium and sell the units, as well as (ii) potential purchasers who may wish to purchase the Property and lease out the units without registering the project as a condominium. In order to reach both potential markets it is the Receiver's opinion that it is necessary for it to be able to deliver the Property free and clear of the purchase agreements and leases. The Receiver therefore seeks approval of the proposed marketing proposal with the express condition that it can offer the Property free and clear of the purchase agreements and leases. In effect, the Receiver is seeking an order that those agreements and leases can be "vested out" upon the approval of any agreement to sell the Property, recommended by the Receiver at the completion of the marketing process, if vacant possession is required by the terms of any recommended purchase agreement.

3 Further, the Receiver recognizes that there is a possibility that a potential purchaser may wish to complete the project as a condominium and may therefore wish to adopt one or more of the agreements or leases or renegotiate such agreements or leases. The Receiver therefore seeks an order that it be authorized, but not bound, to terminate the agreements and leases to allow for the possibility that termination may not be necessary.

4 On the other hand, a group of purchasers (the "Unitholders") have entered into agreements with 2012241 Ontario Limited ("the Debtor") and have made significant investments in the project, in some cases having paid the entire purchase price for their units or having invested many thousands of dollars for the leasehold improvements for businesses which are currently operating out of the premises. Some of the Unitholders made payments of the entire purchase price at the time of occupancy closings. Others made partial payments and began to make occupancy payments for taxes, maintenance and insurance and have made those payments to the Debtor and later the Receiver.

5 At the time of occupancy, the Debtor advised that registration and the final closing would take place in approximately three months. However, registration did not take place as anticipated and in 2011, TD Bank, the first mortgagee, appointed a receiver of the Property. TD subsequently assigned its position to Firm Capital Mortgage Fund Inc ("Firm Capital").

6 Subsequent to the registration of the TD/Firm Capital mortgage, the debtor entered into a number of "pre-sale" agreements, referenced above, pursuant to which several persons agreed to purchase units in the proposed condominium, to close when the Property was registered as such.

7 The Unitholders take the position that the Receiver's proposed course of action would favour Firm Capital and would disregard the interests of the Unitholders. The Unitholders take the position that the Receiver should recognize their purchase

agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold.

8 The Debtor also entered into a number of leases of units after the registration of the TD/Firm Capital mortgage. Although the records are not clear, the Receiver reports that it appears that the Debtor entered into agreements of purchase and sale with respect to 29 units and leases with respect to 5 units. The balance of 30 units appear to be unsold and not leased.

9 None of the agreements and leases are registered against the title to the Property.

10 All of the agreements of purchase and sale contain clauses expressly subordinating the purchasers' interests thereunder to the Firm Capital mortgage security. The provisions read as follows:

> **26. Subordination of Agreement**
>
> The Purchaser agrees that this Agreement shall be subordinate to and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time, and to any easement, service agreement and other similar agreements made by the Vendor concerning the property or lands and also to the registration of all condominium documents. The Purchaser agrees to do all acts necessary and execute and deliver all necessary documents as may be reasonably required by the Vendor from time to time to give effect to this undertaking and in this regard the Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor or any of its authorized signing officers to be and act as his lawful attorney in the Purchaser's name, place and stead for the purpose of signing all documents and doing all things necessary to implement this provision.

11 Three of the five leases also contain similar subordination clauses. The other two leases contain subordination clauses that only refer to mortgages or charges created after the date of the leases. However, the Receiver has been informed that the tenant of one of the units recently terminated its lease and the other unit is vacant and the former Receiver has advised that it believes the lease was terminated or abandoned.

12 It appears from the Debtor's records that most of the Unitholders who entered into agreements to purchase units paid deposits to the Debtor which are held in trust pursuant to the provisions of the *Condominium Act*, 1998. The Receiver advises that while those records contain numerous inconsistencies which made it impossible for the Receiver to determine with certainty whose deposit remains in trust, it appears that most of the initial purchase deposits remain in trust.

13 However, five purchasers apparently paid to the Debtor or its solicitors the balance of the purchase price, notwithstanding that the project had not been registered and further authorized the law firm in question to release the funds from trust and pay them to the holder of the second mortgage registered against title. Those payments total more than $1.2 million.

14 The Receiver advises that it does not have the financial resources to complete the Property to the point of registration as a condominium or to market the unsold units. The Receiver is of the view that the revenue currently generated by the Property is not sufficient to cover ongoing operational expenses, let alone the costs of completing construction, marketing and other related costs. Further, Firm Capital is not prepared to advance funds for this purpose, nor is Firm Capital prepared to subordinate its mortgage security to any new lender.

15 In addition, the Receiver has advised that it will not be in a position to close at least five of the pre-sold units due to the fact that the purchasers of those units paid to the Debtor the full balance of purchase price under their agreements and authorized the Debtor to pay those funds to the second mortgagee instead of being held in trust.

16 From the standpoint of the Unitholders the main issue on this motion is whether the Receiver should be permitted to terminate the agreements of purchase and sale and effectively vest out the interests of the Unitholders.

17 Counsel to the Unitholders points out that at the time of the commencement of the receivership, all stakeholders had the expectation that the project would proceed to registration and that the existing agreements of purchase and sale and lease agreements would be honoured.

18 Counsel to the Unitholders argued that in moving to the appointment of the Receiver, TD had indicated that its goal was to expedite registration and that this was a reasonable goal given that the project was virtually complete and that owners and tenants were operating businesses from their units.

19 Counsel further submits that developers and their successors have a statutory obligation to expedite registration of the condominium so that title to the individual units can be conveyed. Counsel referenced s. 79 of the *Condominium Act*, *1998* (the "Act") with respect to the duty to register declaration and description and that the existence of these duties, although not binding on the Receiver, are relevant considerations in determining the actions which the Receiver should be approved to take.

20 The position put forth by the Unitholders was adopted by counsel to LawPro as insurer for Paltu Kumar Sikder.

21 In my view, this secondary argument can be disposed of on the basis that neither Firm Capital nor the Receiver is a "declarant" or "owner" of the Property. In my view the activities of Firm Capital and the Receiver are not governed by the provisions of ss. 78 and 79 of the Act. Neither Firm Capital nor the Receiver have statutory obligations to the Unitholders.

22 With respect to the main issue, counsel to the Receiver submits that as a matter of law the first mortgage takes legal priority over the interests, if any, of the purchasers and the lessees. (See: Subsection 93 (3) of the *Land Titles Act*.)

23 In this case, the first mortgage was registered on October 20, 2008. The mortgage is in default. The unit purchase agreements and leases are all dated after that date and are not registered.

24 Counsel to the Receiver also points out that with respect to the leases, ss. 44 (1)(4) of the *Land Titles Act* provides that any lease "for a period yet to run that does not exceeds three years" is deemed not to be an encumbrance. All of the leases in question are unregistered and run for periods exceeding three months. Accordingly, counsel submits that they are subordinate to the registered first mortgage.

25 In addition, the purchase agreements and leases contain expressed clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express subordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest. (See: *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* (1997), 33 O.R. (3d) 285 (Ont. Gen. Div.).)

26 Further, counsel submits that in any event, it is doubtful that the purchase agreements create an interest in land, referencing paragraph 19 of the Purchase Agreements which provide in part as follows:

> **19. Agreement not to be Registered**
>
> The purchaser acknowledges this Agreement confers a personal right only and not any interest in the Unit or property...

27 I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees.

28 Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence". (See: *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.).) I accept this submission.

29 In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

30 Having reviewed the evidence and hearing submissions, I am satisfied that the recommendation of the Receiver that it be authorized to market the property in accordance with the process recommended in the First Report is reasonable in the circumstances.

31 With respect to the second issue, namely, whether the Receiver should be authorized to terminate purchase agreements and leases and be entitled to a vesting order that terminates the interest of parties to purchase agreements and leases, it is necessary for the Receiver to take into account equitable considerations of all stakeholders.

32 The remaining question is whether there are any "equities" in favour of the purchasers and lessees that would justify overriding first mortgagee's legal priority rights.

33 Counsel to Firm Capital submits that the equitable considerations with respect to the Unitholders are limited. The interests of the Unitholders fall into four categories:

i. Those who paid deposits that are still held in trust;

ii. Those who purport to have purchased units and paid deposits but which are apparently not held in trust;

iii. Those who paid the balance due on closing under their agreement and authorized release of those funds to the second mortgagee;

iv. Those who claim to have incurred expenses in renovating or improving their units.

34 With respect to the first category, it seems to me that these purchasers would be entitled to the return of their deposits held in trust if the Sale Agreements are terminated and they will not incur any significant financial losses.

35 The second category of purchasers, whose deposits are not held in trust for whatever reason, may have some remedy against the Debtor, or perhaps its advisers.

36 The third category of purchasers paid the balance of their purchase price and expressly authorized the release of those funds from trust to be paid to the second mortgagee, notwithstanding the subordination clauses of their Sale Agreements and the fact that they would not be receiving title to their unit at that time. It seems to me that these purchasers ran the risk of losing those payments, but they may have recourse against other parties.

37 The fourth category of purchasers claim that they have spent significant sums of money on renovations and improvements to their proposed units, and on equipment. As counsel for Firm Capital points out these purchasers spent this money at their own risk and are subject to the subordination clause in their Sale Agreement.

38 In considering the equities of the situation, it seems to me that a review of the above categories establishes that the equities do not favour the Unitholders. These Unitholders either have a remedy to receive back their original deposits or, alternatively, they are responsible for any losses over and above that amount. In the result, I have not been persuaded that the positions of the Unitholders/opposing purchasers, as supported by LawPro have merit.

39 The Receiver's motion is granted and an order shall issue approving its proposed process of marketing and sale, with related relief, as set forth substantially in the form of a draft order attached as Schedule "A" to the notice of motion with revisions to reflect the Receiver's intent as expressed in paragraphs 20 and 21 of the factum submitted by counsel to the Receiver.

Motion granted.

End of Document

TAB 19

2011 ONCA 817
Ontario Court of Appeal

Romspen Investment Corp. v. Woods Property Development Inc.

2011 CarswellOnt 14462, 2011 ONCA 817, 14 R.P.R. (5th) 1, 210 A.C.W.S. (3d) 302, 286 O.A.C. 189, 346 D.L.R. (4th) 273, 85 C.B.R. (5th) 21

Romspen Investment Corporation (Applicant / Respondent) and Woods Property Development Inc. and TDCI Holdings Inc. (Respondents)

John Laskin, M. Rosenberg, Paul Rouleau JJ.A.

Heard: November 18, 2011
Judgment: December 22, 2011
Docket: CA C53496, C54375

Proceedings: reversing *Romspen Investment Corp. v. Woods Property Development Inc.* (2011), 2011 CarswellOnt 2380, 75 C.B.R. (5th) 109, 2011 ONSC 3648, 4 R.P.R. (5th) 53 (Ont. S.C.J.); and reversing *Romspen Investment Corp. v. Woods Property Development Inc.* (2011), 2011 CarswellOnt 10053, 2011 ONSC 5704 (Ont. S.C.J. [Commercial List])

Counsel: Ronald Slaght, Q.C., John J. Chapman for Appellant, Home Depot Canada Inc.
David P. Preger, Lisa Corne for Respondent
Harvin D. Pitch for Respondent, SF Partners Inc.

Subject: Property; Corporate and Commercial; Insolvency; Estates and Trusts; Evidence; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets
Civil practice and procedure
XX Trials
XX.4 Conduct of trial
XX.4.i Powers and duties of trial judge
XX.4.i.iii Miscellaneous
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Evidence
I Proof
I.2 Inferences
I.2.d Miscellaneous
Real property
II Registration of real property
II.3 Improvements made under mistake of title
II.3.b Requirements for relief
II.3.b.i Mistaken belief
Real property
VIII Mortgages

22 Home Depot raised several grounds of appeal. In oral submissions, however, Home Depot focused on the following two grounds:

> 1) Did the motion judge apply an incorrect standard of proof? Specifically, did his failure to draw reasonable inferences render his findings of fact unreliable?
>
> 2) Did the motion judge fail to consider the ownership of the Home Depot store separate and apart from the Ground Lease?

23 I need only deal with the first issue as, in my view, it is dispositive of the appeals. The motion judge's misapprehension of the standard of proof requires that the orders be set aside and that the matter be remitted to the Superior Court of Justice for a new hearing. As I would remit the matter for a new hearing, I would dismiss Romspen and the Receiver's cross-appeal of the first order.

Analysis

Applicable Law

24 The parties agree that the criteria to be applied by the court in a receivership sale are those set out by this court in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). At p. 6, this court summarized the factors a court must consider when deciding whether a receiver, who has sold a property, acted properly:

> 1) It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2) It should consider the interests of all parties.
>
> 3) It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4) It should consider whether there has been unfairness in the working out of the process.

25 The central issue raised on the motions and in these appeals is the application of the second criterion, the consideration of the interests of all parties, when deciding whether the court should vest the Woods Property in the Purchaser free and clear of Home Depot's interest. In considering this criterion, the motion judge referred to Ground J.'s statement in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.* [2006 CarswellOnt 4783 (Ont. S.C.J.)], 2006 CanLII 26476, at para. 19, that: "[I]n determining whether to issue a vesting order terminating the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties." The motion judge then set about making the findings of fact necessary to apply these legal principles.

Position of the Parties on Appeal: Standard of Proof in Making Findings of Fact

26 Home Depot argues that the motion judge committed an error of law in the standard of proof he applied when making findings of fact. Throughout his reasons, the motion judge indicates that he is required to make factual determinations "on the basis of undisputed facts" and that he "cannot make findings of fact by way of inference." Home Depot maintains that this is clearly an error and that the failure to apply the correct standard of proof resulted in the motion judge's failure to draw reasonable inferences from the evidence.

27 Home Depot submits that several important inferences were available on the evidence. Specifically, it could be inferred from the evidence that Romspen gave its express or implied consent to the construction of the Home Depot store and to entering into the Ground Lease. Alternatively, Home Depot submits that if there is no express or implied consent, the record is sufficient to draw the inference that, from the outset, Romspen knew about the construction of the Home Depot store, knew about the Ground Lease and knew or ought to have known that Home Depot believed it had Romspen's consent to build the store and

TAB 20

2020 BCSC 1883
British Columbia Supreme Court

Quest University Canada (Re)

2020 CarswellBC 3091, 2020 BCSC 1883, 326 A.C.W.S. (3d) 192, 85 C.B.R. (6th) 41

In the Matter of the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

In the Matter of the SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA (Petitioner)

Fitzpatrick J.

Heard: November 12-13, 16, 2020
Judgment: November 16, 2020
Written reasons: December 2, 2020
Docket: Vancouver S200586

Proceedings: leave to appeal refused *Southern Star Developments Ltd. v. Quest University Canada* (2020), 2020 CarswellBC 3252, 2020 BCCA 364, Harris J.A., In Chambers (B.C. C.A.)

Counsel: J.R. Sandrelli, V. Cross, for Petitioner
V.L. Tickle, for Monitor PricewaterhouseCoopers Inc.
P. Rubin, G. Umbach, for Primacorp Ventures Inc.
K. Jackson, G. Nesbitt, for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.
P. Reardon, K. Strong, for Southern Star Developments Ltd.
C.D. Brousson, for Vanchorverve Foundation
D.V. Bateman, for Dana Hospitality LP
D. Lawrenson, for Halladay Education Group
K. Mak, for Capilano University
J. D. West, for Landrex Ventures Inc.
J. Sanders, S. Rogers, for Quest University Faculty Union
K. Davies, for Bank of Montreal
A. Welch, for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training
K.E. Siddall, for 1114586 B.C. Ltd.
L. Hiebert, for Association for the Advancement of Scholarship

Subject: Insolvency; Public
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Liquidation or sale of assets
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Parties were involved in proceedings under Companies' Creditors Arrangement Act — Arrangement plan was approved, while approval of transaction and vesting order was adjourned — Creditor SS Ltd. formalized opposition to vesting order and brought application for order prohibiting debtor disclaiming certain subleases of university residences, which was required for

56 In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103 (the "ROFR Article"), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

> . . . Section 11 of the *CCAA* grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the *CCAA* court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia*, the monitor's views on these issues before making any such approvals.

57 At 118-119, the authors conclude that:

> While jurisprudence on this matter is not conclusive, it appears that a *CCAA* court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.
>
> . . .
>
> In summary, common law *CCAA* courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

58 Quest has referred to *Bear Hills Pork Producers Ltd., Re*, 2004 SKQB 213 (Sask. Q.B.), additional reasons 2004 SKQB 216 (Sask. Q.B.). In that *CCAA* proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

59 However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

60 I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in *CCAA* proceedings. For example, Quest refers to *Arctic Glacier Income Fund, Re*, [2012] M.J. No. 451 (Man. Q.B.) where a ROFR was vested off title, although the circumstances under which that *CCAA* relief was granted is not clear.

61 Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp.* (November 23, 2018), Doc. CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a *CCAA* proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

62 Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the *CCAA* to vest off the ROFR, subject to a consideration of the equities as between the parties.

63 For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

TAB 21

Canada Federal Statutes
Bankruptcy and Insolvency Act

R.S.C. 1985, c. B-3

Currency

An Act respecting Bankruptcy and Insolvency

R.S.C. 1985, c. B-3, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 203; R.S.C. 1985, c. 31 (1st Supp.), ss. 3, 28, 69-77; R.S.C. 1985, c. 3 (2nd Supp.), s. 28; R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); S.C. 1990, c. 17, s. 3; 1991, c. 46, s. 584; 1992, c. 1, ss. 12-20, 143 (Sched. VI, item 2), 145, 161; 1992, c. 27, ss. 1-90; 1993, c. 28, s. 78 (Sched. III, items 6, 7) [Amended 1999, c. 3, s. 12 (Sched., item 3).]; 1993, c. 34, s. 10; 1994, c. 26, ss. 6-9, 46; 1995, c. 1, s. 62(1)(a); 1996, c. 6, s. 167(1)(b), (2); 1996, c. 23, s. 168; 1997, c. 12, ss. 1-119; 1998, c. 19, s. 250; 1998, c. 21, s. 103; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 1999, c. 28, ss. 146, 147; 1999, c. 31, ss. 17-26; 2000, c. 12, ss. 8-21; 2000, c. 30, ss. 143-148; 2001, c. 4, ss. 25-27, 28 (Fr.), 29-32, 33(1) (Fr.), (2), (3); 2001, c. 9, ss. 572-574; 2002, c. 7, ss. 83-85; 2002, c. 8, s. 182(1)(b); 2004, c. 25, ss. 7(1), (2) (Fr.), (3)-(8), (9) (Fr.), (10), 8, 9 (Fr.), 10(1) (Fr.), (2), (3) (Fr.), 11 (Fr.), 12-16, 17 (Fr.), 18, 19 (Fr.), 20-23, 24 (Fr.), 25(1), (2) (Fr.), 26, 27(1)-(3), (4) (Fr.), (5), 28-31, 32(1), (2), (3) (Fr.), 33-35 (Fr.), 36-48, 49(1) (Fr.), (2), (3), 50(1), (2) (Fr.), (3), 51 (Fr.), 52(1) (Fr.), (2), 53-64, 65 (Fr.), 66, 67-69 (Fr.), 70-74, 75 (Fr.), 76 (Fr.), 77, 78 (Fr.), 79 (Fr.), 80-83, 84 (Fr.), 85 (Fr.), 86, 87, 88(1), (2) (Fr.), 89, 90 (Fr.), 91 (Fr.), 92, 93, 94 (Fr.), 95-99, 100(1) (Fr.), (2), 101 (Fr.), 102(1), (2) (Fr.), 103; 2005, c. 3, ss. 11-14; 2005, c. 47, ss. 2(1), (2) (Fr.), (3)-(5), (6) (Fr.), 3-52, 53 (Fr.), 54-100, 101(1), (2) (Fr.), (3), 102-123 [ss. 20(3), 30(2), 31(3), 37, 104(3), 106, 116, 120(2) repealed 2007, c. 36, ss. 95-98, 101-104; ss. 39(2), 103 amended 2007, c. 36, ss. 99, 100.]; 2007, c. 29, ss. 91-102; 2007, c. 36, ss. 1-3, 4 (Fr.), 5-7, 8 (Fr.), 9(1) (Fr.), (2), (3), 10, 11 (Fr.), 12-32, 33(1), (2), (3) (Fr.), (4), (5), 34, 35, 36 (Fr.), 37-52, 53(1) (Fr.), (2), 54-60, 112(4), (10)(b), (13), (14) [ss. 25, 31, 40 repealed 2007, c. 36, s. 112(2), (7), (10)(a).]; 2009, c. 2, ss. 355 (Fr.), 356 (Fr.); 2009, c. 31, ss. 63-65; 2009, c. 33, ss. 21-26; 2012, c. 16, ss. 79-81; 2012, c. 31, ss. 414-418; 2014, c. 20, s. 484; 2015, c. 3, ss. 6 (Fr.), 7 (Fr.), 8, 9, 10 (Fr.); 2017, c. 6, s. 122; 2017, c. 26, ss. 5-10; 2018, c. 10, s. 82; 2018, c. 27, ss. 265 (Fr.), 266-268; 2019, c. 29, ss. 133-135, 160, 161; 2022, c. 5, s. 12; 2022, c. 10, ss. 137, 173(2); 2023, c. 6, ss. 2-4.

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Duty of Good Faith [Heading added 2019, c. 29, s. 133.]

R.S.C. 1985, c. B-3, s. 4.2

s 4.2

Currency

4.2
4.2(1)Good faith
Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

4.2(2)Good faith — powers of court
If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

Amendment History
2019, c. 29, s. 133

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

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TAB 22

Bankruptcy and Insolvency Law of Canada, 4th Edition § 1:68

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 1. General; Short Title (S. 1)

III. Interpretation (SS. 2-4.1)

B. Sections 3 to 4.2

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§ 1:68. Requirement to Act in Good Faith

The *BIA* was amended effective November 1, 2019 to add s. 4.2 to the *BIA*, which requires all parties in a *BIA* proceeding to act in good faith. Section 4.2(1) specifies that any interested persons in any proceedings under the *Act* must act in good faith with respect to the proceedings. Section 4(2) sets out the powers of the court—if the court is satisfied that an interested person is failing to act in good faith, on application by any interested person, the court may make any order it considers appropriate in the circumstances. The debtor and the licensed insolvency trustee already have obligations to act in good faith, thus this amendment is aimed at imposing the same obligation on creditors and other parties participating in proceedings under the *BIA*.

See Janis Sarra, "La bonne foi est une considération de base-Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", in J. Sarra and B. Romaine, eds., Annual Review of Insolvency Law 2014 (Toronto: Carswell, 2015) at 145–186.

For a discussion of the cases under this provision, see § 4:82 "Good Faith".

The Alberta Court of Queen's Bench granted a final order of receivership against the debtors. The debtors had argued that the receivership order should not be granted on the basis that the secured creditor had not acted in good faith. Section 4.2 of the *BIA* specifies that any interested person in any *BIA* proceedings shall act in good faith with respect to the proceedings; and if the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances. Justice Mah noted that the statutory provision is relatively new and there is a dearth of case law to guide its application. Justice Mah referenced Century Services Inc. v. Canada (A.G.)), 2010 CarswellBC 3419, 72 C.B.R. (5th) 170, 2010 SCC 60, [2010] S.C.J. No. 60, (*sub nom.* Re Ted LeRoy Trucking Ltd.) 326 D.L.R. (4th) 577 (S.C.C.) where the Court, at para. 70, held that good faith, along with appropriateness and due diligence, are "baseline considerations" for the court when exercising authority under the *CCAA*. Justice Mah held that: interested persons in proceedings under the *BIA* are statutorily required to act in good faith with respect to those proceedings; a secured creditor seeking a receivership order is an "interested person" subject to the good faith requirement, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings; the statutory requirement of good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose; since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in s. 4.2 of the *BIA*. Justice Mah held that the duty of good faith, in this case, requires the parties not to lie to or mislead the other with respect to the status of the loan or the state of the lender-borrower relationship; it does not require the subordination of one's own interest to the other and falls short of a fiduciary duty; whether dishonesty has occurred in a given case is fact- specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence; a remedy may include denial of a receivership order; and the conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the *BIA*. Justice Mah indicated that since the standards of good faith and commercial reasonableness are conjunctive, the breach of one of them is enough to attract consequences. Justice Mah held that for the

purposes of a secured creditor's conduct in the circumstances at hand, the standard of good faith should be consonant with that expressed by the Supreme Court of Canada in pronouncing upon the organizing principle of good faith in contract law in cases such as Bhasin v. Hrynew, 2014 CarswellAlta 2046, 2014 SCC 71, [2014] S.C.J. No. 71, [2014] 3 S.C.R. 494 (S.C.C.) and C.M. Callow Inc. v. Zollinger, 2020 CarswellOnt 18468, 2020 SCC 45 (S.C.C.). Given the factual findings, Mah J. found that there had been no breach of the good faith requirement and it was just and convenient to appoint a receiver over the assets of the corporate defendants. The Court used the factors to be considered set out in Frank Bennett in *Bennett on Receiverships*, 2nd edition, (1995), Thomson Canada Ltd., at 130: CWB Maxium Financial Inc. v. 2026998 Alberta Ltd., 2021 CarswellAlta 392, 2021 ABQB 137 (Alta. Q.B.). [Editor's Note: Both s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act* (Ontario) provide that a receiver may be appointed by an interlocutory order, when it appears to the court to be "*just or convenient*" to do so. Mah J. referenced "*just and convenient*" to do so].

The Ontario Superior Court of Justice held that a bank demonstrated a lack of good faith in events leading up to a scheduled closing date of a transaction, and ordered the bank to close the transaction. Following defaults on credit facilities, the bank applied for a receiver, which was adjourned *sine die* on terms and a monitor was appointed to monitor the finances of the debtor and given limited power to undertake a sale and investment solicitation process (SISP). The monitor conducted a full SISP with a number of interested parties, and the bank accepted the offer of the purchaser. A letter agreement confirmed an irrevocable offer for sale, and the offer was made and accepted. The contract required "to take all reasonable steps necessary" to give effect to the agreement. The Court held that the bank was responsible for the agreement failing to close and was held to a higher standard than passive resistance to closing the deal that it had agreed to and that was under protection of a court-supervised process. The Court held that the creditor's conduct was outside the boundaries of good faith, and the purchaser and debtors would have been able to close on time but for the bank's unreasonable actions: Bank of Montreal v. 592931 Ontario Inc., 2021 CarswellOnt 9150, 90 C.B.R. (6th) 223, 2021 ONSC 4412 (Ont. S.C.J. [Commercial List]).

The appellant claimed that at the time that the Superior Court of Québec granted a bankruptcy order, it had no jurisdiction to make such order because the appellant was arguably already bankrupt due to his failure to file required documents in a proposal proceeding. The Court of Appeal of Québec held that the Superior Court of Québec had jurisdiction to grant the order, and dismissed the appeal. The Court held that pursuant to ss. 43(10) and (11) *BIA*, the Superior Court may suspend bankruptcy proceedings where the debtor denies the truth of the facts in support of the motion or for other reasons deemed sufficient. In addition, ss. 69 and 69.1 *BIA* provide a stay of civil remedies of creditors and the Crown — and not a judicial bankruptcy proceeding — where a notice of intent to make a proposal or proposal is tabled. Section 69.3 *BIA* provides for the suspension of creditors' remedies against the bankrupt. However, s. 69.4 *BIA* allows a bankruptcy court to lift the suspension. The notice of intention to make a proposal does not exclude the court's jurisdiction to issue a bankruptcy order. Here, the court questioned the motivation of the appellant who filed a notice of intention and omitted to file the required documents within the prescribed time limit. Section 4.2(2) *BIA* gives the bankruptcy court a broad power to make any order to remedy a party's lack of good faith. In Québec, the concept of good faith in the context of insolvency can draw on the tradition of the Civil Code of Québec, while keeping in mind the specific objectives of the *BIA* scheme. In the present case, the appellant cannot benefit from his bad faith conduct: Syndic de Poirier, 2024 CarswellQue 4600, 2024 QCCA 554 (C.A. Que.).

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TAB 23

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 CSC 60, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

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

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

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

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

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

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

Related Abridgment Classifications

Tax
I General principles
I.7 Tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.12 Collection and remittance
III.12.b GST/HST held in trust

Headnote

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

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA,

and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

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

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

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

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

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

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

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

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

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

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

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

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

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

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory

provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

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

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

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

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

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

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

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

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

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Alternative granite & marbre inc., Re (2009), *(*sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), *(*sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, *(*sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

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

TAB 24

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, 4 Alta. L.R. (6th) 219, 584 A.R. 6, 623 W.A.C. 6, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts
Related Abridgment Classifications
Contracts
IX Performance or breach
IX.3 Obligation to perform
IX.3.a Sufficiency of performance
IX.3.a.i Duty to perform in good faith
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.h Miscellaneous
Torts
III Conspiracy
III.1 Elements
III.1.d Miscellaneous
Torts
X Interference with contractual relations and inducing breach of contract
X.1 Elements
X.1.b Interference or breach
Headnote
Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contracts --- Remedies for breach — Damages — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.s enrolment directors — C Corp. outlined its plans to Commission and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge's assessment of damages was varied to $87,000 plus interest — C Corp. was liable for damages calculated on basis of what B's economic position would have been had C Corp. fulfilled its duty — While trial judge did not assess damages on that basis, given different findings in relation to liability, trial judge made findings that permitted current Court to do so — These findings permitted damages to be assessed on basis that if C Corp. had performed contract honestly, B would have been able to retain value of his business rather than see it, in effect, expropriated and turned over to H — It was clear from findings of trial judge and from record that value of business around time of non renewal was $87,000.

Torts --- Inducing breach of contract — Elements of tort

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H

were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Torts --- Conspiracy — Nature and elements of tort — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Contrats --- Réparation du défaut — Dommages-intérêts — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial, chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de

permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt — Société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation — Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire — Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H — Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

Délits civils --- Incitation à violer un contrat — Éléments constitutifs du délit

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Délits civils --- complot — Nature et éléments constitutifs du délit — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé

leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

C Corp. was in the business of selling education savings plans to investors, through contracts with enrolment directors. B and H were enrolment directors, and were competitors. An enrolment director's agreement governed the relationship between C Corp. and B. C Corp. appointed H as the provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors. C Corp. outlined its plans to the Commission, and they included B working for H's agency. When B refused to allow H to audit his records, C Corp. threatened to terminate the agreement. C Corp. gave notice of non renewal under the agreement. At the expiry of the contract term, B lost value in his business in his assembled workforce. The majority of B's sales agents were successfully solicited by H's agency.

B's action against C Corp. and H was allowed. The trial judge found C Corp. was in breach of the implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed B's action. B appealed.

Held: The appeal was allowed in part.

Per Cromwell J. (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring): The appeal with respect to C Corp. was allowed, and the appeal with respect to H was dismissed. The trial judge's assessment of damages was varied to $87,000 plus interest. The objection to C Corp.'s conduct did not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith, namely a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

The trial judge did not make a reversible error by adjudicating the issue of good faith. C Corp. breached the agreement when it failed to act honestly with B in exercising the non renewal clause. The trial judge's findings amply supported the conclusion that C Corp. acted dishonestly with B throughout the period leading up to its exercise of the non renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The caims against H were rightly dismissed. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

C Corp. was liable for damages calculated on the basis of what B's economic position would have been had C Corp. fulfilled its duty. While the trial judge did not assess damages on that basis, given the different findings in relation to liability, the trial judge made findings that permitted the current Court to do so. These findings permitted damages to be assessed on the basis that if C Corp. had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It was clear from the findings of the trial judge and from the record that the value of the business around the time of non renewal was $87,000.

La société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions. B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre. La relation entre la société C et B était régie par une entente relative au directeur des souscriptions. La société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C. La société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H. Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente. La société C a donné à B un préavis de non-renouvellement conformément à l'entente. À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise. La majorité de ses représentants des ventes ont été recrutés par l'agence de H.

L'action déposée par B à l'encontre de la société C et H a été accueillie. La juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil. La Cour d'appel a accueilli l'appel et a rejeté l'action de B. B a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Le pourvoi relatif à la société C a été accueilli, le pourvoi relatif à H a été rejeté. L'appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt. Le reproche à l'égard de la conduite de la société C ne cadrait dans aucune des situations ou des relations à l'égard desquelles les obligations de bonne foi ont trouvé application. Il convient de reconnaître une nouvelle obligation en common law qui s'applique à tous les contrats en tant que manifestation du principe directeur général de bonne foi, soit une obligation d'exécution honnête qui oblige les parties à faire preuve d'honnêteté l'une envers l'autre dans le cadre de l'exécution de leurs obligations contractuelles. En vertu de cette nouvelle obligation générale d'honnêteté applicable à l'exécution des contrats, les parties ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat.

La juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi. La société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement. Les motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP. Les demandes contre H ont été à juste titre rejetées. La Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

La société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation. Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire. Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H. Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

Table of Authorities

Cases considered by *Cromwell J.*:

Agribrands Purina Canada Inc. v. Kasamekas (2011), 2011 ONCA 460, 86 C.C.L.T. (3d) 179, 278 O.A.C. 363, 87 B.L.R. (4th) 1, 2011 CarswellOnt 5034, 334 D.L.R. (4th) 714, 106 O.R. (3d) 427 (Ont. C.A.) — referred to

Aleyn v. Belchier (1758), 28 E.R. 634, 1 Eden 132 (Eng. Ch.) — considered

Andrusiw v. Aetna Life Insurance Co. of Canada (2001), 289 A.R. 1, 2001 CarswellAlta 1506, 33 C.C.L.I. (3d) 238, [2002] I.L.R. I-4062, 33 C.C.L.I. (2d) 238 (Alta. Q.B.) — referred to

Atlantic Richfield Co. v. Razumic (1978), 390 A.2d 736, 480 Pa. 366 (U.S. Pa. S.C.) — referred to

Bank of America Canada v. Mutual Trust Co. (2002), 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, [2002] 2 S.C.R. 601, 2002 CSC 43 (S.C.C.) — referred to

Banque canadienne nationale c. Soucisse (1981), 1981 CarswellQue 110, [1981] 2 S.C.R. 339, 43 N.R. 283, 1981 CarswellQue 110F (S.C.C.) — referred to

Banque de Montréal c. Ng (1989), 62 D.L.R. (4th) 1, [1989] 2 S.C.R. 429, 100 N.R. 203, 26 Q.A.C. 20, 1989 CarswellQue 126, 28 C.C.E.L. 1, 1989 CarswellQue 1818 (S.C.C.) — referred to

Banque nationale du Canada c. Houle (1990), 1990 CarswellQue 37, [1990] R.R.A. 883, 1990 CarswellQue 123, *(*sub nom. *Houle v. Canadian National Bank)* 74 D.L.R. (4th) 577, [1990] 3 S.C.R. 122, 35 Q.A.C. 161, 114 N.R. 161, 5 C.B.R. (3d) 1 (S.C.C.) — referred to

Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp. (2013), 365 D.L.R. (4th) 15, 2013 ONCA 494, 4 C.B.R. (6th) 214, 17 B.L.R. (5th) 171, 2013 CarswellOnt 11271, *(*sub nom. *Barclays Bank plc v. Metcalfe & Mansfield Alternative Investments VII Corp.)* 308 O.A.C. 17 (Ont. C.A.) — referred to

TAB 25

2020 SCC 45, 2020 CSC 45
Supreme Court of Canada

C.M. Callow Inc. v. Zollinger

2020 CarswellOnt 18468, 2020 CarswellOnt 18469, 2020 SCC 45, 2020 CSC 45,
[2020] S.C.J. No. 45, 10 B.L.R. (6th) 1, 325 A.C.W.S. (3d) 201, 452 D.L.R. (4th) 44

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)

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

Heard: December 6, 2019
Judgment: December 18, 2020
Docket: 38463

Proceedings: reversing *CM Callow Inc. v. Zollinger* (2018), 86 B.L.R. (5th) 53, 429 D.L.R. (4th) 704, 2018 ONCA 896, 2018 CarswellOnt 18697, Gary T. Trotte J.A., Grant Huscroft J.A., P. Lauwers J.A. (Ont. C.A.); reversing *C.M. Callow Inc. v. Tammy Zollinger et al.* (2017), 2017 CarswellOnt 18587, 2017 ONSC 7095, M. O'Bonsawin J. (Ont. S.C.J.)

Counsel: Brandon Kain, Adam Goldenberg, Vivian Ntiri, Miriam Vale Peters, for Appellant
Anne Tardif, Rodrigue Escayola, David Plotkin, for Respondents
Catherine Beagan Flood, Nicole Henderson, for Intervener, Canadian Federation of Independent Business
Jeremy Opolsky, Winston Gee, for Intervener, Canadian Chamber of Commerce

Subject: Civil Practice and Procedure; Contracts; Property
Related Abridgment Classifications
Contracts
IX Performance or breach
IX.3 Obligation to perform
IX.3.a Sufficiency of performance
IX.3.a.i Duty to perform in good faith
Contracts
IX Performance or breach
IX.6 Breach
IX.6.g Miscellaneous
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.c Contract for service or repair
Headnote
Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

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 Inc.*, 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. 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; *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.), 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

TAB 26

2021 ABQB 137
Alberta Court of Queen's Bench

CWB Maxium Financial Inc v. 2026998 Alberta Ltd

2021 CarswellAlta 392, 2021 ABQB 137, [2021] 7 W.W.R. 299, [2021] A.W.L.D. 2089, [2021] A.W.L.D. 2090, [2021] A.W.L.D. 2091, [2021] A.W.L.D. 2092, [2021] A.W.L.D. 2093, [2021] A.W.L.D. 2126, [2021] A.W.L.D. 2127, [2021] A.W.L.D. 2128, [2021] A.W.L.D. 2135, [2021] A.W.L.D. 2152, 25 Alta. L.R. (7th) 3, 331 A.C.W.S. (3d) 229, 88 C.B.R. (6th) 196

CWB Maxium Financial Inc. and Canadian Western Bank (Plaintiffs) and 2026998 Alberta Ltd., Grandin Prescription Centre Inc., 517751 Alberta Ltd., 1396987Alberta Ltd., 1396966 Alberta Ltd. and Harold Douglas Loder (Defendants)

Douglas R. Mah J.

Heard: January 11-12, 2021
Judgment: February 23, 2021
Docket: Edmonton 2003-04457

Counsel: Terrence M. Warner, Spencer Norris, for Plaintiffs
Jim Schmidt, for Defendants
Ryan F.T. Quinlan, for Interim Receiver, MNP Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.2 Application by only creditor
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.5 Practice and procedure on application
Bankruptcy and insolvency
V Bankruptcy and receiving orders
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.2 Orders
Bankruptcy and insolvency
XX Miscellaneous
Estoppel
IV Practice and procedure
IV.3 Miscellaneous
Evidence
VI Witnesses
VI.4 Credibility
VI.4.a Duty of judge in assessing
Evidence
VII Examination of witnesses
VII.4 Cross-examination
VII.4.m Effect of failure to cross-examine

53 A closer analogy to the present case is found in the Supreme Court of Canada's recent decision in *CM Callow Inc v Zollinger*, 2020 SCC 45 where the Court agreed with the trial judge who found that the defendant condo corporations (through their agent Zollinger) had by means of omission or silence misled the plaintiff into believing its snow removal contract would be renewed, when in actuality the decision had been made months earlier to terminate it. By making the plaintiff believe that the contract would be renewed, the defendants induced the plaintiff to provide an entire summer season of free services as an incentive for renewal.

54 In *Callow*, the Court extended the general duty of honesty in contractual performance to the exercise of discretionary decisions, even where the decision-maker has an absolute right by contract to make the decision.

55 In speaking for the majority, Kassirer J helpfully observes with regard to modes of dishonesty:

> [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. ...

56 The relationship between lender and debtor is contractual. The remedy of receivership sought from the Court is a contractual component and its initiation is subject to the exercise of the lender's discretion, although the legal test is statutory. The good faith to be exhibited must be "in respect of" *BIA* proceedings which, as I concluded, encompasses not only conduct in the course of such proceedings but also the conduct that precipitated the proceedings, as it relates to the indebtedness in question and the relationship between lender and borrower.

57 The application of good faith doctrines in the contractual context may lead to a Court finding that the transgressing party is liable in damages for breach of contract. Adopting those doctrines to inform the good faith requirement in section 4.2 of the BIA may lead to the Court invoking a broad discretionary authority to grant "any order that it considers appropriate in the circumstances", which presumably includes denial of the requested receivership order.

58 At least so far as a creditor invoking insolvency proceedings is concerned, I find it appropriate to import common law concepts stated in *Bhasin* and developed in *Callow* [1] , as cited above, to give content to the notion of "good faith" as found in section 4.2 of the BIA. I temper that statement only by saying that the Court must also remain cognizant of and seek to advance the policy objectives underlying the *BIA*.

59 I summarize and conclude on this point as follows:

- Interested persons in proceedings under the *BIA* are statutorily required to act in good faith with respect to those proceedings.

- A secured creditor seeking a Receivership Order is an "interested person" subject to the good faith requirement, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings, i.e. such conduct is "with respect to" *BIA* proceedings.

- Based on previous caselaw, the statutory requirement of good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose.

• Further, since there is no statutory definition of "good faith", the common law relating to the organizing principle of good faith in contractual performance may be used to inform the good faith requirement in section 4.2 of the BIA in the present circumstances, that is, the relationship between lender and borrower being essentially contractual in nature and, in this case, the contract includes a right on the lender's part to appoint a receiver or to seek such appointment.

• The duty of good faith, in this case, requires the parties not to lie to or mislead the other with respect to the status of the loan or the state of the lender-borrower relationship. It does not impose a duty of loyalty or disclosure, or require the subordination of one's own interests to the other, and falls short of a fiduciary duty.

• Whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence.

• A remedy, at least in this case and given the broad discretion of the Court under s. 4.2, may include denial of the Receivership Order.

• The conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the *BIA*.

60 I emphasize that I am dealing here only with a situation of allegations of lack of good faith in respect of a secured lender's conduct in the events that precipitated the bringing of an application to appoint a receiver. The content or degree of the good faith requirement will necessarily vary with different *BIA* actors and different facts.

2. Section 66(1) of the PPSA

61 The defendants also cite and rely on section 66(1) of PPSA, which provides that all rights, duties or obligations arising under a security agreement must be exercised or discharged in good faith and in a commercially reasonable manner. Again, there is no statutory guidance as to what is meant by "good faith". The authorities have considered the good faith requirement in section 66(1) of Alberta's *PPSA* in these contexts:

• Whether a supposed *bona fide* purchaser for value had a role in improperly discharging a true secured creditor's security interest registration, so as to acquire clear title to stolen trucks, was a question of good faith for determination at trial: E Dehr Delivery Ltd v Dehr 2018 ABQB 846 at para 71;

• The duty informs the exercise of a secured party's manner of disposing of the collateral: Edmonton Kenworth Ltd v Kos 2018 ABQB 439 at paras 80-81; and whether such realization is provident or improvident: Farm Credit Canada v Fenton 2008 ABQB 268 at paras 11-16;

• The good faith requirement applies to the way a Court-appointed Receiver conducts a bid process: Cobrico Developments Inc v Tucker Industries Inc 2000 ABQB 766 at para 35;

• Professor Rod Wood gives this example in his 2017 paper "A Guide to the Alberta Personal Property Act" [2] at para 8.2.3:

> Subsection 66(1) imposes an obligation on parties to act in good faith and in a commercially reasonable manner. A failure to meet the good faith standard might occur where the secured party misled the other secured party into thinking that its security interest was properly perfected (by misrepresenting the name of the debtor) or by performing some act which had the effect of delaying the perfection of the other party's security interest. In such a case, the failure to act in good faith will preclude the secured party from relying upon the priority that would otherwise be available to it.

62 I note that the requirement of good faith here is joined with a concurrent duty to act in a commercially reasonable manner. The latter seems particularly apt for cases where improvident realization is alleged. Apart from that, the specific examples relating to good faith in *E Dehr* and by Professor Wood lead me to conclude that the requirement as it appears in section 66(1) of the PPSA, with regard to a secured creditor acquiring or discharging a right as described in that section, would not be different

TAB 27

2020 ABQB 809
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd (Re)

2020 CarswellAlta 2545, 2020 ABQB 809, [2020] A.J. No. 1453, [2021] A.W.L.D. 478, [2021] A.W.L.D. 481, [2021] A.W.L.D. 483, [2021] A.W.L.D. 568, 327 A.C.W.S. (3d) 166, 86 C.B.R. (6th) 191

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

B.E. Romaine J.

Judgment: December 22, 2020
Docket: Calgary 1901-13767

Counsel: Kelly Bourassa (agent), James Reid (agent), for National Bank of Canada
Robert J Chadwick, Caroline Descours, for Bellatrix Exploration Ltd.
Howard A Gorman, Q.C., Gunnar Benidiktsson, for BP Canada Energy Group LLC
Joseph G.A. Kruger, Q.C., Robyn Gorofsky, for Monitor, Pricewaterhousecoopers Inc.

Subject: Civil Practice and Procedure; Insolvency; Restitution
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.i Liens
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Restitution and unjust enrichment
I General principles
I.1 When remedy available

Headnote
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous
Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Disclaimer provisions did not require performance of contract — Rather, these provisions provided opportunity for orderly termination of contract when necessary.

101 While Bellatrix breached the GasEDI Agreement by non-performance, it has been transparent and candid throughout with respect to its position and conduct. Although it did not abide by the statutory 30 days notice under its notice of disclaimer, that was after BP refused to accept the disclaimer and advised Bellatrix of its view that the agreement was an EFC.

102 It is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts, both before and after filing, whether formally disclaimed or not, and such failure to perform is not per se bad faith.

103 The December payment has been held in trust pending a resolution of the issues of set-off and priority, so Bellatrix has not failed to act in good faith with respect to the payment. The timing of the disclaimer notice, while strategic, was not bad faith conduct, and Bellatrix has not, as alleged by BP, misled the Court or failed to comply with a Court order.

104 The Monitor has stated that it is satisfied that Bellatrix has acted in good faith throughout the proceedings.

105 As noted by Dr. Janis Sarra in "La bonne foi est une considération de base — Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.

106 Bellatrix has not exhibited conduct that would fall within these categories and has not acted in bad faith.

107 The First Lien Lenders and Bellatrix point out that BP failed to allege that Bellatrix was not acting in good faith through four stay applications, and only raised the allegation at the end of August, 2020. However, BP responds that, as Bellatrix as a concession to BP agreed to hold back an amount from the sale proceeds to cover BP's damages claim, it had no need to object to the stay extension. While I have not found bad faith by Bellatrix, I accept that BP's failure to object to the stay does not preclude its claim of bad faith in the circumstance.

4. Delay

108 The First Lien Lenders and Bellatrix submit that it would be inequitable to grant BP the super-priority it seeks for damages in priority to the stakeholders of Bellatrix.

109 They note that BP initially applied for various forms of relief, including orders directing Bellatrix to resume performance of the GasEDI Agreement and to remedy any existing default, but ultimately only pursued the issue of characterization of the GasEDI Agreement as an EFC. While BP may have been constrained by time limits in its initial application heard on January 23, 2020, it knew by February 25, 2020, that Jones, J's decision dealt only with the characterization of the GasEDI Agreement as an EFC, and that it was free to proceed with the remainder of the relief it sought before any other commercial duty judge. The order emanating from the decision grants BP leave to apply for further advice and direction with respect to the remaining relief.

110 While the pandemic interfered with regular commercial duty chambers in March and April, during Bellatrix's May 22, 2020 application before Hollins, J. to make interim distributions to certain priority and secured lenders. BP advised the Court that it may have a priority claim against Bellatrix and asked the Court to set aside US$14.5 million to be held in trust pending resolution of the disclaimer dispute with Bellatrix. The Court refused and suggested that BP bring its own application if it was concerned that it was facing disadvantage. It was not until August 7, 2020, in response to First Lien Lenders priority application, that BP brought a cross-application seeking relief similar to that it had originally sought in December, 2019.

111 The First Lien Lenders submit that it would be inequitable and prejudicial to the First Lien Lenders if BP were now allowed a priority claim in relation to Bellatrix's breach of the GasEDI Agreement. Bellatrix remains indebted to the First Lien

TAB 28

2023 NSSC 238
Nova Scotia Supreme Court

Atlantic Sea Cucumber Limited (Re)

2023 CarswellNS 596, 2023 NSSC 238, 2023 A.C.W.S. 3781, 8 C.B.R. (7th) 123

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

Reg. Raffi A. Balmanoukian

Heard: July 17, 2023
Judgment: July 21, 2023
Docket: 45461, Estate No. 51-2939212

Counsel: Darren O'Keefe, Caitlin Fell, for Applicant, Atlantic Sea Cucumber Limited
Joshua Santimaw, for Trustee, MSI Spergel Inc.
Gavin D.F. MacDonald, Meaghan Kells, for Objecting Creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Debtor applied for extension of time to file proposal — Application sought to have matter heard on emergency basis — Hearing took place on ex parte basis — Application dismissed — Although there were difficulties with proposal, proposal met low standard for viability — Debtor had not done due diligence — Debtor had not taken necessary steps to determine who creditors were and what status they held — Debtor appeared to expect that justice would approve initial order under Companies' Creditors Arrangement Act — Order did not meet specifications for approval — Application was not made in good faith — Applicable law as to extension was permissive rather than mandatory — Judge did not exercise discretion in favour of debtor, as conditions were not met Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50.4(9).
Table of Authorities
Cases considered by *Reg. Raffi A. Balmanoukian*:

Dynamic Transport Inc., Re (2016), 2016 NBCA 70, 2016 CarswellNB 595, 2016 CarswellNB 596, 45 C.B.R. (6th) 45 (N.B. C.A.) — referred to

Entegrity Wind Systems Inc., Re (2009), 2009 PESC 25, 2009 CarswellPEI 47, 56 C.B.R. (5th) 1, 289 Nfld. & P.E.I.R. 347, 890 A.P.R. 347 (P.E.I. S.C.) — referred to

Entegrity Wind Systems Inc., Re (2009), 2009 PESC 33, 2009 CarswellPEI 63, 291 Nfld. & P.E.I.R. 175, 898 A.P.R. 175 (P.E.I. S.C.) — referred to

Kocken Energy Systems Inc., Re (2017), 2017 NSSC 80, 2017 CarswellNS 187, 50 C.B.R. (6th) 168 (N.S. S.C.) — referred to

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (2015), 2015 ONSC 5139, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315 (Ont. S.C.J.) — referred to

Nautican v. Dumont (2020), 2020 PESC 15, 2020 CarswellPEI 30, 79 C.B.R. (6th) 243 (P.E.I. S.C.) — referred to

R. v. Desmond (2020), 2020 NSCA 1, 2020 CarswellNS 15, 53 M.V.R. (7th) 1, 384 C.C.C. (3d) 461 (N.S. C.A.) — referred to

Royalton Banquet & Convention Centre Ltd., Re (2007), 2007 CarswellOnt 3796, 33 C.B.R. (5th) 278 (Ont. S.C.J.) — referred to

Scotian Distribution Services Limited (Re) (2020), 2020 NSSC 131, 2020 CarswellNS 256, 78 C.B.R. (6th) 258 (N.S. S.C.) — referred to
T & C Steel Ltd., Re (2022), 2022 SKKB 236, 2022 CarswellSask 534 (Sask. K.B.) — referred to
Weihai Taiwei Haiyang Aquatic Food Co. Ltd. v. Atlantic Sea Cucumber Ltd. (2023), 2023 NSSC 27, 2023 CarswellNS 81 (N.S. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 4.2(1) [en. 2019, c. 29, s. 133] — referred to
s. 50.4(9) [en. 1992, c. 27, s. 19] — considered
s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — referred to
s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — referred to
s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — referred to
s. 95 — referred to
s. 137 — referred to

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

Interpretation Act, R.S.N.S. 1989, c. 235
Generally — referred to

APPLICATION by debtor in bankruptcy proceedings for extension of time to file proposal.

***Reg. Raffi A. Balmanoukian*:**

1 On July 19, 2023, I wrote to Counsel in the form attached, dismissing the application by Atlantic Sea Cucumber Limited ("ASC" or "Debtor") for an extension of time to file a proposal pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"), following an unsuccessful application to convert the matter to a proceeding under the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the "CCAA"). This exension application also sought to abridge time for making that application, and for the matter to be heard by a Justice or by the Registrar on an emergency basis, *ex parte*. The Trustee, MSI Spergel Inc. (the "Trustee") supported this application. The objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH") did not. This document is to put that communication in reportable form. With the exception of this introductory paragraph, and to add paragraph numbers, there have been no changes from the body of that letter, and it is so reproduced below.

2 On Monday, July 17, 2023 at 4:00 pm, I heard this application on an emergency basis. At the conclusion of that hearing, I gave a 'bottom line' decision dismissing the application, with reasons to follow, in accordance with the Court of Appeal's comments in *R. v. Desmond*, 2020 NSCA 1 respecting written supplements to oral decisions. As I understand an appeal has been filed (which I have not seen), I will do so in this format and in a summary fashion.

3 On May 1, 2023, the Debtor filed a Notice of Intention to make a proposal. On May 26, 2023, Debtor's counsel filed a first application to extend time pursuant to s. 50.4(9) of the BIA. I granted it (and an application for abridgement of time) on May 31, 2023, which was the last day of the initial stay. Mr. MacDonald, for WTH, did not object to the abridgement but did object to the extension (or in the alternative sought a shorter extension). I granted the extension for the full 45 days, given that a 30 day period proposed by Mr. MacDonald as an alternative to a refusal would coincide with the Canada Day weekend. However, I expressed significant concern both with the timing of the application, in light of the timing of the Trustee's first report (May 24, 2023) and observed that there may have been incomplete communication between Trustee and Debtor for a period of time

between the initial NOI and the Trustee's first report. I emphasized to all parties that I would be seeking fulsome evidence of substantive progress, should a further extension be sought.

4 On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13, 2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. I was advised by counsel that the determination to seek to proceed under the CCAA was made in "late June" and that it was deemed to be a "no brainer" that the initial CCAA order would be granted, notwithstanding that it was to be contested.

5 On the afternoon of July 13, 2023, Justice Rosinski heard the CCAA application and I understand that was dismissed on Friday, July 14, 2023 with reasons that are yet to follow.

6 WTH asserts that the BIA stay expired on Saturday, July 15. It argues that the federal *Interpretation Act*, not the Civil Procedure Rules, applies and that Saturdays "count" for such purposes. As such, the application for extension of time that was filed and heard on Monday, July 17 was out of time. That application also sought to abridge time, and for the matter to be heard *ex parte* (although WTH, the Trustee, and perhaps others were in fact served).

7 That application was filed with the Supreme Court, not with me as Rule 9(5) of the BIA *General Rules* require; in fairness, the cover email to the Court sought either a Justice or the Registrar, and the matter was redirected to me.

8 I did not explicitly deal with the *ex parte* element of the application, as the objecting creditor and trustee in fact appeared, and I was prepared for the sake of argument to accept that the July 17 application was not out of time.

9 I was presented with the Trustee's second report, which was principally if not exclusively for the CCAA proceedings. I was also advised that the Trustee had completed an inventory and the report contains a cash flow projection (including $325,000 in professional fees over four months on $800,000 in sales), and obtained an opinion on the "validity and enforceability" of security granted by the Debtor to a non-arm's length entity.

10 WTH objects to various assumptions and elements in this opinion, including under ss. 95 and 137 of the BIA and the *Statute of Elizabeth*. It points out that the security was granted just after Justice Coughlan's decision in favour of WTH against the Debtor (2023 NSSC 27), and just two months prior to the Debtor's NOI, although it purports to secure advances made in 2018.

11 Because of this dispute (and continuing developments in determining creditors), it is currently unclear whether WTH has a 'veto' on any proposal or not. Although I am cognizant of Justice Moir's decision in *Kocken*, (2017 NSSC 80) that adverse statements by a veto-holder with respect to a proposal are not determinative of its ultimate viability, in these circumstances I did pay some attention to WTH's comments, for reasons to which I will return.

12 Against that backdrop, I considered (using the assumption that the application was not in fact out of time to begin with) the three part test in s. 50.4(9) BIA, which may be summarized as present and continuing good faith and diligence, the "likelihood" of an ultimate viable proposal, and lack of material prejudice to any creditor. I further considered whether, should the test be met, granting an extension would be a proper exercise of my resultant discretion. I will discuss the 50.4(9) requirements in inverse order.

Prejudice

13 WTH concedes that an extension would not materially prejudice it under 50.4(9)(c). I agree.

Proposal viability

14 I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a *further* extension application. In short, the "no brainer" that the Debtor thought it had in obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline.

15 This is not the test under 50.4(9)(b) respecting "proposal viability" although I conclude that the application fails not for lack of viability, but under 50.4(9)(a)'s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.

16 In *Re T&C Steel Ltd. et al*2022 SKKB 236, Justice Scherman reviewed the "viability" test, particularly in the context of a second (or subsequent) application, as follows:

> [7] In *Enirgi Group Corp. v Andover Mining Corp.*, 2013 BCSC 1833, 6 CBR (6th) 32 [Enirgi Group], the Court said:
>
> > [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": Cumberland [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not 2022 SKKB 236 (CanLII) - 4 - be a certainty and "likely" means "such as might well happen." (Baldwin [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): Baldwin at para. 3; Cantrail at paras. 13-18).

17 The Court went on to cite my own decision in *Re Scotian Distribution Services Limited*, 2020 NSSC 131, drawing a distinction between a "first extension" and a subsequent one. Justice Scherman was quite critical of the dearth of information before it, granting the second extension by the proverbial skin of its teeth.

18 In summary, the test for the likelihood of a viable proposal is an objective one: *Nautican v. Dumont*2020 PESC 15 at paras. 16-18. Chief Justice Kennedy put it this way (invoking the inimitable Justice Farley in the process) in *Re Scotian Rainbow Ltd. et al*, (2000), 186 NSR (2d) 154 at para. 17 *et seq.*:

> [17] As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219. In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:
>
> > Might well happen or turn out to be the thing specified.
>
> [18] Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

19 While I have very considerable doubts in the context of a second extension of "viability," particularly given WTH's express loss of confidence in the Debtor and its ability to drive a proposal, given the objectivity of the test and the binding comments of Justice Moir in *Kocken* , I am compelled on a bare balance of probabilities *for current purposes* to conclude that the "viability" test, as interpreted by the caselaw, has been met.

Good faith and due diligence

20 That leaves us with 50.4(9)(a) — the due diligence and good faith tests — and with my discretion.

21 Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism — a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate. It is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when the Trustee's representative (a different individual from that later involved

in the file) became quite agitated when I challenged the timeline leading up to that initial (and successful) extension application and whether developments to that date passed the "due diligence" test."

22 The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the "good faith and due diligence" requirement relates to the development of a viable proposal, not to other insolvency options. In *Re Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done "in preparing the proposal." While there was no indication on whether any other work had been done at all (unlike the present case), I read this as supporting the view that due diligence relates to moving the (likely viable) proposal forward — not other options.

23 Again, it appears that the Debtor thought a Justice would "rubber stamp" an initial CCAA order, filed on the eve of the expiry of the initial BIA extension, and when it was unsuccessful was left scrambling for a second BIA extension — not having left time either for a Justice to consider the CCAA application in a timely fashion, or to make a timely application to extend the 50.4 timeline should that be unsuccessful (as it ultimately was). As I discuss below, as well, I question whether in the last 75 days, more could have been done to determine who are the creditors and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.

24 Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under Section 4.2(1) of the BIA.

25 I begin by observing that a failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test — that there is good faith; not the presence or absence of bad faith.

26 At all Court stages of this and the CCAA proceeding, there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result." It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).

27 I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

28 Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."

29 In *Cogent Fibre Inc.*, 2015 ONSC 5139, Justice Penny said this, which I find completely consistent with my prior comments on "recalcitrant creditors" not being determinative but yet not relieving the Debtor of its burden under 50.4(9):

> [17] In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.
>
> [18] In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

> [19] Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.
>
> [emphases added]

30 In this case, the Debtor is essentially saying, "we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA. We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a balance of probabilities, to be "forthright....about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.

31 In making these comments, I wish to be clear that I am not making negative aspersions as to any individual. I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the Debtor's principal is in China and that this posed logistical and perhaps language barriers. This was not a new development and existed at least from the original NOI onward. What is clear is that, for whatever reason, the Debtor found itself in a situation that was awkward at best and out of time at worst, and expected the Court essentially as a matter of right or rote, to fix it.

Discretion

32 Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I "may" grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

33 The case law recognizes that a 50.4(9) extension is a discretionary order, if the conditions for its exercise have been met: see *Re Dynamic Transport*2016 NBCA 70 at paras. 4 and 9; *Re Entegrity Wind Systems Inc.*2009 PESC 25 at para. 30; *Re Entegrity Wind Systems Inc.*2009 PESC 33 at para. 36; *Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC).

34 Thrice in this insolvency has the Debtor come forward on an "emergency" basis, in effect seeking forgiveness not permission. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a "no brainer" and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.

35 It was argued that while this may have been a strategic or procedural mistake, the Debtor should not be held to account for that, given the alleged inimical consequences of a bankruptcy. While both the CCAA and BIA 50.4(9) arguments focused on this alleged destruction of value, no evidence of that was presented to me. I pointed out that a bankrupt can make a proposal (50(1) BIA), and this was argued to be undesirable given the dynamics of who would be "driving the bus" in a bankruptcy proposal versus an insolvency proposal. I did not find that persuasive in convincing me to exercise my discretion if I am wrong in finding that the 50.4(9) "good faith and due diligence" tests have failed. Indeed, it may well be that a change of drivers is exactly what is needed to move the sale process forward, given the other disputes in the file.

36 As I have said, I am aware that my "bottom line" decision is under appeal, on grounds that I have neither seen nor heard. These reasons will illustrate the basis upon which that decision was made.

37 Costs were not argued before me. In the circumstances, that issue should it arise is best left to the appellate Justice.

38 Mr. O'Keefe, solicitor for the Debtor, is to provide a copy of this decision to the service list forthwith.

Application dismissed.

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