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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC.

Applicants

BRIEF OF AUTHORITIES OF COLISEUM CAPITAL PARTNERS, LP, COLISEUM CAPITAL PARTNERS II, LP AND BLACKWELL PARTNERS LLC

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TAB 1

Case Name:

Nortel Networks Corp. (Re)

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

[2009] O.J. No. 2558

55 C.B.R. (5th) 68

75 C.C.P.B. 233

2009 CarswellOnt 3583

178 A.C.W.S. (3d) 305

2009 CanLII 31600

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 21, 2009.
Judgment: June 18, 2009.

(89 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Unsecured claims -- Motions by unionized and non-unionized former employees for orders requiring Nortel to restore

payments to the employees dismissed -- Nortel was granted protection under the Company's Creditors Arrangement Act and was under financial pressure -- The employee claims were unsecured claims and therefore did not have any statutory priority -- Furthermore, the claims were based mostly on services that were provided pre-filing -- There was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors -- Nortel's resources were to be used to attempt restructuring -- Companies' Creditors Arrangement Act, s. 11.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motions by unionized and non-unionized former employees for orders requiring Nortel to restore payments to the employees dismissed -- Nortel was granted protection under the Company's Creditors Arrangement Act and was under financial pressure -- The employee claims were unsecured claims and therefore did not have any statutory priority -- Furthermore, the claims were based mostly on services that were provided pre-filing -- There was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors -- Nortel's resources were to be used to attempt restructuring -- Companies' Creditors Arrangement Act, s. 11.

Motion by the union for an order requiring Nortel to recommence payments that was obligated to make under the collective agreement. Motion by former employees for an order requiring Nortel to pay termination pay, severance pay and other benefits. Nortel was granted protection under the Company's Creditors Arrangement Act in January 2009. At that time, Nortel ceased making payments of amounts that constituted unsecured claims, including termination and severance payments. The union took the position that Nortel was obligated to make the payments under the collective agreement. The former employees took the position that it would be inequitable to restore payments to unionized former employees and not non-unionized former employees. However, Nortel took the position that its financial pressure precluded it from paying all of the outstanding obligations.

HELD: Motions dismissed. The employee claims were unsecured claims and therefore did not have any statutory priority. Furthermore, the claims were based mostly on services that were provided pre-filing. As a result, there was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors and Nortel's resources were to be used to attempt restructuring.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.3

Employment Standards Act, 2000, S.O. 2000, c. 41, s. 5

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

Counsel:

Barry Wadsworth, for the CAW and George Borosh et al.

Susan Philpott and Mark Zigler, for the Nortel Networks Former Employees.

Lyndon Barnes and Adam Hirsh, for the Nortel Networks Board of Directors.

Alan Mersky and Mario Forte, for Nortel Networks et al.

Gavin H. Finlayson, for the Informal Nortel Noteholders Group.

Leanne Williams, for Flextronics Inc.

Joseph Pasquariello and Chris Armstrong, for Ernst & Young Inc., Monitor.

Janice Payne, for Recently Severed Canadian Nortel Employees ("RSCNE").

Gail Misra, for the CEP Union.

J. Davis-Sydor, for Brookfield Lepage Johnson Controls Facility Management Services.

Henry Juroviesky, for the Nortel Terminated Canadian Employees Steering Committee.

Alex MacFarlane, for the Official Unsecured Creditors Committee.

M. Starnino, for the Superintendent of Financial Services.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process - which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

2 In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

3 The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

4 The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

5 The Union seeks continued payment of certain of these benefits including:

(a) retirement allowance payments ("RAP");
(b) voluntary retirement options ("VRO"); and
(c) termination and severance payments.

6 The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

7 There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately $2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

8 There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately $202,000.

9 There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

10 The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are

required to be paid to affected Former Employees in accordance with the *Employment Standards Act, 2000* S.O. 2000 c. 41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

11 The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

12 In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

13 On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

14 Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

15 The Initial Order provides:

(a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;
(b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;
(c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);
(d) for a stay of proceedings against Nortel;
(e) for a suspension of rights and remedies vis-à-vis Nortel;
(f) that during the stay period no person shall discontinue, repudiate, cease to

perform any contract, agreement held by the company (paragraph 16);

(g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or terminating the supply of such goods or services. The proviso is that the goods or services supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

16 The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

17 The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

18 The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

19 Section 11.3 of the CCAA provides:

> No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
> (b) requiring the further advance of money or credit.

20 In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

21 The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smokey River Coal Ltd. (Re)* 2001 ABCA 209 to support its proposition.

22 The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective

Agreement and not those specifically made to those actively employed on any particular given day.

23 The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

24 The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

25 The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

26 The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

27 The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

28 Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

29 Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and

that any such contracting out or waiver is void.

30 Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

31 Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60.

32 In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

33 Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070, aff'd by 1992, 15 C.B.R. (3d) 265), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

> ... if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the court under Section 11 (*Pacific National Lease Holding Corp. (Re), supra*).

34 The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

(a) the ability to stay past debts; and
(b) the ability to require the continuance of present obligations to the debtor.

35 The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd. (Re)*, [2004] A.J. No. 331).

36 Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

37 Counsel to the Applicants also relies on the following statement from *Mirant, supra*, at paragraph 28:

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only is his salary which he has been paid falls within that definition.

38 Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured creditors. The Applicants rely on *Syndicat nationale de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* [2003] Q.J. No. 264 (C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

39 Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

40 The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 - 58:

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.
>
> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

41 In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *Syndicat des employées et employés de CFAP-TV (TQS-Quebec), section locale 3946 du Syndicat canadien de la function publique c. TQS inc.*, 2008 QCCA 1429 at paras. 26-27:

> [Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.
>
> The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

42 Collectively, RAP payment and TRA payments entail obligations of over $22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

43 In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

44 The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

45 The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

46 More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

47 The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp. (Re),* [1992] B.C.J. No. 3070, aff'd by (1992), 15 C.B.R. (3d) 265, at para. 18 citing *Chef Ready Foods Ltd.* v. *Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

48 The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodwards Limited (Re)*, (1993), 17 C.B.R. (3d) 236 (S.C.).

49 The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

50 The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

51 In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

(a) The Applicants are not in a position to honour their obligations to all creditors.
(b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.
(c) The Applicants are in default of certain obligations under the Collective Agreements.
(d) The Applicants are in default of certain obligations owed to the Former Employees.

52 It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

53 There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former

Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

54 However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

55 Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

56 The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

57 In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

58 The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

59 However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

60 An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

61 In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

62 What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

63 It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

64 Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

65 No cases were cited in support of this interpretation.

66 I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services, ... provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

67 The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

68 The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the

outstanding obligations under the Collective Agreement.

69 The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

70 The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau et al v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Desener v. Myles,* [1963] S.J. No. 31 (Q.B.); *Hiesinger v. Bonice* [1984] A.J. No. 281; *Werchola v. KC5 Amusement Holdings Ltd.* 2002 SKQB 339 to support its position.

71 The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

72 As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

73 However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

74 There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Re: Pacific National Lease Holding Corp.* (1992) 15 C.B.R. (3d) 265 (B.C.C.A.), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.

...

> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra.* Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

75 The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60-62, the court said under the heading Recapitulation (in translation):

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
>
> Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
>
> Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

76 The issue of severance pay benefits was also referenced in *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.* 2005 SKQB 331 at paras. 11 and 15. The application of the Union was rejected:

> ... The claims for severance pay arise from the collective bargaining agreement.

> But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> ...
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

77 At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

78 In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

79 The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

(i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;
(ii) nothing has been done or purported to be done that is not authorized by the CCAA;
(iii) the plan is fair and reasonable. *Re: Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.)

80 At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants.

Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

81 It follows that the motion of the Union is dismissed.

82 The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

83 The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

84 Both parties cited *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)* [1993] 2 S.C.R. 230 in support of their respective positions.

85 In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

86 The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

87 However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely

basis.

88 In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

89 This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

G.B. MORAWETZ J.

cp/e/qllxr/qlpxm/qlaxw/qlaxr/qlhcs/qlana

TAB 2

Indexed as:

United States of America v. Friedland

Between
U.S.A., plaintiff, and
Robert Friedland, defendant

[1996] O.J. No. 4399

File No. 96-CU-109731

Ontario Court of Justice (General Division)
Toronto, Ontario

Sharpe J.

Heard: October 22-31, 1996.
Oral judgment: November 5, 1996.

(79 pp.)

Injunctions -- Ex parte injunctions -- Requirements for -- Duty of deponent -- Duty of full disclosure -- Breach of duty, effect of -- Mareva injunctions.

This was a motion by the plaintiff United States of America for a Mareva injunction freezing the defendant's assets. The plaintiff brought a claim against the defendant under the Comprehensive Environmental Response Compensation and Liability Act, an American environmental statute. Under that statute, the United States was authorized to recover cleanup costs incurred by the Environmental Protection Agency from parties responsible for contamination. Such parties included any person who owned or operated a facility at which hazardous wastes were disposed of. The plaintiff had successfully obtained the injunction sought on an ex parte basis and sought the same relief on this contested motion.

HELD: The motion was dismissed and the ex parte order set aside. The plaintiff was ordered to pay costs on a solicitor-and-client basis. A stay of this order was granted to protect the plaintiff's right of appeal. The plaintiff failed to make the full and frank disclosure required of a party who sought the extraordinary relief of an ex parte mareva injunction. For example, the plaintiff told the court that the test for finding liability under CERCLA was a less stringent one than the one previously used in

that jurisdiction, it painted a misleading picture of the defendant's role in the mine and its operations, it failed to disclose that it had the possibility of recovering $50 million of the claim sought from other sources, it exaggerated the risk of flight by the defendant and it exaggerated the need for an ex parte order based on urgency. Thus there was a pervasive failure by the plaintiff to live up to its duty of disclosure and the non-disclosure was material such that the injunction might not have been granted. The law was that where such material non-disclosure occurred, the injunction must be set aside without regard to whether it would have been sustainable on the basis of a corrected record. A litigant who failed to make such disclosure forfeited whatever right it had to a Mareva injunction. Even if the court had a residual discretion not to set the injunction aside, it would not have exercised it here given the conduct of the plaintiff. Even if the plaintiff had satisfied its disclosure duty, it failed to establish a strong prima facie case of liability on the part of the defendant.

Statutes, Regulations and Rules Cited:

Comprehensive Environmental Response Compensation and Liability Act, s. 107.
Federal Debt Collection Procedure Act.
Ontario Rules of Civil Procedure, Rule 39.01(6).

Counsel:

Malcolm Ruby and R. Stephenson, for the plaintiff.
Alan Lenczner and Howard Shapray, for the defendant.

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1 **SHARPE J.** (orally):-- This motion arises from a claim by the United States of America for reimbursement for the costs of restoring environmental harm alleged to have resulted from a mining operation at Summitville in the State of Colorado. The claim is being pursued by the Environmental Protection Agency under the governing U.S. statute, the comprehensive Environmental Response Compensation and Liability Act (CERCLA) in the United States District Court for the District of Colorado.

2 The United States alleges before this Court that the Defendant Robert Friedland has no assets in the United States. It intends to enforce in Ontario the judgment it hopes to obtain in the District Court. On August 21st, 1996, the United States obtained from the Court an ex parte injunction freezing U.S. $152 million worth of shares owned by the Defendant Friedland. As the United States proceeded ex parte, the Defendant was not heard by the Court before that order was granted.

3 The question before me on this contested motion is whether the United States is entitled to this injunction.

4 While the background facts are complex, for the purposes of this judgment, they might be summarized as follows:

5 The claim concerns the Summitville mine site which has been the subject of mining operations for over 100 years. The claim focuses on the activities of the Defendant Friedland in connection with three companies, Summitville Consolidated Mining Company (SCMCI), its parent company Galactic Resources Inc. (GRI), and GRI's parent Galactic Resources Limited (GRL).

6 From 1984 until 1992, SCMCI operated an open pit heap leach gold mine at Summitville. The construction of this mine commenced in October of 1984 and extended to October of 1986. Production began in June of 1986.

7 The heap leach process involves strip-mining ore from open pits. The ore is then crushed and heaped onto a synthetic pad known as the "heap leach pad". A solution containing sodium cyanide is sprayed over and allowed to percolate through the crushed ore to leach out the gold. That solution is processed. The gold is removed. The solution is rejuvenated and recycled. Waste ore is placed on a dump site.

8 The United States alleges that there have been serious leakage problems with the leach pad from the beginning; that there are serious problems with acid mine drainage which have posed environmental hazards.

9 It is clear that SCMCI experienced economic difficulties. On December 4, 1992, the company filed for bankruptcy and shortly thereafter abandoned the site. The EPA conducted an investigation which revealed what it alleges is a serious situation relating from failing equipment and treacherous weather conditions; and since December 15, 1992, the EPA has been involved with restoration activities connected with this mine site.

10 The Defendant Friedland was a co-founder of GRL and was president of that company from January 1981 to June of 1984 when Edward Roper became president and Friedland became GRL's chief executive officer. Friedland again served as interim president in June of 1987 when Roper left the company. He held that position until June of '90 when Peter Guest was hired as president. Friedland was the chairman of the board of GRL from June of 1984 and served as a director until his resignation on November 2nd, 1990. Friedland was also president of SCMCI from August, 1984 to January, 1987. He also served as a director of that company and as president of GRI from 1984 until January, 1987.

11 The governing section of CERCLA, section 107 enables the United States to recover cleanup costs incurred by the Environmental Protection Agency from parties responsible for contamination. To establish liability, four elements must be satisfied:

(a) that the subject is a "facility";
(b) that "release" or "threatened release" has taken place or will take place;

(c) that the release or threatened release has caused the plaintiff to incur response costs; and
(d) that the defendant falls within at least one of the four classes of responsible persons described in the section.

12 One of the classes described is "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous wastes were disposed of".

13 The key issue that had been argued before me relates to the question of whether the U.S.A. has a strong prima facie case that Robert Friedland operated the facility within the meaning of that statute.

14 It is the contention of the Plaintiff United States that, by reason of his involvement with the affairs of the companies I have mentioned he is personally liable as an operator.

15 The United States initiated proceedings against Friedland in the United States District Court of Colorado on May 23rd, 1996, claiming reimbursement for response costs incurred to date and projected in the amount of U.S. $152 million.

16 Immediately, the United States brought three ex parte applications which were heard in camera at the request of the United States.

17 First, the United States sought and obtained from District Court Judge Nottingham an ex parte garnishment order under the Federal Debt collection Procedure Act. That was granted on May 23rd, 1996. Judge Nottingham also granted an order sealing the file.

18 On May 27th, 1996, the United States brought a motion in the Supreme Court of British Columbia for an ex parte Mareva injunction. A similar motion was brought before this Court on May 29th. In both the British Columbia Court and this Court, the order sought was for an injunction restraining the Defendant Friedland from dissipating, disposing or, alienating, encumbering, removing, or otherwise dealing with, INCO Limited share certificates having an aggregate market value of U.S. $152 million pending disposition of the proceedings brought against the Defendant in the United States District Court for the District of Colorado.

19 When those motions were brought, the Plaintiff understood that a transaction between a company in which Friedland holds substantial interests, Diamond Fields Resources Inc. and INCO would close within days and that as a result of that transaction Friedland would acquire a substantial volume of INCO shares.

20 The transaction did not close in May as expected for factors not connected to this proceeding. The Plaintiff had argued the ex parte motion before Justice Spencer in the British Columbia Supreme Court and he had reserved judgment. At the Plaintiff's request, that motion was adjourned sine die. Similarly, the motion brought in this Court before Judge Borins was adjourned sine die.

21 The Defendant Friedland was not served with any of these proceedings.

22 When the Plaintiff learned in the month of August that the transaction was expected to close on August 21st, it renewed the B.C. Motion. On August 20th, Justice Spencer granted the Mareva injunction and gave oral reasons.

23 The motion before Judge Borins was renewed and on August 21st, 1996, Judge Borins adopted the reasons of Justice Spencer and granted the injunction in Ontario. The Defendant Friedland was then served. The Plaintiff moved to continue the injunction. The order was continued by an order of Justice Borins on August 28th and further continued by me on September 6th, when a timetable for dealing with the contested motion was established.

24 The motion has been fully argued before me over eight days. Four broad issues have been presented:

1. Did the Plaintiff make full and frank disclosure of the case when it sought the ex-parte Mareva injunction? If it did not, what are the consequences?
2. Has the Plaintiff established that it has a strong prima facie case on she merits against the Defendant?
3. Did this Court have jurisdiction to order injunctive relief in support of the action in the U.S. District Court?
4. Is it necessary for the Plaintiff to show that the Defendant intends to remove assets from Ontario for the purpose of avoiding execution or is it sufficient to show that there is a risk of removal that will have that effect?

25 The complexity of the issues and the extensive nature of the argument presented by the parties would ordinarily require written reasons. However, in my view, the interests of justice require an immediate response and hence I am delivering these oral reasons today. I turn to the first issue:

Did the Plaintiff make full and frank disclosure of the case when it sought the ex parte Mareva injunction?

26 It is a well established principle of our law that a party who seeks the extraordinary relief of an ex parte injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an ex parte motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:

> There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an ex parte injunction.

(Watson v. Slavik, [1996] B.C.J. No. 1885, August 23rd, 1996, paragraph 10.)

27 For that reason, the law imposes an exceptional duty on the party who seeks ex parte relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

28 If the party seeking ox parte relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

29 These principles are so well established in the law that it is hardly necessary to cite supporting authority. They find expression in the Rules of Court. Rule 39.01(6) provides:

> Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

30 The principle has been affirmed and reaffirmed by judicial decision. In the leading Ontario case on Mareva injunctions, Chitel v. Rothbart (1982) 39 O.R. (2d) 513, a judgment of the Court of Appeal, Associate Chief Justice MacKinnon stated, at page 519:

> There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an ex parte interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and continue the injunction.

31 The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. Ex parte applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See Mooney v. Orr, (1994) 100 B.C.L.R. (2d) 335; Rust Check v. Buchowski (1994) 58 C.P.R. (3d) 324.

32 On the other hand, a Mareva injunction is far from a routine remedy. It is an exception to the basic rule that the Defendant is entitled to its day in court before being called upon to satisfy the Plaintiff's claim or to offer security for the judgment. This is clear from the decision in Chitel v. Rothbart, supra. It was emphasized by the decision of the Supreme Court of Canada in Aetna Financial Services v. Feigelman [1985] 1 S.C.R. 2, where Justice Estey referred to what he described as "the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial".

33 Justice Estey went on to say:

> There is still ... a profound unfairness in a rule that sees one's assets tied up indefinitely pending a trail of an action which may not succeed, and even it does succeed, which may result in an award far less than the caged assets.

34 Justice Estey stated as well:

> A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the Lister rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons cannot afford to await the ultimate vindication after trial.

35 For this reason, it has been said that respect for the duty of full and frank disclosure is especially important with respect to Mareva injunctions because, by their very nature, they are liable to cause substantial prejudice to the defendant. (See the leading English text, Gee, Mareva Injunctions and Anton Piller Relief (3d Edition 1995 at p. 97).

36 It is also clear from the authorities that the test of materiality is an objective one. Again to quote the Gee text at page 98:

> ... The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.

37 This principle is affirmed by decisions in Canada. (See Leung v. Leung (1993) 77 B.C.L.R. (2d) 305 at 313; Canadian Pacific Railway v. United Transportation Union (1970) 14 D.L.R. (3d) at 497; and Panzer v. The Queen (1990) 74 O.R. (2d) 130.

38 I turn then to consider the material that was before Justice Borins when he was asked to give the order.

39 The principal affidavit filed by the United States of America was that of Nancy Mangone. She is described as a member of the Bars of New York, Colorado and the District of Columbia. She is currently an enforcement attorney in the Legal Enforcement Program of the United States Environmental Protection Agency, Regional Office in Denver. She has extensive experience in the area of environmental law and she describes herself as the EPA's lead counsel in relation to the Summitville site.

40 The affidavit of Nancy Mangone attaches, as exhibits, the record of the ex parte proceedings before Judge Nottingham. This includes another affidavit from Mangone and supporting affidavits and four volumes consisting of hundreds of pages of documents gathered by the EPA in its investigative efforts.

41 There are also various other exhibits including an affidavit of another lawyer, Lisa Friedman, which had been prepared for another Ontario case dealing with the CERCLA statute and liability.

42 There are also attached press releases issued by the Defendant Friedland and a newspaper article purporting to set out his position, and the INCO proxy circular which described the INCO/Diamond Fields transaction.

43 Those are the principal items.

44 In addition, there were two factums before Judge Borins, summarizing the Plaintiff's position on the evidence and the law. The first factum was filed originally in May and consisted of some 30 pages. The second factum was filed for the August hearing and it was longer, 37 pages, and focused on the legal point regarding the jurisdiction of the Court.

45 The Mangone affidavit is some 33 pages and it sets out what purport to be various factual assertions concerning the site, the operations, the alleged problems, the alleged environmental harms that have resulted, the alleged involvement of Friedland in those problems and in those companies, the basis for the injunction including the whereabouts of Friedland, and certain details regarding the INCO/Diamond Fields transaction. Ms Mangone, also offers her legal opinion. As the U.S. law applicable to this case is foreign law it had to be proved as a matter of fact. She offers the opinion that the United States has a strong prima facie case against the Defendant Friedland. I will be considering in some detail the Mangone affidavit but note here that the propositions asserted in the affidavit purport to be supported by references to tabs in the U.S. record and, in many cases, these references are general in nature, offering a long list of documents in that record.

46 The Deponent Nancy Mangone was cross-examined, and on her cross-examination certain claims of privilege were raised with respect to background documents that had not been included in the record. Those claims of privilege were based on solicitor/client privilege, litigation privilege and

administrative deliberative privilege under U.S. law.

47 A motion was brought before me to determine the validity of that claim of privilege. In written reasons delivered on September 30, 1996, I found that the U.S.A. had waived privilege and I made an order, which in these proceedings has been called the "privilege order", declaring that Nancy Mangone cannot claim any privilege with respect to any documents that she has see,n or reviewed respecting the matters at issue. On the motion before me to continue the injunction, a significant amount of time was spent on documents which were disclosed pursuant to that order.

48 For the purpose of analyzing the non-disclosure contentions of the Defendant, I will review the complaints made under the following headings:

1. The explanation of applicable foreign law.
2. The factual case against Robert Friedland.
3. Quantum of the claim and availability of other remedies.
4. "Flight Risk".
5. Use and description of the proceedings before Judge Nottingham under the Federal Debt collection Procedure Act.
6. Facts relating to the need for proceeding ex parte.

Explanation of applicable foreign law.

49 The Mangone affidavit refers to the affidavit of Lisa Friedman, filed in another case, and attached as an exhibit. Mangone then sets out the criteria for liability that I have already described. She deposes that, in her view, Friedland falls within one of the four classes of responsible persons. She says that in addition to reviewing the Friedman affidavit, she has conducted certain of her own legal research and on the basis of that, she deposes there exists a strong prima facie case that Friedland is an operator of the site.

50 While Mangone gives a long list of case citations, she provides no detail as to how she arrived at that opinion. The Friedman affidavit that she refers to gives somewhat more detail regarding the appropriate legal standard applicable to someone in the position of Friedland. Friedman's affidavit states as follows:

> U.S. Courts have also repeatedly held that CERCLA liability as an "owner or operator" may attach to individuals or corporations who exercise control over a site, even if title to the site is nominally held by a different corporate entity. Courts have imposed such liability as a matter of statutory construction distinct from "veil piercing" or other derivative liability theories

51 On May 17th, 1996, a few days before Mangone swore the affidavit relied upon for the ex parte injunction, a document she had prepared, known as the "Referral Document", was sent by her supervisor to the U.S. Department of Justice. This is one of the documents produced following my

order that privilege had been waived. It is clear from Mangone's cross-examination that the purpose of this document was to provide the Department of Justice with a candid assessment of the case against Robert Friedland so that the Department of Justice could determine whether it was appropriate to take the recommended proceedings against him. The Referral Document consisted of some 57 single-spaced typed pages and contains Mangone's detailed assessment of the relevant facts and law relating to the liability of Friedland.

52 In the Referral Document, Mangone is much more specific in her analysis of the applicable legal principles. She notes, significantly, as follows:

> Since this theory of liability will be a case of first impression in the Tenth Circuit, the standard the district court will adopt in determining an individual corporate officer's, director's or shareholder's liability is unknown.

53 I note that the U.S. District Court in Colorado is subject to the jurisdiction of the Tenth Circuit.

54 She then goes on to set out four tests that have been evolved by the Courts of the United States:

1. Piercing the corporate veil.
2. The capacity or authority to control corporate conduct.
3. The prevention test; and
4. Direct control over participation in wrongful conduct.

55 After reviewing those tests, she says of the fourth test, as follows:

> A variety of other courts, however, have adopted the fourth and final test of individual corporate officer, director or shareholder liability. This final test requires that the person actually participate in the operations or management of the facility or its hazardous waste disposal practices.

56 Then, again significantly in my view, she states that although the Tenth Circuit has yet explicitly to select one of these tests, a decision, Colorado v. Idarado Mining Company (18 Environmental Law Reports 20578) may be instructive on the Court's leaning. In that case, Mangone says:

> The Court held that a parent corporation would be liable for the acts of its subsidiary due to its "intimate involvement" with the subsidiary's business activities. This suggests this district may require some level of active involvement rather than the mere authority to control the business activities of the company or to prevent the environmental harm in question.

57 Mangone then goes on to state that whatever test the Court applies, the approach the Courts have taken is a "heavily fact-specific inquiry". She then lists a number of criteria that the Courts have examined, which are as follows: the person's position in the company: degree of authority; percentage of ownership; role in decision-making and daily management; knowledge of and responsibility for waste disposal policies; and personal involvement with, neglect of, and ability to control hazardous waste matters.

58 It is difficult to understand why, if in order to provide the U.S. Department of Justice with a candid assessment of the case, it was necessary to explain these various legal theories that might apply and to explain that the Tenth Circuit might well adopt the strictest test, it was not also necessary to provide this Court with the same information. That strict test is surely stricter than that suggested by the Friedman affidavit, namely, that liability "may attach to individuals or corporations who exercise control over a site".

59 A subsequent affidavit from Friedman filed after the ex parte proceedings confirms that the final test requires that the person actually participate in the operations or management of the facility or its hazardous waste disposal practices.

60 In my view, there is a material difference between the description of the applicable legal test contained in the material before the ex parte Judge and the candid opinions offered in the Referral Document. The ex parte material describes a general control test. The candid opinion describes a more precise, more stringent test requiring proof of actual participation in the operations or management of the facility or its hazardous waste disposal practices.

61 A review of the cases cited in support of the stricter test have led me to the conclusion that it is far from evident that the U.S.A. will be able to bring Robert Friedland within that standard. In my view, it is no answer for the U.S.A. now to say that it thinks that Robert Friedland will be liable on any of these four tests.

62 In my view, it was incumbent on Mangone to give a fair and balanced statement of the applicable legal test, just as she did for the Department of Justice, so that this Court could assess for itself whether, on the facts she hoped to prove, the U.S.A. had a strong prima facie case. I find that this was a material fact which went to the heart of the case and that the failure to disclose her opinion that the District Court in Colorado could well apply the stricter test constituted a failure to disclose a material fact bearing upon the entitlement of the U.S.A. to the injunction it sought.

The factual case against Robert Friedland.

63 I note at the outset here that objection was taken to the admissibility of significant portions of the Mangone affidavit and attachments. It is clear that she is relating in her affidavit hearsay evidence and there is an issue as to the admissibility of that evidence. While that contention was raised during argument, I reserved ruling and permitted counsel for the U.S.A. to address the full and frank disclosure issue on the basis of all documentary evidence attached to the Mangone

affidavit, as I felt that was only fair. I will turn to this point later in these reasons.

64 In the Mangone affidavit, she states that it is the contention of the United States of America that the Defendant Friedland personally made various decisions or instructed on-site personnel to conduct various practices that caused or contributed to the release of hazardous substances upon and from the site.

65 She goes on to depose to a plea bargain entered into by SCMCI on May 2nd, 1996 in which she states the company pleaded guilty to 40 felony counts, including one count of conspiracy and 30 counts of knowing unauthorized discharges of pollutants into the waters of the United States, and she attaches a copy of that plea bargain to her affidavit, indicating that the company agreed to pay $20 million for these criminal violations.

66 She further deposes to the bankruptcy of SCMCI on December 4, 1992; to the fact that the company indicated it would leave the site on December 15, 1992; that it was ordered not to abandon the site but that it did, in the event, abandon the site.

67 Then, in paragraph 37, which occupied a great amount of time during the argument, she sets out her factual contentions with relation to Mr. Friedland. She deposes that he:

1. held leadership positions in Galactic Ltd. as Chairman and CEO, and was president of SCMCI.
2. negotiated and executed the contract with the Anaconda Mining Company, under which Galactic Ltd. acquired the right to mine certain mining claims within the site and all of Anaconda's data regarding mining reserves, existing environmental conditions and potential environmental liabilities.
3. negotiated sources of financing for SCMCI, including the financial arrangements with the Bank of America.
4. had personal knowledge of potential environmental problems and liabilities that could result in going forward with the Summitville project.
5. had a primary role in decision-making for the design and installation of the leach pad liner.
6. negotiated numerous engineering and consulting contracts on behalf of the GRL-related corporate entitles. In particular, Friedland negotiated the contract for civil engineering and construction oversight services of Bechtel Civil Engineering & Minerals, Inc.
7. bad the largest percentage of stock in Galactic owned by a private individual; Friedland controlled a large block of common stock in Galactic Ltd., particularly between 1983 and 1986, when the Summitville project was being financed, built, and brought into production. Friedland's percentage of the company amounted to 21.17 per cent at the end of 1983, 26 per cent in 1985, 17 per cent in 1985, and 10 per cent in 1986.

8. exerted substantial authority within and over Galactic Ltd./SCMCI corporate affairs. Executive Committee memoranda question whether Galactic Ltd. would be able to attract a new president to work "under the thumb" of Fried land and whether Friedland could "stop being involved with all aspects of operations". Friedland was also described as one of the "key personnel" in Galactic Ltd.'s filings with the United States Securities & Exchange Commission.
9. had personal knowledge of permit violations at the site.

68 The factum filed on the ex parte motion summarizes these factual contentions as follows:

> Friedland had pervasive control of, and influence over, Summitville. The Summitville project was primarily his idea and he promoted it vigorously. He negotiated and executed the contract with Anaconda through which Galactic acquired the rights to mine at the site. He negotiated sources of financing including arrangements with Bank of America. He had personal knowledge of potential environmental problems and liability that could result from going forward with the project. Indeed, he had a primary role in decision-making relating to the design and installation of the leach pad liner and, available evidence suggests, he well knew of problems yet pressed ahead despite the risks in order to meet production deadlines imposed under loans he had negotiated.

69 As I have noted, Justice Borins of this Court adopted the reasons reached by Justice Spencer and it is before me that the material before Justice Spencer was essentially the same material as before Justice Borins.

70 In his reasons for judgment, Justice Spencer in British Columbia concluded as follows:

> There is evidence put before me which raises in a substantial way the allegation that Summitville, Galactic, and the Plaintiff --

there he clearly meant "the Defendant" --

> as a directing mind of both, were aware from the beginning that the construction of the mine and its operation were done in so careless a manner that it posed the very threats to the environment that are now said to have materialized.

71 Ms Mangone has been subjected to several days of cross-examination; cross-examination which I have read. We have now had disclosure of the documents in the possession of the EPA, produced pursuant to the privilege order, and eight days of extensive argument.

72 On the basis of what I have read and heard, I am satisfied that Justice Spencer could not have come to that conclusion had he been given a fair statement of the evidence regarding Robert

Friedland's involvement. Many of the facts, so-called, in the Mangone affidavit are little more than an expression of what she hopes to be able to persuade the Court. A careful review of the documents that she relies on indicates that she takes an excessively optimistic view of the case. They are far from facts; they are mere inferences that she purports to draw from this record.

73 In my view, the picture painted by this material offered by the United States was a misleading one. It suggests that Robert Friedland was effectively a one-man operation making all crucial decisions relating to the mine and its operations, and that is plainly not the case.

74 I am going to turn to the allegations that I have referred to from paragraph 37. The first significant contention relates to the leadership positions that Mr. Friedland held, and it is clear that much of the United States' case is based upon the simple fact that he exercised positions of authority in the companies concerned. What the Mangone affidavit did not disclose and what, in my view, were relevant facts, are the following:

75 First of all, GRL was a publicly traded company with the usual governing structure. It was not a one-man operation. The memorandum referred to in subparagraph 8 of 37, relating to Friedland's extensive and apparently unwarranted control of the company, was written not at the relevant period when the mine was being constructed but long after in March of 1990. Moreover, it is clearly an inadmissible hearsay document. The circumstances in which it was written are unknown and there is no indication that when the author said what he said, it had any direct bearing on the issues that are before this court.

76 Secondly, Mangone failed to make it clear in her affidavit that for the critical period 1984 to 1987, an experienced mining executive, Ed Roper, was the president of GRL and that the Defendant's position is that Mr. Roper had authority over all aspects of the construction.

77 Thirdly, Mangone failed to make it clear that Robert Friedland had left Summitville and these companies by 1990, two years prior to the bankruptcy and six years prior to the plea upon which she relied. It is clear that Friedland had nothing to do with the bankruptcy, had nothing to do with the abandonment of the site and was in no way involved in the plea of guilty entered by SCMCI in 1996. Indeed, during the hearing, I ruled that that evidence was inadmissible against Friedland and excluded it. In my view, these facts should have been made clear, particularly as, when one looks to the reasons of Justice Spencer, it is apparent that he paid heed to the plea bargain in particular as evidence against Friedland.

78 The suggestion in the material of the United States is that Mr. Friedland had personal knowledge of the potential environmental problems and liabilities that could result from going forward with the Summitville project before they occurred but then went ahead in a careless manner without regard to the environment.

79 If I am incorrect in taking the inference from the material, so too was Justice Spencer because Justice Spencer, as I have noted, clearly found that. The reasons of Justice Spencer were put before

Justice Borins without reservation. In my view, the allegation contained in paragraph 37(4) in this regard is grossly over-stated. It is clear that Mr. Friedland did know that heap leach mining did pose certain risks -- this is apparent from the Securities documents that were filed -- but there is nothing in the evidence to suggest that he carelessly went ahead with operations or participated in decisions to that effect, as suggested by the reasons of Justice Spencer.

80 The Plaintiff relies on the fact that he attended on behalf of the company before the Colorado Mined Land Reclamation Division, and on that occasion expressed a concern regarding environmental problems and undertook, on behalf of the company, to have them resolved. In my view, that is evidence that he did participate in dealing with a problem after it occurred but it does not support what is the clear insinuation of the Mangone affidavit that he knew of these problems before they occurred and went ahead anyway in a careless manner.

81 A vital allegation against Friedland is that of paragraph 37(5) "that he hod a primary role in decision-making for the design and installation of the leach pad liner". It is vital because of the importance attached by the United States to the design and installation of the leach pad liner in its case. In that paragraph, Ms. Mangone cites some 39 documents in support of that contention. She was subjected to an extensive cross-examination and was unable to show that any of those documents supported the specific proposition she advanced.

82 The proposition was argued again at some considerable length before me and I have concluded that there is simply nothing in evidence to justify a statement of that kind. The Plaintiff's theory is put in its written factum as follows:

83 It is the Plaintiff's case that the statement of fact advanced by Mangone that Friedland had a primary role in decision-making with respect to the design and installation of the leach pad liner is made out by the following:

84 That Friedland was at the top of the corporate structure, with authority over others involved in the company and that those people collectively made a decision to proceed with winter construction, notwithstanding the risks.

85 That Friedland arranged financing for the project which required gold production in 1986 which, in turn, required winter construction.

86 That Friedland and other SCMCI personnel insisted to Klohn Leonoff and others that winter construction must proceed. (I note here that that is a highly contentious and disputed proposition which is not, in my view, borne out by the facts.)

87 That Friedland visited the site, called on-site personnel for updates, received progress and environmental reports, and attended the MLRB meeting that I have just referred to.

88 In my view, one need only state that theory to show that there plainly is no evidence of the

specific and crucial assertion that Friedland had a primary role in decision-making for the design and installation of the leach pad liner. To state the Plaintiff's theory is to expose the fact that the evidence simply does not support a statement of that specificity. Given the significance of the Mangone affidavit and the case that the United States attaches to the problems with the leach pad liner, this is a central and critical allegation against Robert Friedland and, in my view, constituted a material misstatement of the facts.

89 Moreover, there is evidence to the contrary on this point that was not revealed by the Plaintiff and by Ms Mangone. In an investigative memo prepared by Mr. Broste in March of 1995, he notes that Roger Leonard, who was the general manager at Summitville from 1984 to 1986 or 1987, claimed that he took orders from Ed Roper and that he was fired by Roper. Broste says that Leonard says that Roper instructed him to proceed with the winter installation of the leach pad lining in spite of very adverse conditions. Leonard did not know if Friedland was involved in that decision. He reported to Roper and did not know to what extent Friedland was directing Roper but Leonard described Friedland as a financier who did not understand mining.

90 In Roper's response to a demand issued by the EPA pursuant to section 104(e) of the Statute, a procedure by which parties potentially responsible may be compelled to provide answers to questions, a document to which I will return later, Mr. Roper states as follows:

> KL (which is Klohn Leonoff, the engineer) performed or subcontracted all engineering, design, geotechnical, construction, supervision permitting (anything and everything) related to the leach pad. No part of the leach pad was constructed or put into use without KL's written approval of it having passed all engineering and construction requirements. KL was also responsible for the slope stability, engineering work for the open pit design. KL was also responsible for Summitville's water balance engineering requirements. KL was working for GRI and/or SCMCI when I left the employment of the companies. KL had total professional engineering independence.

91 Ms Mangone, on cross-examination, accepted that statement as being truthful. On that basis, I have no hesitation in agreeing with the submission of the Defendant that a possible reading of Mr. Roper's 104(e) response is that in fact it exonerates Mr. Friedland from involvement in the design and construction of the leach pad liner and it indicates the degree of reliance placed by SCMCI on experts such as Klohn Leonoff and other engineers to make these crucial decisions.

92 In addition to those misstatements, there is, in my view, a failure on the part of Mangone to disclose certain contrary evidence in her possession regarding the nature of Mr. Friedland's involvement at Summitville. Again, this emerges from the privileged documents which have been produced. As late as March 1985, it is clear from these documents that the investigators of the EPA had some difficulty in establishing a case against Mr. Friedland. In his memo of March 29th, 1995, Mr. Broste states that, after reviewing a large quantity of documents:

> ... I think it is clear that Friedland had virtually no direct involvement in the day to day operations of Summitville.

93 Ms Mangone, in a memo written a few days later, stated:

> ... Dave Broste and I are at a loss to figure out what else we can be doing now to develop the liability case against Friedland.

94 Now, it is clear that following those memos, a number of further documents were obtained. Those documents include a transcript of Roper's examination for discovery in the KL litigation, Roper's section 104(e) response, certain engineering notes from KL, the plea agreement that I've referred to, and the internal Galactic documents. These documents essentially show that on some occasions Mr. Friedland was present or is listed as being present when discussions of site operations, including environmental questions, were discussed. But they go no further than that.

95 In her referral document, Ms Mangone set out, in a detailed manner, certain contrary evidence that was not disclosed to this Court. She states:

> It should be noted that the evidence shows that Friedland did not have a high profile role in decision-making for the day-to-day operations at the facility.

96 She then goes on to relate that information:

> Steven Enders was chief geologist for SCMCI starting in 1984. His role expanded to include exploration manager for GRL. ... Enders said that mine operation decisions were made by the mine manager and "ultimate mine operation decisions" were made in Vancouver by Ed Roper, Robert Cook and Victor Hollister. Enders knew that Friedland was Roper's boss but did not know what his involvement was in decisions. Enders said that Friedland visited the mine periodically in connection with promotional activities.
>
> Pritchard Crowell was the controller for the Summitville Mine from 1984 to 1987. In 1987, he transferred to the GRL offices in Vancouver and worked there as assistant secretary and accountant until 1991. Crowell recalled that Friedland met with the mine's engineers, but did not seem to be involved in daily operations. He said that Ed Roper managed the company.
>
> Daniel Blakeman was process superintendent at the Summitville Mine from 1984 to 1987. Blakeman said that he saw Friedland once or twice a year and said that Friedland was unaware of day-to-day mining operations.

> Milton Hood was mine superintendent from August to December 1985. He said Friedland visited the mine about once a month to show the mine to his investors. Hood said Friedland never directed mine operations. Hood said that Ed Roper visited the mine about twice a month and that Roper did direct operations at the mine.
>
> Roger Leonard was hired to be the plant manager at Summitville in 1984 and was promoted to general manager shortly thereafter. He was employed at the mine until Ed Roper fired him in 1987. Leonard reported to Roper and did not know to what extent Friedland was directing Roper. Leonard described Friedland as a financier who did not understand mining.
>
> Mark Coolbaugh was hired to work as a geologist at the mine in June, 1984 and continued to work at Summitville until February, 1991. he was the general manager during his last month at Summitville. He said that the mine's general manager made operational decisions at the mine. Coolbaugh never saw Friedland direct operations at the mine and said that Friedland did not have technical expertise.
>
> Jim Burchett was employed at the mine as senior mine engineer in July 1988 and worked there until SCMCI went bankrupt in 1992. He has continued to work at the mine for one of the contractors performing response actions at the site. He was only aware of Friedland being at the site one time during his employment there. He was not aware of Friedland directing operations at the mine.

97 Now, the United States submits that, in view of the theory of liability it advances, facts relating to day-to-day management and control are not relevant. The United States submits that CERCLA is very broad and that it will be enough for it to show Friedland's decisions at a more general level; specifically, that his decisions regarding the financing and the effect that decision had on winter construction will be sufficient.

98 I find the excuse offered for not revealing this material to the Court to be wholly unpersuasive, for several reasons.

99 First of all, if that is the theory the U.S.A is relying on, it should have put that theory squarely before Justice Spencer, Justice Borins and Judge Nottingham in the United States. It is clear from the Mangone affidavit and the factum that that is plainly not what those Judges were told. The Plaintiff is now in effect shifting the theory of its case. In my view, the Plaintiff cannot have it both ways.

100 Secondly, the relevance of this information is, in my view, directly contradicted by the fact that Mangone deemed the evidence to be relevant when she was offering her candid opinion to the Department of Justice. One can readily see why she would have formed that conclusion. She had advised the Department of Justice that the Court in Colorado might well apply a strict test requiring active participation in the wrongful act. She had told the Department of Justice that, on the cases, the test for determining liability of an operator was a fact-specific inquiry. One of the criteria listed in that fact-specific inquiry was the role in decision-making and daily management.

101 In my view, on the legal test, as described by Mangone in the Referral Document, the evidence that was not disclosed, described as contrary evidence, clearly was relevant to the decision the Department of Justice would have to make and also was relevant to the decision this Court was asked to make. In my view, Ms Mangone was obliged to set out the facts for and against and she did not do so. Her failure to disclose contrary evidence, I find constitutes a failure to disclose material facts.

102 I note here that the United States also advances the proposition that it made adequate disclosure of Mr. Friedland's position by attaching press releases and newspaper interviews he gave in relation to the problems at Summitville. In my view, that disclosure does not mitigate the non-disclosure and misrepresentations of fact that I have just described. Those articles and releases amount to a far from complete account of Mr. Friedland's position and the very fact that that method was used to disclose his position suggests to the judge hearing the ex parte application that the EPA had nothing in its files that would sustain that position.

103 I note as well that in those articles Mr. Friedland questions the propriety of the actions of the EPA and that there is another internal memorandum disclosed as a result of the privilege order in which Mr. Muller, Mangone's predecessor on the file, expressed a very strong view that the EPA, in proceeding in the way it was proceeding, by way of interim action rather than final remedial action, was jeopardizing the claim that it would seek to advance against responsible parties. He stated specifically:

> It is my opinion that proceeding with the FFS's interim actions instead of as final remedial actions will be inconsistent with CERCLA and the NCP and will seriously jeopardize our cost recovery case.

104 That, too, was not disclosed to the ex parte judge.

Quantum of the claim and availability of other remedies.

105 In paragraphs 35 and 36 of Mangone's affidavit, she deposes that the EPA's response costs to date are $95,750,872 and, relying on an affidavit from another official, she states that the total of the expended and currently planned response costs was estimated to be $152.5 million. What Ms Mangone did not disclose was certain inconsistencies and figures offered within the Referral Document.

106 In the Referral Document, sent, as I have noted, days before she swore this affidavit, the response costs are estimated to be $120-140 million. In a notice filed in the public Federal Register on August 7, 1996, in an attempt to justify certain settlements that were proposed with so-called de minimis PRPs, a notice authored by Mangone, the costs were stated to be estimated at $120 million, some $32 million less than this Court was told.

107 Further, Mangone did not disclose to the Court that certain settlements were underway, in particular the de minimis settlement that I have just mentioned which would produce $700,000. She did not disclose that other settlements were possible which, at one point at least, she estimated might bring as much as $10 million.

108 She further failed to disclose that the State of Colorado was legally obliged to contribute ten per cent of the costs -- on her figures, this would be $15 million -- and it is clear that the United States' claim would be reduced by that amount.

109 In defence, it is submitted by the United States that the U.S.A. and the State of Colorado are both Plaintiffs in the District Court action and hence the total of $152 million could still be recovered against the Defendant Friedland. It is submitted that this is merely a technical point and that the U.S.A. should be entitled to an injunction for the whole amount.

110 In my view, this is far from a technical point and the facts should have been disclosed to the Court. It is surely relevant to the exercise of this Court's discretion that a significant part of the assets to be frozen, in this case some U.S. $15 million, were in fact to be recovered by another party not before the Court. It is by no means clear to me that, apprised of that fact, a Judge would have granted an injunction for the full $152 million.

111 All of these facts relevant to the quantum of the claim, in my view, should have been disclosed. They represent a discrepancy of up to as much as $50 million.

112 It may be that the United States could offer an answer as to why the injunction should still be granted for that amount but it was obliged to give that answer to the Judge; it was not entitled to deprive the ex parte Judge of information that was, in my view, plainly relevant to the exercise of the discretion.

113 Another related area bearing on the right of the United States to an injunctive relief relates to the other potentially responsible parties (PRPs). The privileged documents reveal that since 1993 the United States has had in mind pursuing a long list of PRPs, including three other significant institutional parties of substantial means who were involved in the construction and operation of the mine. Those parties are:

114 The Bank of America which financed the project. The theory apparently to be advanced against the Bank is similar to that advanced against Friedland, namely that the Bank pressured SCMCI and GRL to construct the heap leach pad within a specified time frame, requiring winter

construction so as to get early production. It is also alleged against the Bank that it had an active day-to-day management and operation role, given the terms of its lending agreement.

115 A second party potentially responsible is International Constructors Corporation. This was an independent contractor which operated the mine for several years and was involved directly in mining and transporting material at the mine.

116 Thirdly is Bechtel Civil & Minerals Inc., the engineering firm responsible for overseeing construction of the mine.

117 On October 3rd, 1995, Ms Mangone was asked to provide answers to certain questions regarding her Region's enforcement strategy. In this letter, which was produced as a result of the privilege order, she states as follows:

> The Region does have an enforcement cost recovery strategy for pursuing PRPs for the Summitville site. While we are currently developing evidence on a number of fronts, the basic approach is to file a CERCLA section 107 cost recovery action against all Tier I PRPs jointly and severally.

118 There is nothing in the evidence before me to suggest the EPA has abandoned that strategy.

119 In the same memorandum, Mangone describes briefly the case against these parties, and she states as follows:

> A number of these parties, such as Robert Friedland, Bank of America, Bechtel and ICC are sufficiently capitalized to pay 'the bulk, if not all, of the United States' response costs for the site. While there may be some litigative risks associated with recovering response costs from Friedland and Bank of America, we should have a strong case against ICC and Bechtel.

120 All of these parties are also listed as potentially responsible parties in the Referral Document.

121 The justification for non-disclosure of this information offered by the United States is, first of all, that it was referred to in the affidavit filed in the U.S. proceedings, where Mangone indicated that boxes of material had been collected, with reference to these PRPs. In my view, that was totally insufficient by way of disclosure.

122 It is further argued that the case against these PRPs has not been fully developed and that, in any event, it is not a defence to Mr. Friedland to show that other parties might be responsible. In my view, neither these contentions justify the failure to disclose the possibility of pursuing these other parties.

123 I find that the facts relating to the possibility of pursuing other parties, parties of substance, was clearly relevant to the exercise of the Court's discretion to grant a Mareva injunction. One gains

the distinct impression from the material filed by the Plaintiff that Robert Friedland is the culprit and that if there is no recovery from Robert Friedland, there is a significant risk that environmental costs will fall to be borne by the taxpayers of the United States.

124 The fact that the United States sees Mr. Friedland as its main target does not obscure the fact that he is not the only target and indeed, as Mangone in her letter of October 1995 stated, she thought that while there were certain risks of proceeding against him, there was a strong case against certain other parties.

125 As I have already noted, the Mareva injunction is an exceptional and extraordinary remedy which is available to plaintiffs whose rights will be defeated if something is not done on an urgent basis.

126 Even assuming the Plaintiff were able to show a strong prima facie case against Mr. Friedland, it is my view that in assessing and in balancing the burden the injunction would impose on Mr. Friedland, with the risk that the Plaintiff's lawful claims might be defeated, the Court was entitled to know about the other possible available avenues of recourse available to the Plaintiff. It is possible that apprised of all of these facts relating to the other parties, the Court might still have granted the injunction but it is by no means, in my view, self-evident, given the exceptional nature of Mareva relief.

127 In any event, that was a decision for the Court not for the United States of America, and the material presented by the United States of America deprived the Court of the opportunity to make that assessment.

"Flight Risk".

128 The Notice of Motion filed before this Court stated, as grounds for the Mareva injunction, the following:

> There is a real and substantial risk that the Defendant, a resident of Singapore and/or Australia, if given notice of this motion, will remove or dispose of the securities, which are the Defendant's only known assets in the United States or Canada, from the jurisdiction before a judgment of the District Court or the B.C.S.C., which would be enforceable in this Court, can be rendered or satisfied, thereby causing Plaintiff irreparable harm.

129 The Mangone affidavit deposes to certain facts relevant to this point, namely that certain attempts to serve Friedland under CERCLA with 104(e) requests were met with rebuff. She deposes that Friedland has disposed of certain real property he owned in the United States. She indicates his move from Vancouver to Singapore and Sydney. And she relates that he has asserted privilege claims in relation to documents the EPA wishes to obtain which are held by the solicitors for Galactic.

130 In the factum filed in support of the ex parte order, this evidence is summarized in the following fashion:

> ... based upon Friedland's modus operandi in relation to other assets, such as the California and Colorado real estate properties, there is a risk that Friedland could transfer the shares into the possession of, or register them in the name of, other persons. Furthermore, based on his avoidance of service of information requests made by EPA, the misstatements as to his address in Insider Report filings, and other factors in his background ... there is ample reason to conclude that Friedland can and may well take steps to avoid the jurisdiction of this court, thereby rendering any judgement of this court nugatory.

131 The factum concludes with a citation to a case which is put in the following manner. The citation is to the decision of Mooney v. Orr, which I have already referred to, and the following quotation is included:

> The English Court of Appeal devised the Mareva injunction for marauding charterers. It is equally well-suited to marauding deal-makers to ensure that those B.C. residents who structure their business and personal lives to preserve assets out of sight and attack, may be enjoined from dealing with those assets except under the court's supervision during litigation.

132 The factum concludes with the statement:

> This case, it is submitted, falls squarely within this principle.

133 Justice Spencer was clearly persuaded by this. In his reasons, he states:

> There is a real risk that the defendant may remove assets from this jurisdiction to defeat any judgment against him.

134 He states further, after reviewing the evidence in the Mangone affidavit:

> All of that shows a desire to pick and choose places of residence and to avoid jurisdictions where he might be exposed to claims against him. All of that suggests a real risk that he will remove assets from any jurisdiction where a judgment may be had or enforced including this jurisdiction.

135 It is significant, in my view, that the United States of America more or less abandoned this allegation, by implication, in that it argued strenuously that nefarious, fraudulent or deliberate intent to defeat the process of the court was not required, as a matter of law, to justify a Mareva injunction and that it was enough to show that the effect of Mr. Friedland's actions would be to put his assets out of reach.

136 On cross-examination, Ms Mangone admitted that she had nothing to show that the real estate transfers were other than bona fide.

137 The characterization of Mr. Friedland's resistance to the 104(e) demands as evasion was, in my view, completely unwarranted. The position he took, or his counsel took, which so far as I can tell has not been refuted or at least not shown to be without bona fides, were that these demands were unlawful and that he did not, in law, have to respond.

138 The most serious non-disclosure and misrepresentation, in my view, of Mr. Friedland's position as an alleged "flight risk" arises with respect to a possible settlement of the claim. This comes again from the affidavit of Ms Mangone. Ms Mangone states in her affidavit, as follows:

> Although I have not personally spoken with Friedland, his local counsel, Mr. John D. Fognani of the Denver firm, Gibson, Dunn & Crutcher, has told me that both he and Friedland believe that Friedland is not liable under CERCLA for the conditions at the site.

139 This statement was based upon a meeting between Ms Mangone and Mr. Fognani, the details of which are not explained in the affidavit. However, again as a result of the privilege order, a draft letter that Ms Mangone authored to Mr. Fognani was produced. Although the letter was apparently not sent, Ms Mangone did not dispute that it set out accurately what had been discussed at the meeting from which Ms Mangone asserted the Friedland was denying liability. She states in this draft letter, as follows:

> As I understand your proposal, your client, Mr. Robert M. Friedland, is now interested in settling any potential civil and criminal liabilities he may have for the Summitville Mine Superfund Site. He also wishes to include other potentially responsible parties in his settlement proposal, although those parties are yet to be defined. The basic tenets of the proposal are that Mr. Friedland and/or this PRP group undertake "reasonable" response actions to complete the cleanup of the site, as well as providing a "substantial" or "significant" cash contribution to extinguish civil liability for Past response costs.

140 The draft letter goes on to explore certain information that the EPA would require.

141 It has been acknowledged, and I refer here again to the English text Gee at page 103, that where the plaintiff has been engaged in open negotiations with the defendant, that that is a matter relevant to the exercise of the court's discretion as it bears upon whether the plaintiff needs urgent ex parte relief. Mr. Gee states, as follows:

> If the defendant is willing to attend an open meeting to discuss the claim, this may indicate a measure of responsibility in relation to his legal obligations which would cast doubt on whether the case was suitable for Mareva relief.

142 I find the excuse offered for not disclosing this or for, more importantly, misdescribing it by Ms Mangone, unpersuasive. It is submitted that this was a privileged discussion and that it would be contrary to EPA policy for her to discuss it in any way.

143 It is difficult for me to imagine how that justification could, in any way, permit Ms Mangone to use the part of the discussion that suited her purposes, namely, that Friedland maintained that he was not legally responsible for these costs, while omitting the part that didn't suit her purposes.

144 I note, moreover, that these discussions were in one sense open discussions, in that they arose as a result of a newspaper article in which Mr. Friedland had indicated a willingness to discuss the situation with the EPA and, moreover, that there is some evidence that, following the discussion, Ms Mangone did tell a reporter that she had had this discussion but that confidentiality precluded her from giving the details.

145 The ex parte judge, in my view, could have been told that while Mr. Friedland was unwilling to admit legal liability, there had been some preliminary discussion indicating his willingness to resolve the problem himself and in cooperation with other parties. In my view, it was a serious distortion to characterize this exchange as simply a denial of liability, suggesting that Mr. Friedland was totally unwilling to cooperate in any way with the EPA in resolving the problems that had arisen.

146 The insinuation of the United States that Mr. Friedland has arranged his affairs to avoid his legal obligations is, in my view, totally unsupported by the evidence. The record does indicate that he is fully prepared to assert his legal rights to the demands of the EPA and that he has advanced claims of privilege in relation to material sought by the EPA. However, there is no suggestion that this assertion of rights or claims is unwarranted in the sense of being spurious or lacking in good faith.

147 Mr. Friedland's wide range of business activity has meant that he travels extensively and that the focus of his business interests now lies in Asia. He has moved from North America. As might be expected of a successful international entrepreneur, he moves his assets according to the opportunities and ventures that attract him. In all of this, however, there is simply no evidence before me, nor was there any evidence, in my view, available to the United States, to suggest that he has disposed of property, moved or dealt with assets so as to avoid or evade his creditors. The United States presented that as a fact to the ex parte judge and I find that that was a material misrepresentation of the facts.

Use and description of the proceedings before Judge Nottingham under the Federal Debt collection Procedure Act.

148 The statutory procedure under the Federal Debt collection Procedure Act permitted the U.S.A to obtain a garnishment order. In Mangone's affidavit, that order was described as a temporary restraining order. In the factum filed on the ex parte application, it is described as

follows:

> A temporary restraining order (TRO) in the District Court preventing Friedland from dealing with U.S. $152 million (the total reasonably projected cost of dealing with the cleanup) pending disposition of the Complaint.

149 At a later point in the factum, it is, I must note, referred to as a "garnishment order".

150 It is clear from the transcript of the hearing before Judge Nottingham, which was produced after the ex parte order was granted, and clear from the cross-examination of Ms Mangone, that the United States knew at the time it brought the motion before Judge Nottingham that Mr. Friedland had no assets that could be the subject of a garnishment order. The purpose of the motion, it is apparent, was to show the Canadian courts that relief similar to that being sought from those courts had been sought and obtained in the United States and that the principle of comity might extend to persuade she Canadian court to grant similar relief.

151 It is clear from the reasons of Judge Spencer that he was impressed by the fact that Judge Nottingham had given the order that he gave. The order was not a temporary restraining order and this was a misdescription of that order. It is submitted that this was not significant or merely inadvertent. Again, I find this unpersuasive. The major purpose of going to Judge Nottingham was, as I have just said, to show an Ontario Court that the Plaintiff had sought and obtained similar relief in the United States Court. The Ontario Court was being asked to respect the principle of comity. In my view, in those circumstances, it was not asking too much to insist that the Plaintiff provide a fair and accurate description of the precise nature of the remedy it sought and obtained from Judge Nottingham.

152 When one turns to the brief that was filed in the United States Court before Judge Nottingham, one finds similar allegations of direct involvement by Mr. Friedland and allegations that he is a "flight risk". It is stated the Friedland controlled mining operations at Summitville; that he exercised pervasive control over the actions of these corporations with respect to the site; that he exercised extreme control over the operations at the site. It is further stated:

> It is clear that Defendant Friedland's direct authority and control over the mine site, and his direct authority and control over the activities at the mine site leading to the release of hazardous substances, makes him a liable operator under CERCLA. ...
>
> Defendant was intimately involved in all major decisions associated with the mining operations at the Summitville site ...

153 It is further stated significant decisions related to design and construction of the site were his.

154 And it concludes:

> As a result of the formal positions he held, his close involvement with major decisions affecting the mining operations, and as well as a result of his extensive influence within these corporations, Mr. Friedland had the actual authority to control and in fact did control the operations at the Summitville mine.

155 Ms Mangone's affidavit deposes that she was fortified in her conclusion of the strong prima facie case by virtue of the findings of Judge Nottingham and, as I have noted, this impressed Judge Spencer in British Columbia and Judge Borins in this Court.

156 The transcript of the proceedings before Judge Nottingham make it clear, first, that Ms Mangone was present and, secondly, that there was virtually no consideration of any kind of the merits of the case. Judge Nottingham was concerned by procedural issues: When the order would be served on Mr. Friedland? Should the file be sealed? He also posed questions regarding the jurisdiction of the case and was told by counsel for the United States, as follows:

> The heart of the case is that he is very very very much involved with the site of Colorado and the Summitville mining operations at least.

157 Judge Nottingham's response to that was, as follows:

> Well, I guess he can appear and contest jurisdiction if the asserted basis for jurisdiction is incorrect.

158 It is clear that the order given by Judge Nottingham was made on the basis of similar or perhaps even more exaggerated representations than those made to the British Columbia and Ontario Courts and that it is entitled to little or no weight. Judge Nottingham does not appear to have given any consideration to the merits or strength of the United States' case, perhaps because of the statutory regime under which he was operating, and yet the impression was given to the Canadian Courts that a United States Court had given its considered opinion on this matter.

Facts relating to the need for proceeding ex parte.

159 As I have indicated, the motion originally brought in May was adjourned when it was learned by the United States that the Diamond Fields/INCO transaction had been postponed. What was not disclosed at any time was that the INCO securities filing made it clear that Mr. Friedland was irrevocably committed to the Diamond Fields/INCO transaction. It is my view that that clearly might have had an important bearing on whether a court would permit this matter to proceed ex parte. The justification for proceeding ex parte is urgency. Here, almost three months expired from the time the matter was originally brought in May.

160 The other justification for an ex parte order is that there is a risk that, if given notice, the

Defendant might remove assets or dispose of assets so as to defeat the rights of the Plaintiff.

161 The simple fact is that Mr. Friedland was legally bound to complete the transaction and that that, accordingly, had a direct bearing on whether an ex parte proceeding was justified.

162 There were three months between May, when the application was first brought, and August, and Mr. Friedland could have been served during that time. In my view, this was plainly a matter that should have been raised before Justice Borins.

163 The United States submits that notice of these proceedings might have affected the INCO transaction and the interests of third parties. It is difficult to understand this submission because the injunction had nothing to do with INCO but, rather, was to enjoin Mr. Friedland after the transaction had been completed and could take no priority over any right INCO or any third party might have had.

164 In any event, even if there was such a risk, it is my view that that was a matter for the Court to assess in determining whether this matter should proceed ex parte or not. By not disclosing this important term of the INCO agreement, the United States of America deprived this Court of the opportunity to make that assessment.

165 I note here that, with respect to this and certain other points regarding non-disclosure, the fact that the INCO circular was before the Court and that it might have been argued, although, in fairness, the United States did not make this argument, that the information had therefore been disclosed.

166 In my view, the fact that a document is before the Court, given the volume of exhibits and the time which an ex parte judge has to deal with such matters, does not relieve the moving party of its duty to make full and fair disclosure. It is apparent that a judge cannot read all of that material and that the judge will necessarily focus on the lead affidavit, the factum and the representations of counsel, and that it is up to the parties and counsel to bring relevant matters to the attention of the Court.

167 I refer for that proposition to the Gee text at page 99 and 100.

168 For these reasons, I have no hesitation in finding that the United States of America failed to make full and frank disclosure of the case of Justice Borins when it sought an ex parte Mareva injunction.

169 In my view, the material submitted contained material statements of fact which are misleading; statements of fact which are wholly unsupported by evidence; that there was a failure to disclose material facts in relation to the liability of the Defendant; that there was a failure to disclose material facts relevant to the exercise of this Court in its discretion to grant a Mareva injunction.

170 In my view, this is not imposing upon the Plaintiff an unrealistically high standard of disclosure. The United States of America has been preparing its case against Mr. Friedland for a number of years. It had, even if it was rushing to file material in May, another three months before the matter was returned to the Court.

171 Moreover, Ms Mangone had at hand readily a full and detailed analysis of the case, her Referral Document.

172 This is not a situation where there are just one or two instances but, rather, a pervasive failure to live up to the duty in all areas of the case.

173 I have concluded that the United States of America made no serious effort or attempt to take an objective view of its case and present it in a frank, fair and balanced way to the ex parte judge.

174 What are the consequences of this failure? I am referred to two decisions of the English Court of Appeal, Brink's Mat Ltd. v. Elcombe, [1988] 1 W.L.R. 1350, and Lloyd's Bowmaker v. Britannia Arrow Holdings [1988] 1 W.L.R. 1337, where the English Court of Appeal has held that despite non-disclosure or failure to live up to this duty, there is a discretion to continue an injunction.

175 In my view, the authorities applicable in Ontario establish that these cases do not state the law in this jurisdiction. Those authorities establish that where there has been a finding of material nondisclosure or misstatement, the injunction must be set aside as a matter of right, without regard to whether the injunction might be sustainable on the basis of a corrected record, and that a litigant who fails to make full and frank disclosure forfeits whatever right it might have had to a Mareva injunction.

176 I refer here to the passage I have already quoted from the judgment of Associate Chief Justice Mackinnon in Chitel v. Rothbart; and to the following Ontario authorities: BBM Bureau of Measurement v. Cybernauts Ltd., (1992) 8 C.P.C. (3d) 293 at 301, where Justice Davidson expressly declines to follow the Brinks v. Mat case; Lynian Ltd. v. Dubois (1990) 45 C.P.C. (2d) 231; and Bardeau Ltd. v. Crown Food Services Equipment Ltd. (1982) 38 O.R. (2d) 411 at 413.

177 Moreover, even if I were of the view that there did exist a residual discretion to continue the injunction, I would not exercise that discretion in this case. In my view, the extent of non-disclosure and misstatement by the United States of America was serious and fundamental. It represents conduct which deserves to be sanctioned by this Court and, in my view, a party guilty of such conduct has abandoned any claim to have the equitable discretion of this Court exercised in its favour.

178 In view of the conclusion I have reached regarding the United States of America's failure to make full and frank disclosure, it is not strictly necessary for me to consider the three other issues that have been raised. While I do not think it appropriate in these circumstances to deal with the

legal issues concerning the jurisdiction of this Court to make the order, or the need to show intention to evade the process of the Court, I do propose briefly to deal with the other issue.

Has the Plaintiff established a strong prima facie case?

179 It is agreed by all parties that that is the appropriate standard required of a party who seeks a Mareva injunction. In my view, there are serious shortcomings in the case of the United States of America on this standard.

180 First of all, there is the question of admissibility of evidence. During the hearing, as I have indicated, I excluded certain evidence, namely, the plea bargain and extracts from discovery of Mr. Roper in another action, and notes of counsel preparing for that discovery. I reserved on the question of whether the Mangone affidavit, or substantial portions thereof, should be struck out. Rule 39.01(4) does permit hearsay evidence on motions of this kind. It provides:

> An affidavit for use on a motion may contain a statement of a deponent's information and belief if the source of the information and the fact of the belief are specified in the affidavit.

181 While I would not apply this rule in a formalistic manner, and while I recognize that to some extent perhaps practice has become relatively lax in this area, even by those lax standards it is clear that the Mangone affidavit exceeds anything approaching what is acceptable. The documents attached to the affidavit are plainly hearsay. The references given in the tabs are so general that it is difficult, if not impossible, to identify what document is relied upon for a specific statement.

182 Indeed, as I have noted, on significant matters Ms Mangone herself was unable to do this on cross-examination. Accordingly, had it been strictly necessary to do so, I would have had no hesitation in striking out substantial portions of her affidavit and, in particular, paragraph 37 which contains the key allegations against Mr. Friedland.

183 I note as well that there are other serious deficiencies in the Plaintiff's evidence against Mr. Friedland. The Plaintiff's case is essentially that Mr. Friedland's role as a key decision-maker in arranging financing, negotiating engineering contracts, and hurrying the project through winter construction, had a dire environmental impact.

184 A careful review of the documents and, in particular, the Referral Document, indicates that this contention, while possible, is anything but clear. There is a very revealing statement in the Referral Document where Ms Mangone states, after reviewing the relationship between various individuals and their participation or what the EPA knew of their participation in decisions:

> Given this loose chain of command, Ed Roper may be the only person in a position to know the extent of Friedland's involvement in decision-making in the liner issue and on-site construction and operational matters as a whole. In

> depositions taking for the KL lawsuit, Roper implicated Friedland as having shared the decision-making responsibility over bringing the project into production, stating that he and Friedland made all decisions together.

185 It is telling, in my view, that the Plaintiff United States has offered no affidavit from Ed Roper nor did it summons Mr. Roper as a witness. Counsel indicated the Mr. Roper was unwilling to come forward for various reasons, including, apparently, his own fear of personal liability and a falling out he had had with Mr. Friedland.

186 In my view, based on what I have, it is by no means clear precisely what Mr. Roper would say. We know what the United States hopes he will say but it is not clear what in fact he will say. As I have already noted, his 104(e) response does not unambiguously favour the case of the United States.

187 Other so-called evidence relied upon by the United States to show that his authority was undermined was a lawyer's letter written in relation to a constructive dismissal, action, stating that in 1987 Mr. Roper's authority had been undercut. What was not referred to was the fact that in the same letter, the lawyer asserted that for the crucial period for the purposes of this lawsuit, 1984 to 1987, Mr. Roper had plenary authority and control of president of the company.

188 The absence of any direct evidence from Mr. Roper is, as I have said, telling. But we are not dealing with a case with a total vacuum of evidence because, of course, we have the affidavit of Robert Friedland. I am going to quote a significant paragraph in his affidavit as it sets out his position in a clear way:

> To state the matter simply, during the material period I was the chief executive officer, not the chief operating officer, for Galactic Resources Ltd. I am not a geologist or an engineer. I am a financier and venture capitalist. In planning the Summitville Mine, GRI hired Ed Roper, whom we believed was one of the best mining persons available and at the time was by reputation one of the leading experts in the emerging field of heap leach mining technology, that is, the extraction of precious metals from ore by heap leach mining technology using cyanide. Second, GRL retained one of the largest and most respected civil engineering firms in the world, Bechtel Civil & Minerals Ltd, to design the mine and related facilities at the Summitville mine site, all encompassed within an integrated, bankable Feasibility Study of such a stand to support non-recourse project finance. Further project financing was thereafter provided by the Bank of America in reliance upon the Bechtel design. It was a condition of the financing that the Bank of America had to approve the technology and the design of the Summitville mine by its own independent mining consultants. I relied upon the professionals to design the Summitville mine and make operational decisions as any responsible executive would have done.

189 Mr. Friedland in his affidavit goes on to point out that GRL was a publicly held company; that all decisions to proceed with construction, development and operation of the mine were authorized by the board of directors, as a whole, and based upon the recommendation of mining and other professional engineers; that he had no prior knowledge, as suggested by the reasons of Justice Spencer, of the environmental problems. He recites at length the role played by Bechtel and other experts in design of the mine. He deposes, "I maintained no material responsibility for design, construction or day-to-day operation of the mine" and he states, "I was not involved in SCMCI at an operational level and I was not even an officer or director of SCMCI for about 85 per cent of the period between 1986 and 1992". GRL had many other mining ventures beyond Summitville in progress in various parts of the world, and that these other projects occupied a great deal of his time.

190 He deposes that he "was constantly travelling around the world, seeking out new mining venture opportunities, raising substantial financing and promoting various ventures".

191 He categorically denies that he had "a primary role in decision-making for the design and installation of the leach pad liner".

192 Mr. Friedland was cross-examined for some ten hours on this affidavit, and again I have carefully read that cross-examination. No significant challenge was made to his version of his role and responsibility at the mine. Indeed, having reviewed the documents, it appears to me that his version is in fact closer to what is suggested by the documents than that relied upon by the United States of America.

193 The United States produced, after the ex parte order had been given, an affidavit from a junior level engineer with Klohn Leonoff, Tom Krasovec. I note here that there was a dispute between SCMCI relating to Klohn Leonoff which resulted in litigation and which was ultimately settled in SCMCI favour.

194 Mr. Krasovec produced notes that he had made at the time regarding problems with the leach pad liner and which indicate that Mr. Friedland was made aware of some of these problems. Mr. Krasovec goes on to describe a tour that he conducted with Mr. Friedland, allegedly in June or July of 1986. He states that he advised Mr. Friedland of certain problems with repairs to the liner, and he states that he recommended to Mr. Friedland that the remainder of the existing pad be ripped down and reconstructed.

195 It is hardly surprising, in my view, that Mr. Friedland did not immediately accept the advice of this junior engineer, given the structure that was in place for this project.

196 Mr. Krasovec further deposes that in August there was another tour with Mr. Friedland and that Mr. Friedland shared his thoughts about the cost of the production, the need for gold production. He states that Mr. Friedland admitted to an assembled group of project employees that he had made a mistake by promising to build the mine under adverse working conditions.

197 If accepted, this evidence could well be significant in the case against Mr. Friedland. However, I note certain important facts that have to be taken into account.

198 First, it is categorically denied by Mr. Friedland that he made any of these admissions that are alleged by Mr. Krasovec.

199 Secondly, as I have already noted, Mr. Krasovec was a very junior level engineer. It is to me surprising that if the United States of America has such an overwhelming case against Robert Friedland, that he exerted pervasive influence over this project apparently influencing and ordering engineers to do things that shouldn't have been done, that it is only able to produce as a witness, as proof of those facts, a person at this level of the operations.

200 The evidence presented has led me to the conclusion that the liability of Robert Friedland under CERCLA is anything but clear. It certainly falls very well short of the standard of a strong prima facie case that would be required to support a Mareva injunction.

201 Accordingly, even if I had dismissed the various contentions advanced by the Defendant that the United States of America failed to satisfy its obligation of full and frank disclosure, I would have had no hesitation in setting the injunction aside and refusing to continue the injunction on the ground that a strong prima facie case of liability was not demonstrated.

202 For those reasons, I have endorsed the record as follows:

203 For oral reasons given today, the ex parte order of Borins, J. of August 21, 1996, continued by the orders of August 28, 1996 and September 6, 1996, is set aside and the Plaintiff's motion is dismissed. (Submissions by counsel follow)

204 I have added the following to my endorsement:

205 In my view, the findings I have made amply warrant an order requiring the Plaintiff to pay the Defendant's costs on a solicitor-and-client basis. While party-and-party costs are the rule, my reasons for judgment make it clear that I consider the Plaintiff to have been guilty of conduct which merits the censure of this Court.

206 The conduct of the Plaintiff was, in my view, a serious departure from a fundamental rule important to the integrity of the judicial process. It falls within the principles recently enunciated by the Manitoba Court of appeal in Pulse Microsystems Ltd v. SafeSoft Systems Inc. (1996) 134 D.L.R. (4th) 701 at 715. I order that those costs be assessed and paid forthwith.

207 I am asked to stay my order until the end of Friday to permit the Plaintiff to consider an appeal and, if so advised, to seek a stay of my order dissolving the injunction from the appropriate appellate court.

208 In view of the findings I have made on non-disclosure and misrepresentation, it is my view

that apart from one point the Plaintiff is not entitled to the exercise of the Court's discretion. In my view, the sole point that deserves any consideration is the contention that its rights of appeal could be rendered nugatory if no stay is granted. This has been recognized as a valid basis for granting a stay. (Van Brugge v. Arthur Fromer International Ltd. (1982) 35 O.R. (2d) 333; Erinford Properties Ltd. v. Cheshire Country Council, [1974] 1 Chancery 261)

209 In my reasons for judgment, I dismissed as unfounded the contention that the Defendant has demonstrated any intent to defeat the process of this Court or any other Court. Obviously, there was nothing before me to cause me to alter my view on that point in any way.

210 The difficulty I face is that that point is the very ground relied upon for granting the stay and a potential ground of appeal, namely, that if the stay is not granted the Defendant may defeat the process of the Court.

211 A litigant in our system does have the right to appeal and to challenge findings that have been made and, as noted, a stay may be granted to protect the right of appeal.

212 In the circumstances, and with some considerable hesitation, I grant a short stay until 4.30 p.m. Friday, November 8th, 1996 on the narrow ground outlined herein, to afford the Plaintiff the opportunity to consider an appeal and present an application for a stay to a judge of the appropriate appellate court.

213 What I've done is I've endorsed a draft copy of your order, as follows,

214 Upon reading my endorsement relating to the stay, Mr. Lenczner made the undertaking that the shares would be held until 4.30 p.m., November 8, 1996, subject to any order, as per this draft order.

215 In my view, it is appropriate to dispose of this matter on the basis of Mr. Lenczner's undertaking, as reflected by this draft order, a copy of which I have signed.

TAB 3

Case Name:

Hayes Forest Services Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, and
IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57, and
IN THE MATTER OF Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Limited, Petitioners

[2008] B.C.J. No. 1770

2008 BCSC 1256

46 C.B.R. (5th) 189

2008 CarswellBC 1946

171 A.C.W.S. (3d) 714

Docket: S085453

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

G.D. Burnyeat J.
(In Chambers)

Oral judgment: September 4, 2008.

(19 paras.)

Creditors and debtors law -- Proceedings -- Practice and procedure -- Orders -- Interim and interlocutory orders -- Application by the petitioners for extension of Initial Order allowed -- Motion by bank to file proceedings if respondents successful in arguing against extension adjourned -- Respondents a company that owed debt to petitioners and was owed by them and a First Nation

that petitioners could secure cutting contract with -- Respondents argued material non-disclosure -- Not clear that respondents were actually creditors so any non-disclosure not material -- Initial Order made after considering whether stay would allow petitioners to present plan to creditors -- Bank intended to advance funds to petitioners sufficient to bring forth plan -- Stay extended until October 31, 2008.

Statutes, Regulations and Rules Cited:

Business Corporations Act, SBC 2002, CHAPTER 57,

Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, s. 11(6)

Counsel:

Counsel for Petitioners: J.I. McLean, C.D. Brousson and B.J. Greenberg.

Counsel for CIBC: F.R. Dearlove.

Counsel for Western Forest Products: E.J. Milton, Q.C. and P.G. Voith, Q.C.

Counsel for Teal Cedar Products Ltd.: S.C. Fitzpatrick.

Counsel for Klahoose First Nation: G.J. Gehlen and B. Stadfeld.

Counsel for GE Canada Leasing Services Company: S. Collins.

Counsel for CIT Financial Ltd.: G.G. Plottel.

Counsel for the Province of British Columbia: A.A. Welch.

Counsel for United Steelworkers Local 1-80 and 1-85C: D. Bavis.

Oral Reasons for Judgment

1 **G.D. BURNYEAT J.** (orally):-- There are a number of motions before me. The first motion is on behalf of the Petitioners, Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Limited ("Hayes"), that the effect of the order that was granted as the initial order in these proceedings on July 31st, 2008 ("Initial Order"), as amended by Mr. Justice Leask on August 15th, 2008, be extended until October 31st, 2008.

2 There are also motions on behalf of Teal Cedar Products Ltd. ("Teal") and Western Forest Products Ltd. ("Western") that the Initial Order be set aside because of alleged material non-disclosure. There is also a motion on behalf of the Canadian Imperial Bank of Commerce that it be permitted to file proceedings under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 ("***Act***") if the motions of Teal and Western are successful.

3 The test of whether it is in order to extend the Initial Order is set out in s. 11(6) of the ***Act*** as follows:

> The court shall not make an order under subsection (3) or (4) unless:
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

4 I am satisfied that the applicant Hayes has acted with due diligence and in good faith since the Initial Order. If nothing else was before me, I would be satisfied that the extension requested by Hayes should be granted. However, the question raised by Teal and Western comes as a result of their applications to set aside the Initial Order on the basis that there was material nondisclosure and that the Initial Order would not have been made if certain facts had been disclosed. The Klahoose First Nation support the application that the Initial Order should be set aside on the basis of material non-disclosure.

5 The test of whether to set aside an *ex parte* order is whether the facts which were not disclosed might well have affected the outcome if they had been known at the time the application was made.

6 There have been various decisions regarding nondisclosure in the context of proceedings under the ***Act***. In the decision of Tysoe J., as he then was, in ***United Used Auto & Parts Ltd. (Re)*** (1999), 12 C.B.R. (4th) 144, the question was whether to set aside an *ex parte* stay of proceedings granted in the initial order on the basis of nondisclosure. While dismissing the application to set aside the initial order Mr. Justice Tysoe stated:

> As was pointed out in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C.S.C.), the standard of disclosure must be realistic. In my view, the Petitioners met a realistic standard of disclosure and I decline to set aside the stay Order on the basis of non-disclosure.

7 Similar statements were made in ***Philip's Manufacturing Ltd. (Re)*** (1991), 60 B.C.L.R. (2d) 311, and in ***Long Potato Growers Ltd. (Re)***, 2008 NBQB 231 to the effect that the disclosure must be realistic. In ***(Re) Philip's***, MacDonald J. stated:

> The complicated financial picture, which may not be fully known at the time of the application, cannot be completely covered in the initial application. The level of disclosure which the applicants suggest is completely impractical in respect of applications under the *Act*. There is still, and will always remain, a risk that by applying *ex parte*, the order may subsequently be set aside for material non-disclosure. However, the financial situation of the Company remains much the same as it was represented in the material and on the application for the *ex parte* order. I would still be prepared, despite the arguments I have now heard, but subject to the variations discussed below, to direct the stay of proceedings under the *Act* which I pronounced *ex parte* on September 3, 1991. (at p. 314)

8 Counsel also rely on the decision in ***Hester Creek Estate Winery Ltd. (Re)*** (2004), 50 C.B.R. (4th) 73, where I stated:

> For the reasons set out above, I have concluded that if there had been full and fair disclosure or if the Petitioner had not inadvertently or advertently misled the court, the order that was made on February 16, 2004 would not have been made. On *ex parte* applications and in all materials which will be presented to the Court and to the creditors of a company seeking protection under the *C.C.A.A.*, it is unacceptable for the materials to constitute anything less than full and fair disclosure. Affidavit material prepared by counsel for a petitioner should not be presented to the Court without counsel making proper inquiries about all material facts. Affidavits should not be sworn in support of a petition without the affiant making proper inquiries about all material facts. Materials which constitute less than full disclosure or which mislead the Court about material facts are unacceptable. In the case at bar, the materials prepared and filed were not only woefully inadequate but were also purposely misleading. In the circumstances, the Order will be discharged. (at para. 30)

9 In proceedings under the ***Act***, the question of whether an initial order will be made is based on whether the prerequisites under the ***Act*** such as certain debt, et cetera, have been met, whether the effect of the stay of proceedings requested will allow enough time to bring about a plan to be presented to the creditors, and whether all material facts have been disclosed. Although determinative of the issues at that time and although there was a finding of material nondisclosure, the findings in ***Hester Creek***, *supra*, were made in the context of whether or not any plan was doomed to failure, not whether the initial order itself should have been set aside. The facts which might affect the outcome at the first hearing are facts about whether the company qualifies or not as well as whether it is likely that a plan can come forward.

10 In accordance with the principles set out by Tysoe J.A. in ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.***, 2008 BCCA 327, para. 35, I find that Hayes has shown an intention to put a plan before its creditors. I am also satisfied that the financing is in place which will allow

sufficient time to bring forward a plan for the consideration of the creditors.

11 I am not satisfied that the matters which were not disclosed when the Initial Order was granted would have resulted in the Initial Order not being made if those matters had been before me. I find that there was a realistic standard of disclosure met by Hayes which resulted in a full and fair disclosure.

12 Both Teal and Western have contracts with Hayes. Those contracts see interim payments made relating to logging activity, a reconciliation of payments once a year, and a reference to arbitration if an agreement is not reached as to the monies which are either owing by Hayes to Teal and/or Western or by Teal and/or Western to Hayes. Although some mention of the current status of certain arbitrations is set out in the materials which were before me when the Initial Order was granted, it is the submission of Teal and Western that not sufficient detail was provided and that this material non-disclosure goes to the issue of the likelihood that there will be sufficient funds available to Hayes so that it can bring forward a plan to its creditors and that there will be significant monies owing after the arbitrations are complete so that Teal and Western will be in a position to set off monies that are owing to Hayes under later contracts so that there will not be sufficient funds available to Hayes during the extended time requested by Hayes. I am not in a position to accede to those submissions. First, the activities with Teal and Western generate only approximately 25 percent of the total anticipated revenue of Hayes. While this is significant, it is not necessarily material. Second, while it may be that the effect of the arbitrations will require Hayes to pay significant sums to Western and Teal and to then allow Western and Teal to set off those amounts against what may be owing by Western and Teal under later contracts, I should not assume such a result at this time. The matter should be left to the arbitrators to determine. In that regard, it may well be that Teal and Western will not even be creditors.

13 Third, it may well be that other contracts will be available in the period to October 31st, 2008, to affect the situation as to whether a plan will be accepted by the creditors of Hayes and whether other fund sources will be available. Accordingly, while contracts may not be available from traditional sources and while it may ultimately be the case that Western and/or Teal can set off amounts against what is owing by them to Hayes, I cannot conclude that the finances between now and October 31st, 2008, will be so impaired as to make the possibility of a plan coming forward an impossibility. Accordingly, the facts surrounding the ongoing disputes between Hayes and these two potential creditors would not have affected the outcome, being the granting of the Initial Order.

14 The Klahoose people also claim that there was material non-disclosure relating to their potential claim. While the only reference to tree farm licence number 10 was not complete, I cannot conclude that the failure to outline the current litigation commenced by the Klahoose people was a material nondisclosure. While that litigation raises the question of Aboriginal title as a result of an alleged failure by the Provincial Government to consult with the Klahoose people, a cutting licence has not been granted to Hayes and the question of the feasibility of heli-logging if such a licence is granted can only be ascertained if additional time is available to Hayes. Whether Hayes can see

about 9 percent of its revenue from this source can only be tested if the stay is extended. As well, the Klahoose people are not creditors at this time, so the only relevance of their submission is as to the question of what revenue may be available from that source. That will only be a question which can be decided and answered if and when a cutting permit is obtained and logging does or does not start.

15 I am also mindful of the fact that the banker for Hayes, the Canadian Imperial Bank of Commerce, supported the granting of the Initial Order and appears to be prepared to advance sufficient funds by way of Debtor in Possession financing to allow Hayes sufficient time to bring forward a plan to be voted on by its creditors. I am also satisfied that the parties who have an interest in these matters will be protected by a flow of information. The creditors and potential creditors will continue to receive information from the monitor with a report no later than September 30th, 2008 so they can then apply if it appears that a plan cannot come forward. I cannot conclude at this time that Hayes will not be in a position to place a plan before its creditors which will have a reasonable prospect of success.

16 The application of Hayes is allowed. The stay will remain in effect to 4:00 p.m. on October 31st, 2008. Any application by Hayes regarding that deadline will be before me no later than October 28th, 2008.

17 Teal and Western will be at liberty to apply after October 1st, 2008, to set aside the stay if they are satisfied that the stay should be revisited because of the information set out in the report or reports of the monitor.

18 The motion of the Canadian Imperial Bank of Commerce is adjourned generally in the circumstances. The motion of GE Canada Leasing Services Company is also adjourned generally.

19 The orders made are made with the requirement that counsel need not approve the order as to form. However, I will impose the following schedule in that regard: the draft order or orders are to be drawn by counsel for Hayes and circulated to counsel no later than September 10th, 2008. Counsel will then have until September 15th to negotiate changes and/or to provide alternate drafts to counsel for Hayes. Counsel for Hayes will be at liberty to submit the order or orders to my attention no earlier than September 17th, 2008, at which time I will settle the terms of the order or orders if there is still a dispute as to their form. I will then arrange for the early entry of the orders in any event on September 17th, 2008.

G.D. BURNYEAT

cp/e/qlrds/qlmxt/qlaxw/qlbrl/qlana/qlaec

TAB 4

** Preliminary Version **

Case Name:

Century Services Inc. v. Canada (Attorney General)

Century Services Inc., Appellant;

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada, Respondent.

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

2011 D.T.C. 5006

409 N.R. 201

296 B.C.A.C. 1

12 B.C.L.R. (5th) 1

2010 CarswellBC 3419

326 D.L.R. (4th) 577

EYB 2010-183759

2011EXP-9

J.E. 2011-5

2011 G.T.C. 2006

[2011] 2 W.W.R. 383

72 C.B.R. (5th) 170

[2010] G.S.T.C. 186

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

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

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Compromises and arrangements -- Where Crown affected -- Effect of related legislation -- Bankruptcy and Insolvency Act -- Appeal by Century Services Inc. from judgment of British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies allowed -- Section 222(3) of the Excise Tax Act evinced no explicit intention of Parliament to repeal s. 18.3 of CCAA -- Parliament's intent with respect to GST deemed trusts was to be found in the CCAA -- Judge had the discretion under the CCAA to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit debtor company to make an assignment in bankruptcy.

Appeal by Century Services Inc. from a judgment of the British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies. The debtor company commenced proceedings under the Companies' Creditors Arrangement Act (CCAA), obtaining a stay of proceedings with a view to reorganizing its financial affairs. Among the debts owed by the debtor company at the commencement of the reorganization was an amount of GST collected but unremitted to the Crown. The Excise Tax Act (ETA) created a deemed trust in favour of the Crown for amounts collected in respect of GST. The ETA provided that the deemed trust operated despite any other enactment of Canada except the Bankruptcy and Insolvency Act (BIA). However, the CCAA also provided that subject to certain exceptions, none of which

mentioned GST, deemed trusts in favour of the Crown did not operate under the CCAA. In the context of the CCAA proceedings, a chambers judge approved a payment not exceeding $5 million to the debtor company's major secured creditor, Century Services. The judge agreed to the debtor company's proposal to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. After concluding that reorganization was not possible, the debtor company sought leave to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the Bankruptcy and Insolvency Act (BIA). The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. The judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal found two independent bases for allowing the Crown's appeal. First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the ETA to allow payment to the Crown. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes.

HELD: Appeal allowed. Section 222(3) of the ETA evinced no explicit intention of Parliament to repeal CCAA s. 18.3. Had Parliament sought to give the Crown a priority for GST claims, it could have done so explicitly, as it did for source deductions. There was no express statutory basis for concluding that GST claims enjoyed a preferred treatment under the CCAA or the BIA. Parliament's intent with respect to GST deemed trusts was to be found in the CCAA. With respect to the scope of a court's discretion when supervising reorganization, the broad discretionary jurisdiction conferred on the supervising judge had to be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. The question was whether the order advanced the underlying purpose of the CCAA. The judge's order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the CCAA's objectives to the extent that it allowed a bridge between the CCAA and BIA proceedings. The order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that was common to both statutes. The breadth of the court's discretion under the CCAA was sufficient to lift the stay to allow entry into liquidation. No express trust was created by the judge's order because there was no certainty of object inferrable from his order. Further, no deemed trust was created.

Statutes, Regulations and Rules Cited:

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and

Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 69, s. 128, s. 131

Bank Act, S.C. 1991, c. 46,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-, s. 67, s. 86

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23

Cities and Towns Act, R.S.Q., c. C-19,

Civil Code of QuÚbec, S.Q. 1991, c. 64, art. 2930

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.4, s. 18.3, s. 18.4, s. 20, s. 21

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36,

Employment Insurance Act, S.C. 1996, c. 23, s. 86(2), s. 86(2.1)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), s. 227(4.1)

Interpretation Act, R.S.C. 1985, c. I-21, s. 2, s. 44(f)

Personal Property Security Act, S.A. 1988, c. P-4.05,

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

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order

partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Court Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J., Binnie, LeBel, **Deschamps**, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial

discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp.(Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse

of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision *creating* the trust and a *CCAA* or *BIA* provision explicitly *confirming* its effective operation. The *Income Tax Act*, the *Canada Pension Plan Act* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not *confirm* the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Per Abella J (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a

deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18(3) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act,* that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

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By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to**: *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp, Re* (1992), 19 B.C.AC. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

Mary I.A. Buttery, *Owen J. James* and *Matthew J.G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 **DESCHAMPS J.**:-- For the first time this Court is called upon to directly interpret the

provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an

amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is

achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

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

Insolvency Law:

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

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

3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the

Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s. 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for

the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222...** .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

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

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senator* s rested its conclusion on two considerations.

First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts

are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have

inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced

regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a

> court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory

authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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

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

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

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

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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

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

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 *Express Trust*

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

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

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

85 At the time of the order, there was a dispute between Century Services and the Crown over

part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J.:--

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is

> deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

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

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222**. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from

> property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit

-- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under

> this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
> >
> > (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that

> compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be

"overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed with costs, ABELLA J. *dissenting.*

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or

of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,
(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

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

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

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

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

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

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

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

> (*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the

court considers necessary, which period may not be more than 30 days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

> (*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the

Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

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

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

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

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

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

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

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

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

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

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

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

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax

imposed on individuals under the *Income Tax Act*, or

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

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or

provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

> (*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

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

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

> (*a*) property held by the bankrupt in trust for any other person,
>
> (*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or
>
> (*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

> (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or

that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

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

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

1 Section 11 was amended, effective September 18, 2009, and now states:

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

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

TAB 5

Indexed as:

Sorochan v. Sorochan

Mary Sorochan, appellant;
v.
Alex Sorochan, respondent.

[1986] 2 S.C.R. 38

[1986] S.C.J. No. 46

File No.: 19171.

Supreme Court of Canada

1986: June 26 / 1986: July 31.

Present: Dickson C.J. and Beetz, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Unjust Enrichment -- Constructive trust -- Long term "common law" relationship -- Common law husband acquired farm before relationship -- Common law wife's farm work essential to maintenance and preservation of farm -- Expectation to receive an interest in farm -- Whether or not unjust enrichment allowing the imposition of a constructive trust in favour of estranged common law wife.

Mary and Alex Sorochan lived together for forty-two years. They jointly worked a mixed farming operation and had six children. They were never married. Appellant ran the household, cared for their children and worked long hours on the farm. For a number of years, the respondent worked as a travelling salesperson. During these periods, appellant often assumed sole responsibility for the farm chores. When the parties began living together, respondent owned six quarter sections of farmland along with his brother; he later became sole owner of three quarter sections. At the time of the transfer, appellant was asked to sign documents barring any potential dower entitlement. Early in their relationship, appellant had asked respondent to marry her, with the reply of "later on". In 1971, she requested the respondent to transfer part of the land into her name and was refused.

Appellant commenced legal action for an interest in the farm after failing health and a deteriorating relationship forced her to move to a senior citizen's home.

The trial judge found a constructive trust and ordered that one quarter section be transferred to appellant, provided that she reconvey it forthwith to her children. A cash payment was also awarded. The Court of Appeal allowed an appeal from that decision. At issue is whether a court can impose a constructive trust in a situation [page39] where a common law wife has contributed her labour for a number of years to preserving and maintaining a farm and doing all the domestic labour, despite the fact that her spouse already owned the property prior to the date when cohabitation commenced.

Held: The appeal should be allowed.

A constructive trust can be imposed to remedy an unjust enrichment. The elements of unjust enrichment include: (a) an enrichment, (b) a corresponding deprivation, and (c) the absence of any juristic reason for the enrichment. Respondent clearly benefitted from the appellant's many years of unpaid labour maintaining and preserving the farm and running the household. Appellant suffered a corresponding deprivation. There was no juristic reason for the enrichment. Appellant was under no obligation, contractual or otherwise, to perform this work. Furthermore, she had a reasonable expectation of receiving some benefit in return for her labour and respondent knew or ought to have known of that expectation.

In assessing whether a constructive trust remedy was appropriate, the first factor considered was whether there was a clear link between the claimant's contribution and the disputed property. The contribution does not have to be connected to the acquisition of property. A sufficient nexus may exist where the contribution relates to the preservation, maintenance or improvement of property.

A second consideration in determining whether proprietary relief should be ordered was whether the claimant reasonably expected to receive an actual interest in property and whether the respondent knew or reasonably ought to have known of that expectation. This criterion was met on the facts of this case.

The longevity of the relationship was the final consideration in assessing whether an in rem remedy was appropriate.

The remedy ordered by the trial judge was appropriate in all but one respect. The trial judge erred when he made appellant's entitlement to the land contingent on her immediate transfer of title to her children. Appellant was the person who suffered the deprivation and it was she who was entitled to the remedy.

[page40]

Cases Cited

Applied: Pettkus v. Becker, [1980] 2 S.C.R. 834; Considered: Murray v. Roty (1983), 41 O.R. (2d) 705; Pierce v. Timmons, Ont. C.A.Lawrence v. Lindsey (1982), 28 R.F.L. (2d) 356; Distinguished: Beard v. Beard, [1982] 1 S.C.R. 282, affirming (1980), 35 A.R. 448, varying (1978), 16 A.R. 271; Referred to: Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Cie Immobilière Viger Ltée v. Lauréat Giguère Inc., [1977] 2 S.C.R. 67; Beaudoin-Daigneault v. Richard, [1984] 1 S.C.R. 2, reversing on other grounds [1982] C.A. 66; Herman v. Smith (1984), 42 R.F.L. (2d) 154; Rochon v. Emary (1982), 32 R.F.L. (2d) 217, affirming (1981), 21 R.F.L. (2d) 366; Wilson v. Munro (1983), 32 R.F.L. (2d) 235.

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Klippert, George B. Unjust Enrichment. Toronto: Butterworths, 1983.
McClean, A. J. "Constructive and Resulting Trusts -- Unjust Enrichment in a Common Law Relationship -- Pettkus v. Becker" (1981), 16 U.B.C.L. Rev. 155.
Palmer, George C. Law of Restitution, vol. 1 Boston: Little, Brown, 1978.
Waters, D. W. M. Law of Trusts in Canada, 2nd ed. Toronto: Carswells, 1984.

APPEAL from a judgment of the Alberta Court of Appeal (1984), Alta. L.R. (2d) 119, allowing an appeal from a judgment of Purvis J. Appeal allowed.

Margaret R. Odishaw and Terryl J. Rostad, for the appellant. Damon D. Himsl, for the respondent.

Solicitors for the appellant: Odishaw & Odishaw, Edmonton.
Solicitor for the respondent: Damon David Himsl, Vegreville.

The judgment of the Court was delivered by

1 **DICKSON C.J.**:-- In this appeal, the Court is called upon to consider whether the appellant, Mary Sorochan, is entitled to an interest in the farmland owned by the respondent, Alex Sorochan, on the basis of the law of constructive trust. The central issue is whether a court can impose a constructive trust in a situation where a "common law" wife has contributed her labour for a number of years to preserving and maintaining a farm and [page41] doing all of the domestic labour, despite the fact that her spouse already owned the property prior to the date cohabitation commenced.

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Facts

2 Mary and Alex Sorochan lived together for forty-two years, between 1940 and 1982, on a farm in the Two Hills District of Alberta. During this time, they jointly worked a mixed farming operation and had six children. They never married. Mary Sorochan did all of the domestic labour associated with running the household and caring for the children. In addition, she worked long hours on the farm. The family lived in modest circumstances.

3 At the time the parties began living together, Alex Sorochan was the owner, along with his brother, of six one-quarter sections of farmland. In 1951, the land was divided between the two brothers and the respondent became the registered owner of three one-quarter sections. From 1942 to 1945, and from 1968 to 1982, the respondent worked as a travelling salesperson. During these periods, Mary Sorochan often assumed responsibility for doing all of the farm chores on her own. In 1982, due to the failing health of the appellant and the deteriorating relationship between the couple, Mary Sorochan moved to a senior citizen's home. She subsequently commenced this legal action for an interest in the farm upon which she had worked for forty-two years.

II

Judgments

Alberta Court of Queen's Bench

4 At trial, Purvis J. of the Alberta Court of Queen's Bench, relying on Pettkus v. Becker, [1980] 2 S.C.R. 834, held that "the law of constructive trust can be extended to cover situations such as the one disclosed in the evidence in these proceedings". He found that Alex Sorochan was enriched by his association with Mary Sorochan and that she had suffered a corresponding deprivation. Purvis J. also found that there was no juristic [page42] reason justifying the enrichment. Mary Sorochan had prejudiced herself with the reasonable expectation of receiving an interest in the property and Alex Sorochan knew of that expectation. Purvis J. noted, in particular, that in 1971 Mary Sorochan had asked the respondent to transfer land into her name.

5 Accordingly, Purvis J. ordered the transfer of one of the three quarter sections of land into the name of Mary Sorochan, upon her undertaking to transfer title forthwith to her six children. He also ordered Alex Sorochan to pay $8,000 in cash forthwith to Mary Sorochan and a further $12,000 within one year, the latter sum to be reduced to $7,000 if paid within six months.

Alberta Court of Appeal

6 The Court of Appeal reversed the trial judge's order and rejected the finding of a constructive trust in favour of Mary Sorochan. Lieberman J.A., for the Court, held that the trial judge had erred

in his interpretation of Pettkus v. Becker, stating:

> Plaintiff's counsel argues that a constructive trust has been created here by reason of the unjust enrichment of the defendant as a result of the plaintiff's labours, but she has been unable to point out any accumulation of assets by the couple during the relevant period.

7 In Pettkus Dickson J., as he then was, said at page 183:

> "For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute."

8 Unfortunately, the facts in the case at bar do not fall within that principle. There is no link between the acquisition of the property in question and the plaintiff's labour.

[page43]

III

Unjust Enrichment

9 To ascertain whether a constructive trust should be imposed in this case, we must begin by examining the doctrine of unjust enrichment. As I had occasion to say in Rathwell v. Rathwell, [1978] 2 S.C.R. 436, at p. 444:

> On the legal front, acceptance of the notion of restitution and unjust enrichment in Canadian jurisprudence (Deglman v. Guaranty Trust Company, [1954] S.C.R. 725) has opened the way to recognition of the constructive trust as an available and useful remedial tool in resolving matrimonial property disputes.

In Pettkus v. Becker, the Court stated at pp. 847-48:

> The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v. Macferlan (1760), 2 Burr. 1005, put the matter in these words: "... the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust

> enrichment might arise ... . The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury.

See also: Waters, Law of Trusts in Canada, 2nd ed. (Toronto 1984), pp. 378-85; Fridman & McLeod, Restitution (Toronto 1982), pp. 20-22, 34-39; Palmer, Law of Restitution, vol. 1 (Boston 1978), p. 5.

10 It is also interesting to note that the principle of unjust enrichment has been firmly acknowledged as part of the civil law of Quebec: see Cie Immobilière Viger Ltée v. Lauréat Giguère Inc., [1977] 2 S.C.R. 67, at pp. 75-77, in which Beetz J. articulates the theoretical principles underlying the concept of unjust enrichment. In the family law context, see Richard c. Beaudoin-Daigneault, [page44] [1982] C.A. 66, where the Quebec Court of Appeal applied the principle of unjust enrichment, although it ultimately rejected the merits of the unjust enrichment claim on the facts of the case. On appeal to this Court (see Beaudoin-Daigneault v. Richard, [1984] 1 S.C.R. 2), the Court of Appeal's judgment was reversed on another ground and the Court expressly held it unnecessary to consider the merits of the unjust enrichment claim.

11 Before a constructive trust can be imposed in this case, the Court must find that there has been an unjust enrichment. In Pettkus and Rathwell, the Court outlined three requirements that must be satisfied before it can be said that an unjust enrichment exists. These include:

(a) an enrichment;
(b) a corresponding deprivation; and
(c) the absence of any juristic reason for the enrichment.

12 In the present appeal, the appellant worked on the farm for forty-two years, during which time she received no remuneration from the respondent. She did all of the household work, including the raising of their six children. In addition, she looked after the vegetable garden, milked the cows, raised chickens, did farmyard chores, worked in the fields, hayed, hauled bales, harvested grain and helped to clear the land of rocks. She also sold garden produce, milk and eggs to pay for food and clothing for the family and for the schooling of the youngest child. On numerous occasions when Alex Sorochan was engaged in his sales activities, Mary Sorochan was left with sole responsibility for the operation of the farm.

13 The trial judge held that there was "clear evidence of enrichment" to the respondent. The Court of Appeal found that Mary Sorochan "performed all the work of a diligent farm wife". In my view, it is clear that the respondent derived a benefit from the appellant's many years of labour in the home and on the farm. This benefit included valuable savings from having essential farm services [page45] and domestic work performed by the appellant without having to provide remuneration. Professor McLeod, in his annotation of Herman v. Smith (1984), 42 R.F.L. (2d) 154,

a case involving a contribution primarily in the form of housekeeping services, summarized the enrichment aspect of the judgment at p. 155:

> The initial point raised is: Has the man received a benefit? In the case, the benefit resulted from the claimant performing the normal "spousal" services. No attempt was made to state the issue on any other basis. The rendering of spousal services amounts to a valuable service.

14 In addition, through the appellant's years of labour, the farm was maintained and preserved as valuable farmland. It did not deteriorate in value through neglect or disuse, as it no doubt would have in the absence of Mary Sorochan's faithful and long years of labour. The appellant's maintenance and preservation of the land, therefore, conferred a significant benefit on the respondent. As noted in Rochon v. Emary (1981), 21 R.F.L. (2d) 366 (B.C.S.C.), at p. 370, affirmed on appeal (1982), 32 R.F.L. (2d) 217 (B.C.C.A.), "the plaintiff ... made a valuable contribution by way of her services as housekeeper and in assisting the defendant in maintaining and improving the property".

15 On the other side of the coin, the labour done by Mary Sorochan during those forty-two years constituted for her a corresponding deprivation. The trial judge concluded that this was the case. Moreover, the case law indicates that the full-time devotion of one's labour and earnings without compensation can readily be viewed as a deprivation. In Murray v. Roty (1983), 41 O.R. (2d) 705 (Ont. C.A.), for example, a case involving a joint business and farm operation, Cory J.A. commented (at p. 710): "For eight years of her life she devoted all of her time and energy and almost all of her wages for the benefit of Roty. The deprivation is obvious". [page46] Similarly, Pettkus addressed the first two criteria as follows at p. 849:

> ... the first two requirements laid down in Rathwell have clearly been satisfied: Mr. Pettkus has had the benefit of nineteen years of unpaid labour, while Miss Becker has received little or nothing in return.

16 The third condition that must be satisfied before a finding of unjust enrichment can be made is also easily met on the facts of this case. There was no juristic reason for the enrichment. Mary Sorochan was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land. In Pettkus, the Court held that this third requirement would be met in situations where one party prejudices himself or herself with the reasonable expectation of receiving something in return and the other person freely accepts the benefits conferred by the first person in circumstances where he or she knows or ought to have known of that reasonable expectation.

17 Mary Sorochan came to live with Alex Sorochan on his farm. Together they worked the land, had six children and held themselves out to the community as married. In my view, Mary Sorochan had a reasonable expectation of receiving some benefit in return for her forty-two years of domestic and farm labour. Indeed, it was reasonable for her to believe that this would take the form of an interest in the property. In 1951, when the two brothers split their joint ownership of the land, Mary

Sorochan was asked to sign the conveyancing documents to bar any dower entitlement to the lands ceded to Alex Sorochan's brother. At the time of their first child in 1941, Mary Sorochan asked Alex Sorochan to get married. She testified at trial that he responded "later on". In 1971, she asked him to transfer part of the land into her name, which he refused to do. These incidents convince me that Alex Sorochan knew or ought to have known that Mary Sorochan had a reasonable expectation of obtaining some share in the land in return for her long-term commitment to working the farm and raising their six children.

[page47]

18 In my view, to deny Mary Sorochan any form of relief would be unjust. I conclude, therefore, that the three pre-conditions for unjust enrichment have been satisfied in this case.

IV

Constructive Trust

19 The constructive trust constitutes one important judicial means of remedying unjust enrichment. Other remedies, such as monetary damages, may also be available to rectify situations of unjust enrichment. We must, therefore, ask when and under what circumstances it is appropriate for a court to impose a constructive trust. (See discussions in Waters, supra, chapter 11; McClean, "Constructive and Resulting Trusts - Unjust Enrichment in a Common Law Relationship - Pettkus v. Becker" (1981), 16 U.B.C.L. Rev. 155, at pp. 171-74; Klippert, Unjust Enrichment (Toronto 1983), chapter 7; Goff & Jones, The Law of Restitution, 2nd ed. (London 1978), at pp. 60-63).

20 In this regard, the first issue to be considered is the causal connection requirement, upon which the Court of Appeal's decision turned. Relying on the decision in Pettkus, the Court of Appeal held, and the respondent now submits, that before a constructive trust can be imposed, some connection must be shown between the deprivation and the actual acquisition of the property in question. Alex Sorochan already owned the land at the time Mary Sorochan moved in with him; it is maintained, therefore, that she did not contribute in any way to the acquisition of the farm.

21 It is understandable that this issue could be a source of confusion. Since the early constructive trust cases involved situations where there was some acquisition of property, there was a tendency to treat a particular manifestation of a general principle as the rule itself. In the same paragraph from which the Alberta Court of Appeal derived the acquisition requirement in Pettkus, however, one also finds articulations of the causal connection [page48] test in more general terms. It is suggested simply that there should be "a clear link between the contribution and the disputed asset" (p. 852). The question of a connection between the deprivation and the property is further explained as "an issue of fact". That is, courts must ask whether the contribution is "sufficiently substantial and direct" to entitle the plaintiff to an interest in the property in question.

22 In a number of cases, this more general formulation of the causal connection test has been adopted and courts have held that constructive trusts can be imposed in situations where the contribution does not relate to the acquisition of property. See, for example, Pierce v. Timmons, Ontario Court of Appeal, Feb. 26, 1985, unreported; Murray v. Roty, supra;Lawrence v. Lindsey (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.) Nevertheless, in each of these cases, some reasonable connection did exist between the contribution or deprivation and the property (i.e. property improvement, maintenance or preservation).

23 In Pierce v. Timmons, the Ontario Court of Appeal approved of the application of the constructive trust principle in a situation where a common law farm wife worked for over twenty years to maintain and preserve the farm. The following passage from the trial judgment was cited with approval at p. 1:

> I find that without the significant contributions of Annie Pierce in animal husbandry, in the operation of heavy equipment, in crop cultivation, in farm and house management, and in personal care and nursing of an ailing farm proprietor Weldon Timmons would have been required to expend a very large sum of money and over a period of two decades. Indeed, bearing in mind his propensity to drink, and the abandonment of Weldon by all of his family for many years, and for good cause, it is entirely possible that Annie Pierce is the sole reason that Weldon Timmons was able, despite serious illness and growing physical incapacity to hold his assets together for so long. Clarence Timmons was enabled to harvest a very substantial windfall in realty and chattels, substantially in excess of $100,000 because of the loyalty, the unselfishness and the continued devotion and service of Annie Pierce.

[page49]

24 In Murray v. Roty, the Ontario Court of Appeal also upheld the imposition of a constructive trust. The common law wife had worked in her husband's gas station business for less than minimum wage, did all of the domestic labour and contributed almost all of her salary to the maintenance of the properties and the purchase of groceries. Although it was held that she had in fact contributed directly and indirectly to her common law husband's acquisition of properties, it was also held that she contributed to their maintenance, improvement and increase in value (p. 712). Moreover, as pointed out in the appellant's factum, Cory J.A. stated at pp. 712-13:

> It is not strictly necessary to the disposition of this case but I should add that the remedy need not be confined to situations where the contribution, direct or indirect, was to the acquisition of the property. If a party to a relationship such as this contributed significantly to the construction of an addition or to the major

> renovation, improvement or modernization of a property I would hope that the remedy would be available to ensure that appropriate relief was granted. As an example where this remedy was granted in such a situation, see Hussey v. Palmer, [1972] 1 W.L.R. 1286.

Of further note is Cory J.A.'s comment at p. 711 to the effect that it may be important to distinguish commercial cases from those arising in the context of the family:

> The parties lived together and worked together during a significant span of time. From the words and deeds of Roty, Charlotte Murray believed they were working towards common goals. In spite of her arduous toil and significant contributions, her efforts will benefit only Roty unless judicial intervention is warranted to protect her interest. It may well be necessary and appropriate to scrutinize closely the contributions of business partners to the acquisition of property. It is unnecessary and inappropriate to scrutinize the contributions of married couples or couples in a relationship such as this one in the same way. Instead, equity and fairness should guide the court.

[page50]

25 Lawrence v. Lindsey provides another illustration of a constructive trust being imposed in a situation where no acquisition has occurred. The parties lived in a common law relationship for approximately twenty-four years, during which time they had five children. From the commencement of the relationship, the defendant owned the house in question. The plaintiff had initially moved in to provide housekeeping services to the defendant for a sum of $15 to $20 per month. This continued for about three months at which time the plaintiff became pregnant. The Alberta Court of Queen's Bench held that the plaintiff reasonably believed she would receive an interest in the property. She had conferred a benefit on the defendant by doing all of the housekeeping and child raising labour. Although the Court found that a constructive trust could be imposed in these circumstances, her claim was denied due to her eighteen year delay in bringing the action.

26 These cases reveal the need to retain flexibility in applying the constructive trust. In my view, the constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice. What remains primary is whether or not the services rendered have a "clear proprietary relationship", to use Professor McLeod's phrase. When such a connection is present, proprietary relief may be appropriate. Such an approach will help to ensure equitable and fair relief in the

myriad of familial circumstances and situations where unjust enrichment occurs. As stated in Pettkus at pp. 850-51: "The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs."

[page51]

27 In the present case, Mary Sorochan worked on the farm for forty-two years. Her labour directly and substantially contributed to the maintenance and preservation of the farm, preventing asset deterioration or divestment. There is, therefore, a "clear link" between the contribution and the disputed assets.

28 It is appropriate at this point to address the case of Beard v. Beard, [1982] 1 S.C.R. 282, affirming (1980), 35 A.R. 448 (Alta. C.A.), varying (1978), 16 A.R. 271 (Alta. S.C.) In that case, the Alberta Court of Appeal reversed the trial judge's decision to give a husband one half the increase in value of certain properties inherited by his wife just five and a half years before the dissolution of their thirty year marriage. The Court of Appeal held that the increase in value of these lands was "solely inflationary". The property had been jointly farmed by the parties. Clement J.A. concluded at p. 448, "neither the facts nor the applicable principles of law, support the finding of the learned trial judge that one-half the inflationary increment should be apportioned to Mr. Beard".

29 On appeal to this Court, Laskin C.J. rendered the following oral judgment:

> We do not need to hear you, Mr. Crane and Mr. Stephen. We are all of the opinion that there was no ground shown to set aside the judgment of the Alberta Court of Appeal. This appeal is accordingly dismissed with costs.

The respondent submitted that this case should be applied in the present appeal to deny Mary Sorochan any entitlement to an interest in the farm properties. I do not find this submission persuasive for three reasons.

30 First, I do not think the Alberta Court of Appeal's decision in Beard or this Court's brief oral judgment stands for the proposition that inflationary increases are never to be apportioned between spouses when the land was acquired solely by one of the spouses. In some circumstances, it will be appropriate to award the claiming spouse [page52] an interest in the property that includes value increases due to inflation. For example, if the asset would have been sold absent the claimant's contribution, a "clear link" would exist between the deprivation and the increase in value through inflation over the time when the asset was retained. In other circumstances, it may be appropriate to discount inflationary increases from the quantum of relief ordered. Much will depend on the particular facts of each case. Indeed, the Alberta Court of Appeal reached its conclusion in Beard on the basis of both the facts of the case and principles of law.

31 When we look at the particular facts in Beard, we find a situation markedly different from the present appeal. This brings me to my second reason for rejecting the applicability of Beard. In Beard, most of the farm property was divided evenly. Unlike the case at bar, therefore, in the absence of the constructive trust remedy, the husband in Beard would not be left with nothing upon dissolution of the marriage.

32 A third reason for not applying Beard is the absence of any clear evidence in the present appeal regarding that part of the property value increase that can be attributed to inflation. There was no discussion of this issue in the decision either at trial or at the Court of Appeal. This is not an appropriate case, therefore, to elaborate the legal interplay between inflationary property increases and constructive trusts.

33 In addition to the causal connection requirement, it is often suggested that the reasonable expectation of the claimant in obtaining an actual interest in the property as opposed to monetary relief, constitutes another important consideration in determining if the constructive trust remedy is appropriate: see, for example, Wilson v. Munro (1983), 32 R.F.L. (2d) 235 (B.C.S.C.), McClean, supra, at p. 171. A reasonable expectation of benefit is part and parcel of the third pre-condition [page53] of unjust enrichment (the absence of a juristic reason for the enrichment). At this point, however, in assessing whether a constructive trust remedy is appropriate, we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in property and whether the respondent was or reasonably ought to have been cognizant of that expectation. As concluded above, Mary Sorochan did have a reasonable expectation in obtaining an interest in the land and Alex Sorochan was aware of her expectation in this regard.

34 In assessing whether or not an in rem remedy is appropriate, a final consideration in this case is the longevity of the relationship. The appellant worked the farm for forty-two years of her life. In my opinion, this constitutes a further compelling factor in favour of granting proprietary relief.

35 Under these circumstances, I conclude that it was appropriate for the trial judge to provide relief, at least in part, by way of constructive trust.

V

The Appropriate Remedy

36 There remains the question of the appropriateness of the trial judge's remedial orders. After considering the equities and the circumstances of the parties, he awarded Mary Sorochan title to one third of the farm property by way of constructive trust, on the condition that she transfer title forthwith to her six children. This portion of the farm had an assessed market value of $40,000 in 1983. The total value of the farm was approximately $138,000. It appears that the trial judge's order for proprietary relief was motivated by Mary Sorochan's desire to devise an interest in the lands she had worked for forty-two years to her children. This further explains the condition stipulated by the trial judge that title be transferred forthwith to her children -- a matter to which I shall return below.

The trial judge allowed Alex Sorochan to retain full title to the other two-thirds of the farm, which included the home quarter. In so doing, [page54] Alex Sorochan could continue to live on the farm and derive his income from the land.

37 In addition to the constructive trust remedy, the trial judge made an order for monetary relief for $20,000 (to be reduced to $15,000 if paid within six months). In my opinion, it was open to the trial judge to make this type of lump sum award. The statement of claim of Mary Sorochan had requested not only proprietary relief, but as well "such further Order that this Honourable Court may deem just".

38 To remedy the unjust enrichment, therefore, the trial judge relied in part on the constructive trust device and in part on a straightforward monetary award.

39 The quantum of the trial judge's award has not been challenged by either party, except in so far as the respondent contends that no remedy whatsoever should have been granted. Under these circumstances, and bearing in mind that the trial judge is much better situated to assess what is fair and just in light of the particular facts of each case, I am inclined to defer to the trial judge's ruling in all but one respect.

40 In my view, the trial judge erred when he made Mary Sorochan's entitlement to the land contingent on her immediate transfer of title to her children. Mary Sorochan is the one who suffered the deprivation and it is she who is entitled to the remedy -- not her children. She may well decide to transfer title to the land to her children, but this will be her decision alone to make.

VI

Conclusion

41 I would allow the appeal, reverse the decision of the Alberta Court of Appeal and reinstate the judgment of the trial judge save that (i) the obligation [page55] imposed upon Mary Sorochan to transfer title of the quarter section to her children shall be deleted; and (ii) the "one year" and "six months" periods referred to in the judgment at trial shall commence to run from the date of this judgment. The appellant is awarded costs in this Court and in the courts below.

Appeal allowed with costs.

TAB 6

Case Name:

Boughner v. Greyhawk Equity Partners Limited Partnership (Millenium)

RE: James Boughner, Richard Gibson and Jack Waldock, Plaintiffs, and Greyhawk Equity Partners Limited Partnership (Millenium), Greyhawk Equity Partners Ltd., Bedford and Associates Research Group Inc., Terrence M. Bedford and Joanne Harris-Bedford, Defendants

[2012] O.J. No. 3950

2012 ONSC 3185

111 O.R. (3d) 700

95 C.B.R. (5th) 239

2012 CarswellOnt 10466

221 A.C.W.S. (3d) 869

Court File No. CV-119089-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

July 16, 2012.

(97 paras.)

Wills, estates and trusts law -- Trusts -- Trust property -- Tracing -- Application by Receiver for directions for distribution of commingled funds allowed -- Investors were duped into believing Greyhawk Fund was large profitable investment vehicle -- Receiver appointed following collapse of Fund and sought directions regarding distribution of shortfall to investors -- General rule provided for pro rata sharing based upon tracing unless otherwise practically impossible -- Receiver's

evidence established possibility of accurate calculations based on lowest intermediate balance rule -- No basis for departure from general rule, which would result in equitable distribution given significant amounts invested by small number of investors.

Application by the Receiver for directions for distribution of commingled funds to victims of a fraudulent investment scheme. Investors were duped into believing that the Greyhawk Fund was a large profitable investment vehicle. Instead, the Fund was fraudulently operated with forged statements hiding a consistently negative fund performance. Its value declined significantly between 2000 and 2008 and the Fund collapsed in 2011. A Receiver was appointed and directed to distribute remaining funds to investors. A shortfall represented the loss of the investors' principal. The Waldock Group submitted that the remaining monies should be distributed as per the pro rata ex post facto method, which contemplated pro rata sharing based on original contributions to the Fund. Gibson submitted that distributions should be made as per the Lowest Intermediate Balance Rule (LIBR), which contemplated pro rata distribution based on actual performance of the Fund during the period of each investor's investment. Under the Gibson proposal, an investor could not claim an amount in excess of the lowest balance in a fund subsequent to their investment and attributable thereto. The Receiver calculated that funds distributed as per the Waldock proposal would result in Waldock receiving $694,856 and Gibson receiving $216,196. Conversely, funds distributed as per the Gibson proposal would result in Waldock receiving $139,130 and Gibson receiving $958,662.

HELD: Application allowed as per Gibson proposal. The jurisprudence aligned with the position put forth by Gibson. As a general rule, pro rata sharing based upon tracing was the preferable approach to resolving competing claims to mingled trust funds unless it was otherwise practically impossible. The uncontroverted evidence of the Receiver established that it was capable to make accurate LIBR calculations. As such, the general rule was applicable and produced a result that was just and equitable given the small number of investors and the significant amount of their investments. Distribution was directed pursuant to the fund unit allocation method, LIBR. Costs were payable from the assets of the Fund.

Counsel:

John Pirie and David Gadsden, for Jack Waldock and the Waldock Group.

Orestes Pasparakis and Alex Dimson for Richard Gibson.

Paul Michell and Daniel Naymark, for A. Farber & Partners Inc., Receiver.

ENDORSEMENT

G.B. MORAWETZ J.:--

OVERVIEW

1 The issue to be determined is how to distribute commingled funds to the victims of a fraudulent investment scheme called the "Greyhawk Fund" ("Greyhawk" or the "Fund"). Following the discovery of the fraud and the appointment of A. Farber & Partners Inc. as receiver (the "Receiver"), a significant shortfall was discovered. The Receiver wishes to distribute the remaining funds; however, there is disagreement amongst the investors regarding the appropriate method of distribution.

2 Jack Waldock and the Waldock Group (together, "Waldock"), argue that the remaining funds should be distributed *pro rata* based on original contributions to the fund. This method is referred to as the "*pro rata*" method or the "*pro rata ex post facto*" method.

3 Richard Gibson ("Gibson") argues that distributions should be made *pro rata* based on actual fund performance during the period while each investor was invested in the fund. The method proposed by Gibson is generally known as the Lowest Intermediate Balance Rule ("LIBR"). The Receiver refers to it as the "fund unit allocation" method. It has also been referred to in case-law and elsewhere as "*pro rata* on the basis of tracing," the "North American" method, and the "Rolling Charge" method. Under LIBR, an investor cannot claim an amount in excess of the lowest balance in a fund subsequent to their investment and attributable thereto.

4 An example fact pattern is illustrative in demonstrating the difference between the methods advocated by Waldock and Gibson: A invests $100 in a fund. The value of the fund then declines to $50. B invests $100, bringing the balance in the fund to $150. The value of the fund then declines to $120.

5 In this fact pattern, if LIBR were applied, A could not claim more than $50, because that is the lowest balance in the fund prior to B's investment. In other words, the initial decline in the value of the fund from $100 to $50 is borne entirely by A. When B contributes $100, her investment constitutes 2/3 of the $150 in the fund. As a result, when the fund declines to $120, 2/3 of the decline is borne by B, while 1/3 is borne by A. Therefore, of the $120 remaining in the fund, A can claim $40 while B can claim $80.

6 If, on the other hand, the funds were distributed *pro rata* based on original contributions, as Waldock maintains should occur in the present case, both A and B would receive $60, since both invested an equal amount: $100.

7 Which method is applied in the present circumstances will have significant financial consequences for the parties. The Receiver has calculated that if the funds are distributed using the *pro rata* method, Waldock will receive $694,856, and Gibson will receive $216,196. If the funds are distributed using LIBR, Waldock will receive $139,130, and Gibson will receive $958,662. The

dollar amounts referred to throughout this endorsement are based on calculations performed by the Receiver.

FACTS

8 The facts are generally not in dispute.

9 Investors were duped into believing that the fraudulent Greyhawk Fund was a large, highly profitable investment vehicle. Investors were provided with fictitious account statements, financial reports, and audit reports. They were allocated units on the basis of their investments, and they received monthly reports suggesting that the value of their units was increasing. However, the unit values were fabricated and actual fund performance was consistently negative. Thus, the reported unit values bore no relation to the actual value of each investor's investment.

10 During the life of the fraud, the deposits of 24 investors were commingled in a number of electronic trading accounts, which were then used to purchase and sell a variety of securities. The Greyhawk Fund consistently lost money and its value declined significantly from 2000 to 2008.

11 Waldock was the first investor in the Greyhawk Fund, with an investment of $1 million in July, 2000. By November 1, 2002, Waldock had invested $4,214,014.64 in the Fund. James Boughner was the next investor in the Fund. Between November, 2000 and December 31, 2010, Boughner invested $3,056,818 in the Fund.

12 Nobody else invested in the Fund until April, 2008. By that time, $4,717,068 had been invested by Waldock and Boughner, but the Fund had been depleted to $542,919.

13 Waldock recommended the Greyhawk Fund to Gibson in early 2008, and on April 30, 2008, Gibson invested $1 million. By the time the Fund collapsed in January, 2011, Gibson had invested $2.2 million.

14 After Gibson's initial investment, a number of other investors invested in the Fund, including family members of Gibson and Waldock. This brought the total number of investors to the aforementioned 24.

15 While total Fund losses were just over $4.2 million when Gibson made his initial investment, they were approximately $5.4 million by the time the Fund collapsed.

16 In January, 2011, Gibson's son, Glen, discovered an error in the financial statements that were purportedly prepared by PricewaterhouseCoopers ("PwC"). Glen Gibson contacted PwC and learned that PwC did not conduct any audit of the Greyhawk Fund. PwC confirmed that the statements were not prepared or signed by PwC, but were in fact forged. PwC advised the Ontario Securities Commission of the matter.

17 On February 11, 2011, the court ordered the appointment of the Receiver over Greyhawk and

related entities.

18 The Receiver determined the present market value of the Fund to be US $3.871 million and estimated a shortfall of approximately US $3.526 million. The shortfall represents the loss of principle amounts invested by the remaining investors (*i.e.* those investors who did not redeem their investments prior to the discovery of the fraud).

19 The Receiver suggested three methods of allocating the remaining funds to the remaining investors:

a) *Pro rata* based on original contributions, as described above;
b) LIBR, as described above;
c) "Last in, first out" (or "LIFO", and also known as the "rule in Clayton's Case," 35 E.R. 781), which is not supported by any party in this motion.

20 The Receiver's evidence is that it has been able to properly calculate the distributions to each party using both methods (a) and (b) above. With respect to calculating distributions based on LIBR, the Receiver was asked: "[i]s the [LIBR calculation] complete, or would further calculations and refinements be required before that methodology could be applied to accurately distribute the Greyhawk proceeds at issue?" The Receiver responded: "No further calculations remain to be done, unless any redemptions are repaid to the fund or otherwise made available for distribution, in which case the present calculations would need to be refined to account for the additional funds received by the Receiver".

POSITION OF WALDOCK

21 Counsel to Waldock takes the position that the case-law and equitable principles direct in favour of distributing the remaining funds *pro rata* based on original contributions.

22 Counsel submits that courts have determined that, as a general rule, *pro rata* distribution is appropriate where an account is in a shortfall position, funds have been commingled by a wrongdoer, and the remaining funds are to be distributed amongst innocent beneficiaries. In support of this proposition, counsel cites *Law Society of Upper Canada v. Toronto-Dominion Bank* (1998), 42 O.R. (3d) 257 (C.A.) ["*Law Society*"] at paras. 12, 34-35, leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 77; *Ontario Securities Commission v. Greymac Credit Corp.* (1986), 55 O.R. (2d) 673 (C.A.) ["*Greymac*"] at para. 18, aff'd 65 O.R. (2d) 479 (S.C.C.); *Ontario Securities Commission v. Consortium Construction Inc.*, [1993] O.J. No. 1408 (Gen. Div.) ["*Consortium*"] at paras. 68-69; and *Winsor v. Bajal* (1990), 1 O.R. (3d) 714 (Gen. Div.) at paras. 20-22.

23 Counsel to Waldock cites *Greymac* and *Law Society* for the proposition that in determining the appropriate method to distribute remaining funds to innocent beneficiaries, where a portion of the funds has been misappropriated by a wrongdoer, the court should apply the method that is most just, convenient and equitable in the circumstances. Counsel submits that a *pro rata* distribution is

just and equitable because, unlike LIBR, it does not rely on "happenstance" and the timing of investments to prioritize certain investors over others.

24 *Law Society*, *Greymac* and *Consortium* are cited for the proposition that the following factors support a *pro rata* distribution: (a) the funds of multiple beneficiaries have been commingled, (b) the dispute as to the appropriate method of distribution is between innocent investors as opposed to between an alleged trust beneficiary and creditors, and (c) it is the most convenient method.

25 Counsel to Waldock maintains that courts have only used methods other than *pro rata* in limited circumstances, such as when it is necessary to determine whether certain funds should form part of a trust and where the dispute over the remaining funds was between an alleged trust beneficiary and general creditors (*i.e.* where priority is at issue), rather than between similarly placed beneficiaries. In support of this argument, counsel cites *Graphicshoppe Ltd. (Re)*, [2005] O.J. No. 5184 (C.A.) ["*Graphicshoppe*"] at paras. 125-127; *Corp. Jetsgo, Re*, 2010 QCCA 1286 at para. 67; and *389179 Ontario Ltd. (No. 3), Re*, (1980) 113 D.L.R. (3d) 207 (Bktcy) at para. 22.

26 Counsel takes the position that the leading case applicable to the present circumstances is *Law Society*, in which competing innocent beneficiaries faced a shortfall of funds in a trust account in which monies were commingled and misappropriated by a solicitor. Counsel notes that at para. 7 in *Law Society* the court stated that once a contribution is deposited into a commingled investment account it is no longer possible to identify a claimant's deposit as that specific claimant's funds. Rather, counsel contends that *Law Society* established that a commingled fund should be considered a whole fund, and that the timing of investments is irrelevant in an investment fraud scheme. As such, all beneficiaries have an equal claim against the funds in a commingled account.

27 Counsel further submits that *Law Society* and *Graphicshoppe* direct that LIBR is only appropriate where it is a wrongdoer and an innocent beneficiary competing over remaining funds, rather than multiple innocent beneficiaries, in which case *pro rata* distribution is appropriate. Counsel submits that under factually similar circumstances, the court in *Law Society* applied a *pro rata* distribution, citing the following passage from para. 32 of *Law Society*: "[n]o authority has ever applied [LIBR] in circumstances involving the rival claims of trust beneficiaries." Counsel also submits that in *Greymac* the Court of Appeal held that *pro rata* distribution is logical and just in circumstances involving competing innocent beneficiaries.

28 Counsel to Waldock submits that the above authorities are relevant in these circumstances as all of the Greyhawk Fund investors were equally deceived. Before the fraud was uncovered, none of the victims knew that the account statements were fictitious. Thus, this is a case involving similarly situated wronged parties, which, counsel submits, justifies a *pro rata* distribution.

29 Counsel to Waldock also submits that applying LIBR would arbitrarily punish innocent investors based on the timing of their contributions to the Greyhawk Fund. Counsel maintains that it would unfairly punish early investors to the benefit of later investors. Counsel again cites *Law Society*, noting that the court determined that it would not be appropriate to limit the recovery of

innocent beneficiaries based on the timing of contributions and distributions, and that to apply LIBR would create an "illogical preference for later investors". This is particularly the case, they argue, when none of the investors knew of the fraud until 2011.

30 Counsel to Waldock also takes the position that a *pro rata* distribution would be more convenient, and that LIBR is not workable in the present circumstances. Counsel maintains that courts have historically preferred the *pro rata* method because it is more convenient and workable, especially when dealing with competing claims to a commingled fund by innocent beneficiaries.

31 Counsel submits that it would be unworkable to apply LIBR because:

a) it is not possible to earmark funds or match trades made to specific investors,
b) the Receiver has indicated that it would be costly and time-consuming to use daily trading statements to recreate the actual inflows and outflows in the trading accounts in the Greyhawk Fund (the Receiver has, instead, used monthly statements),
c) there were no individual trading accounts to trace investments into, and
d) the securities that were converted to cash by the Receiver cannot be earmarked to original investments by the parties.

32 Counsel takes the position that while the Receiver has done the best it can to calculate the amounts to be distributed under the LIBR method, "the various assumptions under this method would not depict an accurate tracing of assets". Specifically, counsel takes issue with the following assumptions made by the Receiver:

a) investments and redemptions are calculated based on the month-end market value of the Greyhawk Fund regardless of when during the month the investment and/or redemption took place;
b) the notional unit price at the inception of the Greyhawk Fund was $1,000;
c) any dividend and interest income has been included in the amounts of the monthly market value statements of the investment trading accounts; and,
d) investor redemptions have been calculated based on the market value of the Greyhawk Fund at the time of the redemption, notwithstanding that the redemption amount exceeded the number of units the investor owned.

33 Counsel notes that because some investors redeemed their investments before the discovery of the fraud, for those investors the Receiver was required to allocate a number of units that would have exceeded the amount of units they actually held at the time based on the true market value of the Fund. As a result, the remaining investors are still "paying" for the gains of the investors who redeemed earlier, obtaining false profits.

34 Finally, Counsel to Waldock takes the position that U.S. courts have applied the *pro rata*

method in similar circumstances. Counsel cites *Cunningham v. Brown*, (1924) 265 U.S. 1, 13 (U.S. Sup. Crt.) ["*Cunningham*"], in which the United States Supreme Court upheld the principle of equality for similarly situated victims in the famous investment fraud scheme of Charles Ponzi. Counsel also cites *SEC v. Credit Bancorp, Ltd*, 290 F. 3d 80, 89 (2d Cir. 2002) and *United States v. Durham*, 86 F. 3d 70, 72 (5th Cir. 2001) for the proposition that a *pro rata* distribution is appropriate in the case of victims of ponzi schemes in which earlier investors' returns are generated by the influx of fresh capital from new investors.

POSITION OF GIBSON

35 Counsel to Gibson agrees with counsel to Waldock's assertion that the test as to how best to distribute the remaining funds is to determine which method is "just, convenient and equitable".

36 In response to the assertion by counsel to Waldock that it would be unworkable to apply LIBR in these circumstances, counsel to Gibson submits that this is not the evidence of the Receiver. Rather, counsel to Gibson notes that the Receiver confirmed that its LIBR calculations are complete. As indicated above, the Receiver was asked: "[i]s the [LIBR calculation] complete, or would further calculations and refinements be required before that methodology could be applied to accurately distribute the Greyhawk proceeds at issue?" The Receiver responded: "No further calculations remain to be done, unless any redemptions are repaid to the fund or otherwise made available for distribution, in which case the present calculations would need to be refined to account for the additional funds received by the Receiver".

37 Counsel to Gibson takes the position that counsel to Waldock has misconstrued the issue in this case, emphasizing that both parties are advocating a method of distribution that could be referred to as a *pro rata* distribution. The LIBR method still incorporates *pro rata* calculations, but the manner in which Gibson proposes that the proportionate shares be calculated differs from Waldock. Counsel to Gibson explains the difference as follows:

> Waldock advances what has been described in the jurisprudence as the "*pro rata ex post facto* approach" whereby commingled monies are distributed *pro rata* based on the original contributions to the fund; whereas Gibson supports an approach whereby commingled monies are distributed *pro rata* based on the value of the contributions at the time the funds are commingled.

In *Greymac*, Morden J.A. referred to the latter approach as "*pro rata* sharing on the basis of tracing."

38 Counsel to Gibson cites an example given in the Law Reform Commission of British Columbia, *Report on Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case*, (Vancouver, 1983) ["Law Reform Commission Report"]: A, a trustee, deposits $1,000 of B's money in his account, mixing it with $1,000 of his own money. A removes $1,500. A then deposits $1,000 of C's money. Following C's deposit, there is $1,500 in the account.

39 Following the position of Waldock, the funds would be distributed *pro rata* based on original contributions. As both B and C originally contributed $1,000, they would each receive an equal $750. Following the position of Gibson, on the other hand, the funds would be distributed *pro rata* in accordance with the value of the contributions at the time of the commingling. B would receive $500, and C $1,000.

40 Counsel to Gibson cites page 54 of the Law Reform Commission Report for its reason for preferring Gibson's approach:

> B and C should not share in the $1,500 equally, notwithstanding that B's original interest in the fund was $1,000 and that C's current interest is $1,000. B's interest in the fund has been reduced by $500. B's lien should be reduced from security $1,000 to now security $500, the minimum balance of the fund following the deposit of his money and preceding the deposit of C's money. C would be entitled to a lien of $1,000. No transactions have occurred yet to reduce his interest in the fund.

41 Counsel to Gibson also cites the opinion of Judge Learned Hand in *Re: Walter J. Schmidt & Co.* (1923), 298 F. 314 (DC NY), where Judge Hand used an example that is analogous to the present circumstances, and favoured the equivalent of the LIBR approach.

42 Counsel also submits that by advocating for *pro rata* distribution, Waldock is attempting to "throw" his losses on to Gibson and claim a portion of Gibson's deposit. As evidence of this, counsel cites the Receiver's calculations for the two approaches both immediately prior to Gibson's investment as well as after that investment. Prior to Gibson's investment, Waldock would have had a claim to $298,708 using the *pro rata* method and $145,130 using the LIBR method. One month after Gibson's investment, those numbers would be $694,856 under the *pro rata* method and $139,130 applying LIBR. Counsel notes that using the *pro rata* method Waldock's claim increases substantially after Gibson's investment, indicating that Waldock is taking monies that can be attributed to that investment. Counsel submits that there is no reason in equity why Waldock should benefit from Gibson's investment, and notes Lord Justice Dillon's observation of same in *Barlow Clowes International Ltd. v. Vaughan*, [1992] 4 All E.R. 22 (C.A.) [*Barlow*]: "[*pro rata*] distribution among all seems unfair to late investors."

43 While LIBR was not applied in *Barlow*, this was because the court faced 11,000 claimants, and thus determined that the "most just result" was impractical in that case.

44 Counsel to Gibson also cites *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005) ["*Waters' Law of Trusts*"], at page 1283, for the proposition that the *pro rata* method is unfair to later investors: "Although there is a certain fairness in proportionate sharing, this approach shifts earlier losses onto later contributions, whose money could not possibly have been implicated in those losses".

45 Counsel to Gibson notes that while the LIBR calculation is more complex in the present circumstances than in the example from the Law Reform Commission Report cited above, the Receiver's evidence, as noted above, is that it was nonetheless able to successfully perform these calculations.

46 Counsel to Gibson also disagrees that *Greymac* supports the position of Waldock, and submits that a careful reading of that case demonstrates that Morden J.A. adopted LIBR as a general rule in circumstances such as the present case. Counsel cites page 688 of *Greymac*:

> At the time of the mingling of the trust funds the companies [i.e., one group of claimants] had $4,683,000 in the account. Regardless of how much they had earlier in the account, they cannot say that they had a proprietary interest in any more than the amount in the account to their credit on and after December 15, 1982 [the date the funds became commingled]: see James Roscoe (Bolton), Ltd. v. Winder, [1915] 1 Ch. 62, and Re Norman Estate, [1951] O.R. 752, [1952] 1 D.L.R. 174.

47 Further, counsel to Gibson notes that, at page 688 of *Greymac*, Morden J.A. expressly rejected Waldock's approach:

> While it might, possibly, be appropriate in some circumstances to recognize claims on the basis of a claimant's original contribution ... I do not think that it is appropriate where the contributions to the mixed fund can be simply traced, as in the present case.

48 Finally, at page 689 of *Greymac*, Morden J.A. cited the *Restatement of the Law, Restitution* section 213 (1937), stating:

> I am not persuaded that considerations of possible inconvenience or unworkability should stand in the way of the acceptance, as a general rule, of [LIBR]. That it is sufficiently workable to be the general rule is indicated by the fact that it appears to be the majority rule in the United States.

49 Thus, counsel to Gibson argues that Morden J.A.'s position in *Greymac*, at page 690, was that unless LIBR is not "practically ... possible", it is the general rule. Counsel again emphasizes the Receiver's evidence, mentioned above, that it has been able to successfully calculate distributions using the LIBR method.

50 Counsel to Gibson submits that *Greymac* is binding, as it was affirmed by the Supreme Court, which adopted "the reasons therefore delivered by Morden J.A. on behalf of the Court".

51 Counsel disagrees with Waldock's position that *Law Society* directs in favour of employing *pro rata* distributions in the present circumstances, rather, *Law Society* is simply an example of a

situation where the court determined that LIBR was unworkable. At page 271, the court in *Law Society* stated:

> There are over 100 claimants. There were misappropriations in the area of $900,000 in bits and pieces. It is not even clear that each deposit and debit can be looked at individually, on the state of the record ... It is not at all clear on the evidence that this exercise can be done.

52 Counsel to Gibson acknowledges that in *Law Society*, the court expressed the view, at page 267, that LIBR "is too complex and impractical to be accepted as a general rule for dealing with cases such as this ... [even though it] may be 'manifestly fairer' in the pure sense of a tracing analysis." However, counsel notes that *Waters' Law of Trusts*, at page 1282, states that the decision in *Law Society* is contrary to "established principles," and that it has come under criticism from other academics as well: see Lionel Smith, "Tracing in Bank Accounts: The Lowest Intermediate Balance Rule on Trial" (2000), 33 Can. Bus. L.J. 75 ["Smith"].

53 Counsel to Gibson also notes that the decision in *Law Society* turned substantially on the fact that the case involved a solicitor's trust account, which the court described as a trust for economic and organizational benefit to the public: see *Law Society*, *supra,* page 272. As noted in *Waters' Law of Trusts*, at page 1283, this means that *Law Society* "would not govern in instances which do not involve, like a solicitor's trust account, a lawfully created common trust fund".

54 Further, counsel to Gibson maintains that the law in Ontario prescribes LIBR as the general rule in these circumstances. This, according to counsel, was subsequently supported by the majority in *Graphicshoppe*, in which, at para. 129, Moldaver J.A. (as he then was) accepted LIBR, and cited Smith, stating that he does "not see how applying [LIBR] can be erroneous, when in this case it is solidly supported by the facts."

55 Counsel to Gibson also argues that LIBR is supported by *Underhill & Hayton: Law Relating to Trusts and Trustees*, 17d (LexisNexis Butterworths, 2006), a leading text on English trust law, as well as by the case *Shalson v. Russon* [2003] EWHC 1637 (Ch). In response to Waldock's assertion that *Cunningham*, the original ponzi scheme case from 1924, supports the *pro rata* method, counsel to Gibson notes that in that case the fraud was far too complicated to apply LIBR.

56 Counsel to Gibson takes the position that equity directs in favour of applying LIBR in the present circumstances. Just as earlier investors would not have expected to share their gains with later investors, they should not be allowed to so share their losses.

57 Gibson places heavy reliance on *Greymac*, in which the Court of Appeal for Ontario was faced with the question of how comingled funds should be distributed among two innocent parties where there were insufficient funds to pay both in full.

58 In *Greymac*, Morden J.A. determined that in dividing comingled funds, a *pro rata* approach

was to be preferred over the rule in Clayton's Case (or what the Receiver has described as "last in, first out" or "LIFO"). Morden J.A. concluded, at page 687, that "[t]he application of the rule in Clayton's Case to the problem under consideration is arbitrary and unfair".

59 Counsel to Gibson submits that a careful reading of *Greymac* discloses that the court adopts as a rule *pro rata* sharing based on the value of the contributions at the time of comingling. At page 688, the court in *Greymac* stated:

> At the time of the mingling of the trust funds, the companies had $4,683,000 in the account. Regardless of how much they had earlier in the account, they cannot say that they had a proprietary interest in any more than the amount in the account to their credit on or after December 15, 1982 (the time funds were comingled): See *James Roscoe (Bolton), Ltd. v. Winder*, [1915] 1 C.H. 62 and *Re Norman Estate*, [1951] O.R. 752, [1952] 1 D.L.R. 174.

60 At page 688, counsel submits that the court removed any doubt that it is expressly rejecting the *pro rata* method favoured by Waldock:

> While it might, possibly, be appropriate in some circumstances to recognize claims on the basis of a claimant's original contribution (but see Scott, The Law of Trust, Vol. 5, 3rd edition, (1967) at pp. 3647-52), I do not think that it is appropriate where the contributions to the mixed fund can be simply traced, as in the present case.

61 Counsel to Gibson submits that these are the circumstances of this case. Where the various deposits into the fund are documented along with the value of the fund from time to time, the simplistic *pro rata* sharing based on original contributions ought to be rejected.

62 Counsel to Gibson further submits that, in support of his decision to accept *pro rata* based on tracing (or LIBR) over *pro rata ex post facto*, Morden J.A. cited The Law Reform Commission and the *Restatement of the Law, Restitution*, at section 213 which affirms a *pro rata* distribution based on the value of the funds at the time they are comingled.

63 Counsel points out that Morden J.A. also addressed the issue of convenience and accepted that a *pro rata* distribution based on original contributions is more convenient, but observed that convenience and justice are not synonymous. Counsel points out that, at pages 688-689, Morden J.A. concluded that a *pro rata* distribution based on tracing is "workable" and, as such, ought to be the "general rule":

> While acknowledging the basic truth of Lord Atkin's observation that "convenience and justice are often not on speaking terms" (*General Medical Council v. Sprackman*, [1943] A.C. 627 at p. 638), I accept that convenience, perhaps more accurately workability, can be an important consideration in the

> determination of legal rules. A rule that is in accord with abstract justice but which, for one or more reasons, is not capable of practical application, may not, where larger considerations of judicial administration are taken into account, be a suitable rule to adopt. However, I am not persuaded that considerations of possible inconvenience or unworkability should stand in the way of the acceptance, as a general rule, a *pro rata* sharing on the basis of tracing. That it is sufficiently workable to be the general rule is indicated by the fact that it appears to be the majority rule in the United States (See Scott, *The Law of Trusts*, Vol. 5, 3rd edition (1967) pp. 3639-41; J. F. Ghent, *Distribution of Funds Where Funds of More Than One Trust Have Been Commingled by Trustee and Balance is Insufficient to Satisfy Act Trust Claims* (Annotation) (1968), 17 A.L.R. (3d) 937) and has been adopted in the Restatement of the Law: Trusts (2nd) (s. 202) and the *Restatement of Restitution* (s. 213).

64 In addition, Morden J.A. references Scott, *The Law of Trusts*, which expressly approves the analysis of Judge Learned Hand, discussed above.

65 Counsel goes on to point out, however, that the court in *Greymac* recognized that certain exceptional situations are so complicated that *pro rata* division on the basis of tracing cannot be undertaken. Quoting from a journal, Morden J.A. observed, at page 689:

> Naturally, the number of accounts, investments and transactions can be multiplied to a point where calculations become too complicated and expensive to undertake.

66 In these circumstances, Morden J.A. suggested that a *pro rata* distribution based on total claims (or original contributions) is better than the rule in Clayton's Case:

> I might add that it may well be that proportionate sharing on the basis of the claimant's original contributions (that is, not on the basis of tracing) may be just as convenient or, possibly, more convenient than the application of the rule in Clayton's Case and, also, fairer.

67 Concluding on this point, counsel submits that Morden J.A. adopted *pro rata* on the basis of tracing (or LIBR) as the "general rule" and *pro rata ex post facto* as the exception. Counsel further submits that Morden J.A. explained that *pro rata ex post facto* ought to be used when it was not "practically ... possible" to divide a fund *pro rata* based on tracing.

68 Counsel to Gibson concludes by submitting that the decision of Morden J.A. that *pro rata* based on tracing (or LIBR) is the "general rule" is binding because the Supreme Court of Canada affirmed *Greymac* on appeal and expressly adopted "the reasons therefore delivered by Morden J.A. on behalf of the court".

LAW AND ANALYSIS

69 Both parties argue that *Greymac* suggests their position. I disagree. I have concluded that the reasoning in *Greymac* aligns with the position put forth by Gibson.

70 *Greymac* is the controlling authority and, given the submissions of Waldock, must be contrasted with the decision in *Law Society*.

71 In *Law Society*, the issue before the court was how to distribute the funds in the comingled account and whether the bank should be able to claim priority with a *pro rata* distribution based on tracing (the court in *Law Society* referred to this as LIBR).

72 The court in *Law Society* found against the bank and concluded that distribution on the basis of *pro rata ex post facto* was appropriate.

73 The result in *Law Society* is consistent with the result in *Greymac*. Morden J.A. acknowledged in *Greymac* that, in circumstances where *pro rata* on the basis of tracing (LIBR) is not practically possible, distributions should proceed on a *pro rata ex post facto* basis. The court in *Law Society*, at page 271, determined that it was not "practical" to undertake a tracing exercise in the circumstances of that case:

> There are over 100 claimants. There were misappropriations in the area of $900,000 in bits and pieces. It is not even clear that each deposit and debit can be looked at individually, on the state of the record ... It is not at all clear on the evidence that this exercise can be done.

74 *Law Society* expressly rejected the rule in Clayton's Case. The court then considered *Greymac*, but arrived at the conclusion that it was not practical to apply *pro rata* tracing on the facts of *Law Society*. Blair J. (*ad hoc* at the time) found, in *Law Society*, at page 267: "In my view, however, this approach is too complex and impractical to be accepted as a general rule for dealing with cases such as this".

75 Blair J. went on to state, at page 269: "although LIBR may be "manifestly fairer" in the pure sense of a tracing analysis, it is manifestly more complicated and more difficult to apply than other solutions".

76 Given the statements in *Law Society*, and the fact that *Law Society* follows *Greymac*, it is necessary to consider the statements of Blair J. in *Law Society* in the context of the decision. In doing so, it seems to me that there is no direct contradiction between the two decisions.

77 At the outset of *Law Society*, Blair J. introduces the case: "It raises issues concerning what is known as "the rule in Clayton's Case" and a descendant concept called "the lowest intermediate balance rule" (frequently referred to by the acronym "LIBR")".

78 At part 2 of his decision, entitled "Law and Analysis", Blair J. references the following subheading: "A Consideration of 'The Rule in *Clayton's Case*' and the 'Lowest Intermediate Balance Rule'".

79 His overview of this section, at page 261, states:

> The bank's attempt to invoke the lowest intermediate balance rule in the circumstances of this case amounts to nothing more, in my opinion, than an attempt to reinvoke the rule in Clayton's Case, which was rejected by this court and by the Supreme Court of Canada in *Ontario (Securities Commission) v. Greymac Credit Corp., supra*. The effect of applying the "lowest intermediate balance rule" to the competing claims of the trust fund beneficiaries is to permit the bank - the last contributor - to recover what for practical purposes is all of its deposits, exactly the result which would transpire upon the application of the rule in Clayton's Case. I do not think that result is called for in the circumstances of this case.

80 At page 262, Blair J. went on to state:

> Speaking for a unanimous court in *Greymac*, Morden J.A. resolved that as a general rule the mechanism of *pro rata* sharing on the basis of tracing was the preferable approach to be followed, although he left room for other possibilities such as those circumstances where it is not practically possible to determine what proportion the mixed funds bear to each other, or where the claimants have either expressly or by implication agreed among themselves to a distribution based otherwise than on a *pro rata* division following equitable tracing of contributions (pp. 685-90). Whatever approach was chosen, Morden J.A. was concerned that it should be one which met the test of convenience - or "workability", as he termed it (p. 688). The core of the court's conclusions is to be found in the following passage from its judgment at p. 685:
>
> > The foregoing indicates to me that the fundamental question is not whether the rule in Clayton's Case can properly be used for tracing purposes, as well as for loss allocation, but, rather, whether the rule should have any application at all to the resolution of problems connected with competing beneficial entitlement to a mingled trust fund where there had been withdrawals from the fund. From the perspective of basic concepts, I do not think that it should. The better approach is that which recognizes the continuation, on a *pro rata* basis, of the respective property interests in the total amount of trust monies over property available.

> Having determined that the rule in Clayton's Case ought not to be applied in cases involving the claims of competing trust beneficiaries, Morden J.A. concluded in *Greymac* that *pro rata* sharing based on the respective property interests of the claimants and the total amount of trust money or property available, should be applied. He accepted such *pro rata* sharing as the general method of determining such competing interests. Whether, as some have suggested, he also recognized and incorporated into the *pro rata* sharing exercise the concept of the lowest intermediate balance rule, and if so to what extent, is an issue that will be dealt with momentarily. First, however, I propose to turn to an analysis of the history and application of the LIBR notion.

81 From the above, I discern the following:

(i) The controlling authority, *Greymac*, clearly rejects the rule in Clayton's Case as unfair, arbitrary, and based on a fiction.

(ii) The court in *Greymac* held that, as a general rule, the mechanism of *pro rata* sharing based upon tracing (or LIBR) was the preferable approach to resolving competing claims to mingled trust funds.

(iii) In *Law Society*, the outcome is consistent with *Greymac*. At page 271, Blair J. states:

> In this case, it is not practicable to conduct the LIBR exercise. There are over 100 claimants. There were misappropriations in the area of $900,000 in bits and pieces. It is not even clear that each deposit and debt can be looked at individually, on the state of the record, although the total amounts deposited by each of the claimants are apparently known. Notwithstanding this, if the LIBR principle is to be applied to a *pro rata* distribution in the circumstances of this case, it would be necessary to consider not only the deposits of each individual claimant and the timing of such deposits, but also what was the lowest balance in the Upshall account between each deposit and the imposition of the freeze. This would involve analyzing the pattern and timing of each misappropriation and applying the results to each individual deposit or circumstances. It is not at all clear, on the evidence, that this exercise can be done.

(iv) The finding in *Law Society* as expressed above falls within the exception provided for in *Greymac*. In essence, the general rule as stated by Morden J.A., could not, in the view of Blair J., be applied in the circumstances of *Law Society*. The court in *Law Society* spent considerable time addressing

> the parameters and practical application of LIBR. However, this analysis has to be considered in the context of the conclusion reached by Blair J. as set out at page 271, namely, "In this case, it is not practicable to conduct the LIBR exercise".

82 There is no doubt that the issues, terms and concepts discussed at length in both *Greymac* and *Law Society* are complex. As noted by Blair J., at page 267, in reference to the British Columbia Law Reform Commission in its "Report on Competing Rights to Mingled Property: Tracing and the Rules in *Clayton's Case*" (1983), terms like "*pari passu*", "*pro rata*", "rateably", and "proportionally" are inherently ambiguous. To this list of terms can be added, "LIBR", the "rolling charge", and the "North American" approach. It seems to me that these terms have not always been used with precision and, as a result, considerable confusion has arisen in the cases.

83 A further example of the issue is set out in *Graphicshoppe*. Writing for the majority, Moldaver J.A. (as he then was) at para. 126 and following stated:

> 126. ... the reasoning in *Law Society* as it relates to the issue of how best to allocate the funds remaining in a mixed trust account between competing beneficiaries simply has no application to this preliminary question. The same thing can be said about the reasoning in *Greymac*, which, like the reasoning in *Law Society*, focused on the resolution of beneficiaries' competing proprietary claims to the remaining trust funds.
>
> 127. I would also add that throughout his reasons for judgment in *Law Society*, Blair J. (*ad hoc* at that time) clearly acknowledged that the issue before the court was confined to determining the best approach for resolving the claims of competing beneficiaries to funds remaining in a mixed trust account. Blair J. considered the *pari passu ex post facto* approach to be the best approach for that task because of the inconvenience that is often associated with having to apply the lowest intermediate balance rule [or *pro rata* on the basis of tracing] in cases involving any significant number of beneficiaries in transactions, and because of the nature and purpose of the mixed trust fund. In Blair J.'s view, such a fund is in many ways a mechanism of convenience, in that it avoids the necessity, cost and cumbersome administrative aspects of having to set up individual trust accounts for each beneficiary. Blair J. reasoned that "a mixed fund of this nature should be considered as a whole fund, at any given point in time, and that the particular moment when a particular beneficiary's contribution was made and the particular moment when the defalcation occurred, should make no difference".

84 This passage from *Graphicshoppe* confirms that in *Law Society* Blair J. determined the *pro rata ex post facto* approach to be the best approach in that case because of the inconvenience that is often associated with having to apply LIBR in cases involving any significant number of beneficiaries and transactions, and because of the nature and purpose of the mixed trust fund. In my

view, neither *Law Society* nor *Graphicshoppe* stand for the proposition that LIBR is not to be utilized when circumstances are such that it can be. Rather, consistent with *Greymac*, the general rule is that LIBR should be applied unless it is unworkable. As Morden J.A. stated in *Greymac*, at page 688: "I am not persuaded that considerations of possible inconvenience or unworkability should stand in the way of the acceptance, as a general rule, of *pro rata* sharing on the basis of tracing [or LIBR]".

85 In *Graphicshoppe*, the decision involved trust claims of employees to a mixed fund. In dissent, Juriansz J.A. followed the analysis of Blair J. in Law Society and expressly rejected "the logic of the LIBR".

86 However, Moldaver J.A., writing for the majority, did not agree with Juriansz J.A.'s "analysis or conclusions". In arriving at his decision, Moldaver J.A. applied LIBR: "... it is clear from the record that as of the date of bankruptcy, none of the employee contributions that had been deposited into *Graphicshoppe*'s bank account remained intact. We know that with certainty because prior to the date of bankruptcy, the account went into negative balance".

87 Justice Moldaver distinguished *Law Society* on its facts and also addressed the role of LIBR. After citing Lionel Smith's article, Moldaver J.A. stated:

> I recognize that my colleague Juriansz J.A. says that this argument is simply an attempt to apply the logic of the lowest intermediate balance rule. With respect, assuming that characterization is correct, I do not see how applying this logic can be erroneous, when in this case, it is solidly supported by the facts.

88 Thus, it seems to me that although the Court of Appeal for Ontario did not, on the facts, apply LIBR in *Law Society*, it was accepted by Moldaver J.A. in *Graphicshoppe*. Thus, by virtue of the Supreme Court of Canada's affirmation of *Greymac* and the more recent decision in *Graphicshoppe*, LIBR is an available mechanism to distribute comingled funds.

89 The controlling authority, *Greymac*, directs, in my view, that *pro rata* sharing based on tracing (LIBR) is the "general rule" that ought to be applied in this case unless it is practically impossible to do so.

90 In the present case, I accept the uncontroverted evidence of the Receiver that all steps have been taken to establish that LIBR calculations can be made. As such, the general rule as set out in *Greymac* must be applied in this case.

91 In my view, the application of the general rule as set out in *Greymac* produces a result that I consider to be just and equitable. Morden J.A. recognized that the principles of "logic, justice and convenience" govern in circumstances such as these (see *Greymac* at page 680). Blair J. in *Law Society* also noted that "the court should therefore seek to apply the method which is the more just, convenient and equitable in the circumstances" (see *Law Society* at page 269).

92 On the facts of this case, justice dictates that the funds should be distributed proportionately based on the interests of the parties at the time of comingling: the Receiver's fund unit allocation method (or LIBR). A *pro rata ex post facto* distribution would not result in a fair outcome where a very small number of individuals, including Waldock, had invested a significant amount of money early on in the lifespan of the fund. By the time of Gibson's investment, the evidence is clear that these early investors had lost over 88% of their investment value.

93 In this case, the practical concerns cited in *Greymac* do not exist. The Receiver has determined a practicable method for distributing the Greyhawk Fund *pro rata* on the basis of LIBR. The Receiver has confirmed that it had the necessary information to complete its calculation accurately.

94 Waldock raises the issue, at paragraph 9 of the Reply Factum, that the evidence of the Receiver is that it would be impossible to trace the various investments and transactions that occurred in this case. The Receiver has determined that it cannot trace or match trades and securities to specific investors as investor funds were comingled over a lengthy period. To further complicate matters, the Receiver has confirmed that it is not possible to match any particular sale of securities to a corresponding redemption. However, there is no evidence to suggest that the Receiver would need to be able to do these things in order to properly calculate distributions using the fund unit allocation method (LIBR). Rather, as noted previously at [36], the evidence of the Receiver is that it has been able to make these calculations in spite of the challenges noted by Waldock.

DISPOSITION

95 For the foregoing reasons, I direct that distributions be made pursuant to the fund unit allocation method (or *pro rata on the basis of tracing*, or LIBR).

96 In recognition of the fact that this issue had to be determined prior to any distribution and given that both Waldock and Gibson were victims of a fraud, it is appropriate that the costs of the parties be paid out of the assets of the Greyhawk Fund.

97 I thank counsel for their very helpful submissions on this matter.

G.B. MORAWETZ J.

cp/e/qljel/qlpmg/qlced/qlhcs/qlcas

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

Proceeding commenced at Toronto

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