COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC AND DOMINION FINCO INC.
DOCUMENT	**BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins / Walker W. MacLeod / Pantelis Kyriakakis / Nathan Stewart Tel: 403-260-3531 / 3710 / 3536 / 3534 Fax: 403-260-3501 Email: scollins@mccarthy.ca / wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca

Clerk's Stamp

BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.

IN SUPPORT OF THE APPLICATION TO PERMIT DDMI TO REALIZE ON COVER PAYMENT SECURITY
TO BE HEARD BY
THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK

October 30, 2020 at 10:00 A.M.

TABLE OF CONTENTS

I. INTRODUCTION

1. The Stalking Horse Bid of Washington Group, which ultimately did not include Diavik, has fallen apart and will not close. The SISP did not otherwise unearth any executable bids for Diavik. Dominion Diamond owes DDMI $119.52 million in Cover Payments, plus interest (presently estimated to be in the amount of $2.37 million) and legal fees, costs and expenses. It is appropriate for DDMI to sell the diamonds it holds as security (the "**DDMI Collateral**") in an attempt to recover the outstanding Cover Payments. DDMI does not expect there to be a serious contest raised by interested stakeholders to this proposition.

Affidavit #4 of Thomas Croese, sworn on October 19, 2020 at para. 5 ["Croese Affidavit #4"].

2. When the Stalking Horse Bid SISP was launched, the Monitor, Dominion Diamond and the stakeholders that supported the process, asserted the value of collateral to be held by DDMI should equal no more than the Cover Payment debt; with such value to be determined in accordance with the GNWT's monthly royalty valuation performed by DICAN (the "**DICAN Gross Valuation**").

3. The factual bases that underpinned the amount of collateral to be held included the contention that the SISP would likely bring forth a resolution to the outstanding Cover Payments. The facts have changed. It is quite certain that Dominion Diamond's interest in Diavik will not be purchased. Even more certain is the fact that Dominion Diamond will never be able to meet its payment obligations under the JVA. Dominion Diamond has never had any intention of making the Cash Calls under the JVA or repaying its Cover Payment indebtedness. The Court indicated that the issue of the amount of collateral to be held could be revisited. DDMI thus also applies for an order to allow it to hold all of Dominion Diamond's production until the Cover Payments are repaid in full.

4. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to such terms in the Affidavit #4 of Thomas Croese, sworn on October 19, 2020 (the "**Fourth Croese Affidavit**").

II. STATEMENT OF FACTS

(i) Background

5. Pursuant to Section 9.4(b) of the JVA, the amount of any Cover Payment shall: (i) constitute indebtedness due from the defaulting Participant to the non-defaulting Participant; and, (ii) be secured by, a mortgage of and security interest in such Participant's right, title and interest in, to, and under, whenever acquired or arising, its Participating Interest and the Assets (each as defined in the JVA) (the "**Security**").

[TAB 1].

6. DDMI's security interest for the Cover Payments is first-ranking, including under and pursuant to the Intercreditor Agreements.

Copies of the Intercreditor Agreements are attached to the Supplemental Affidavit of Thomas Croese, sworn on May 7, 2020, as Exhibits "A" and "B" thereto.

(ii) The Realization Process

7. The precise details of DDMI's proposed realization process (the "**Realization Process**") are contemplated to be attached to the order sought in connection with the within application. The Realization Process has not yet been attached to the draft order owing to the fact that DDMI is consulting with interested parties with respect to the proposed Realization Process.

8. At a high level, the Realization Process provides that:

(a) the DDMI Collateral shall, whenever possible, be treated in the same or a substantially similar fashion as the DDMI production from the Diavik Mine;

(b) DDMI shall shall be expressly authorized and empowered, but not obligated, to do any of the following where it considers it necessary or desirable in respect of the collateral which DDMI is realizing upon (the "**DDMI Realization Collateral**"):

(i) transport the DDMI Realization Collateral from the Diavik Mine production sorting facility in Yellowknife, Northwest Territories (the "**PSF**") to Antwerp, Belgium;

(ii) clean, sort, value and market the DDMI Realization Collateral to and with the assistance of any Person;

(iii) sell, transfer and convey DDMI Realization Collateral to any Person on such terms and conditions of sale as DDMI, in its discretion, may deem or consider appropriate;

(iv) receive and collect all monies and accounts now owed or hereafter owing to Dominion Diamond in respect of the DDMI Realization Collateral and to exercise all remedies of Dominion Diamond in collecting such monies, including, without limitation, to enforce any security held by Dominion Diamond in respect of the DDMI Realization Collateral;

(v) take any steps reasonably incidental to the exercise of these powers as may be required to realize upon the DDMI Realization Collateral in a manner that is consistent with standard processes and procedures for diamond sales;

(vi) and in each case where DDMI takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including Dominion Diamond, and without interference from any other persons.

(c) upon the completion of a sale of all or any portion of the DDMI Realization Collateral (each, a "**Transaction**"), Dominion Diamond's interest in the DDMI Realization Collateral that is subject to such sale shall vest absolutely in the applicable purchaser, free and clear of and from any and all claims and encumbrances; and,

(d) The proceeds resulting from any Transaction shall be distributed:

(i) first, to all fees, costs and expenses incurred by or on behalf of DDMI in the implementation of the Realization Process and the completion of the Transaction including, without limitation, a fee equal to 2.5% of the gross

value of any Transaction payable to DDMI for handling, sorting, selling and collecting proceeds;

(ii) second, to DDMI, in satisfaction of all indebtedness, liabilities and obligations owing by Dominion Diamond to DDMI for Cover Payments (including accrued and unpaid interest thereon); and

(iii) the balance to Dominion Diamond's creditors, or as may be directed by the Court.

(iii) The SARIO

9. On June 19, 2020, DDMI sought the right to hold the entirety of Dominion Diamond's share of production from the Diavik Mine, as opposed to a share of production based on the DICAN Gross Valuation. In holding that the share of production be based on the DICAN Gross Valuation, the Court stated:

> DDMI has argued that they should have the ability to hold the whole 40 percent production that is coming in light of their cover payments that they're making, which are sort of like a DIP, as I had indicated in my prior judgment on this. But it seems to me right now, based on the evidence that I have in front of me, that it's not necessary for DDMI to have the ability to hold all of the 40 percent of the diamonds and that just the amounts that can be determined by the independent evaluator should be held, the -- the amounts that should cover the cover payments. And I understand that this is a moving target, so to the extent that we need to revisit this issue down the road, well, then DDMI, when it's appropriate -- because we'll come to that -- can raise this as an issue.
>
> **Transcript of proceedings in Action No. 2001-05630 (June 19, 2020) at 141:9-141:18 [TAB 2].**

10. Paragraph 16 of the Second Amended and Restated Initial Order (the "**SARIO**") was thus granted on June 19, 2020 and provides, in pertinent part:

> […] DDMI, in its capacity as manager under the Diavik JVA, be and is hereby authorized to hold an amount of Dominion's share of production from the Diavik Mine equal to the total value of the JVA Cover Payments made by DDMI (the "Dominion Products") at the Diavik Production Splitting Facility in Yellowknife, Northwest Territories (the "PSF") and the value of the Dominion Products shall be determined based on royalty valuations performed from time to time at the PSF by the Government of the Northwest Territories. […]

(e) on the happening of any of the following dates, events or ocurrences, or with leave of the Court, DDMI shall be entited to apply to this Honourable Court to seek an Order allowing it to exercise rights and remedies as against the Dominion Products:

(i) the date that the within CCAA proceedings are terminated;

(ii) the date that the Interim Lenders take any action to enforce the Interim Lenders' Charge, whether pursuant to the Interim Financing Term Sheet, the Definitive Documents or at law generally;

(iii) any time after the Phase 1 Bid Deadline, when there is no Phase 1 Qualified Bid or Phase 2 Qualified Bid (including the Stalking Horse Bid) which includes the assets owned by Dominion in the Diavik Joint Venture; and

(iv) November 1, 2020.

11. Paragraph 65 of the SARIO provides:

> 65. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

12. On September 25, 2020, the Court granted an order suspending the requirement implicit in Paragraph 16 of the SARIO that DDMI deliver excess DDMI Collateral to DDMI.

III. ISSUES

DDMI's position with respect to the issues to be determined is:

(a) The Realization Process should be approved; and

(b) DDMI should not be required to deliver DDMI Collateral to Dominion Diamond until the Cover Payments are repaid in full unless the Court, on application by an interested party, orders otherwise.

IV. LAW

13. The Court has broad statutory and inherent jurisdiction to grant the relief sought by DDMI. Section 11 of the CCAA states:

> **General power of court**
>
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor

> company, 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.
>
> ***Companies Creditors' Arrangement Act*, R.S.C., 1985, c. C-36 [the "CCAA"], at s. 11 [TAB 5].**

14. Courts have confirmed on numerous occasions and in various situations that where factual circumstances change, the supervising CCAA Court must seek to balance the interests of the parties, even if that means revisiting an issue that was addressed in an initial order.

15. For instance, in *Canada North Group*, in considering a comeback clause that was identical to paragraph 65 of the SARIO, Justice Topolniski stated:

> "Recourse through the comeback clause is available when circumstances change. As explained in ***Re Pacific National Lease Holding Corp***:
>
> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems."
>
> ***Canada North Group Inc. (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para. 50 [emphasis original] [TAB 3], quoting *Re Pacific National Lease Holding Corp* (1992), 15 CBR (3d) 265, 72 BCLR (2d) 368 (CA) at para. 30, 1992 CanLII 427 (BC CA) at para. 32 [TAB 4].**

16. Section 58(2) of the Northwest Territories *Personal Property Security Act* (the "**PPSA**") provides, in pertinent part:

> 58. (2) Subject to sections 36, 37, 37.1 and 38 and subsection (3) of this section, on default under a security agreement
>
> (a) the secured party has, unless otherwise agreed, **the right to take possession of the collateral** or otherwise enforce the security agreement by any method permitted by law;
>
> ***Personal Property Security Act*, S.N.W.T. 1994, c. 8 ["PPSA"], at s. 58(2)(a) [emphasis added] [TAB 6].**

17. Sections 59(2), 59(3) and 59(5) of the PPSA provide, in pertinent part:

> 59 (2) After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to
>
> (a) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of

the collateral and any other reasonable expenses incurred by the secured party, and

(b) the satisfaction of the obligations secured by the security interest of the secured party disposing of the collateral,

and any surplus shall be dealt with in accordance with section 60.

(3) Collateral may be disposed of

(a) by private sale;

(b) by public sale, including a public auction and sale by closed or open tender;

(c) as a whole or in parts or in commercial units; or

(d) if the security agreement so provides, by lease.

…

(5) The secured party may delay disposition of all or part of the collateral.

PPSA, at ss. 59(2), 59(3), and 59(5) [TAB 6].

18. Section 60(2) of the PPSA provides:

(2) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57 or has disposed of it in accordance with section 59 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested parties, be accounted for and paid, in the following order:

(a) a person who has a subordinate security interest in the collateral

(i) and who has, prior to the distribution of the proceeds, registered a financing statement using the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed as serial number goods, or

(ii) whose security interest was perfected by possession at the time the collateral was seized

(b) any other person with an interest in the surplus, if the other person has given a written notice of that interest to the secured party prior to the distribution, and

(c) the debtor or any other person who is known by the secured party to be an owner of the collateral,

but the priority of claim of any person referred to in paragraph (a), (b) or (c) is not prejudiced by payment to anyone under this section.

PPSA, at s. 60(2) [TAB 6].

19. Section 62(1) of the PPSA provides:

62. (1) At any time before the secured party has disposed of the collateral or contracted for disposition under section 59 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61, any person entitled to receive a notice of disposition under subsection 59(6) or (10) may, unless that person otherwise agrees in writing after default, redeem the collateral by

(a) tendering payment of the monetary obligations secured by the collateral together with a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition, if such expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement; and

(b) agreeing to fulfill any other obligations secured by the collateral.

PPSA, at s. 62(1) [TAB 6].

20. Section 63(2) of the PPSA provides:

63. (2) On application by a debtor, a creditor of a debtor, a secured party, a Sheriff or any person with an interest in the collateral, the Supreme Court may

(a) make any order, including a binding declaration of a right and injunctive relief, that is necessary to ensure compliance with this Part or sections 17, 36, 37, 37.1 and 38;

(b) give directions to any person regarding the exercise of rights or the discharge of obligations under this Part or sections 17, 36, 37, 37.1 and 38;

(c) relieve a person from compliance with the requirements of this Part or sections 17, 36, 37, 37.1 and 38;

(d) stay enforcement of rights provided in this Part or sections 17, 36, 37, 37.1 and 38;

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

PPSA, at s. 63(2) [TAB 6].

21. Section 77 of the *Mining Regulations* (Northwest Territories) (the "**Mining Regulations**") provides, in pertinent part:

> 77 …
>
> (2) Subject to section 77.1, until they have been valued by a mining royalty valuer, precious stones may not be
>
> (a) removed from a mine, other than in a bulk sample or in a concentrate for the purposes of establishing the grade and the value of the stones in a mineral deposit,
>
> (b) cut,
>
> (c) polished,
>
> (d) sold; or
>
> (e) transferred.
>
> (3) The operator of a mine shall provide, in the Northwest Territories, any facilities and equipment, other than computer equipment, necessary for a mining royalty valuer to value any precious stones produced from the mine.
>
> (4) For the purposes of these regulations, facilities referred to in subsection (3) are deemed to be part of the mine and any transfer of the precious stones from one part of the mine to another is deemed not to be a removal of the stones from the mine. **…**
>
> (6) As soon as any precious stones have been processed into a saleable form, they must be presented to a mining royalty valuer for valuation.

***Mining Regulations*, NWT Reg 015-2014 ["Mining Regulations"], at ss. 1(1), 77(2), (3), (4), (6) [TAB 7]. The Mining Regulations define "precious stone" as follows: "precious stone means a diamond, a sapphire, an emerald or a ruby."**

V. ARGUMENT

(i) No Sale of Diavik Mine (or Ekati)

22. The relief sought by DDMI must be considered against the backdrop of the material adverse change resulting from the fact that there is no sale and the challenges associated with the valuation of diamond collateral in the current market. It must also be considered with reference to the unfairness that would result from requiring DDMI to deliver collateral to Dominion Diamond in the current circumstances. In sum, the SISP Procedures have confirmed that (i) there will not be a sale of Dominion Diamond's participating interest in the Diavik Mine; (ii) the market

view that the value of Dominion Diamond's participating interest in the Diavik Mine is less than the aggregate of the obligations in arrears and future obligations including closure and remediation costs; and (iii) DDMI will necessarily have to recover the Cover Payment indebtedness from the DDMI Collateral.

23. Pursuant to paragraph 16(e) of the SARIO, DDMI was expressly authorized to apply to this Honourable Court for an order allowing it to exercise rights and remedies against the DDMI Collateral, *inter alia*, "at any time after the Phase 1 Bid Deadline Phase 1 Bid Deadline, when there is no Phase 1 Qualified Bid or Phase 2 Qualified Bid (including the Stalking Horse Bid) which includes the assets owned by Dominion in the Diavik Joint Venture". This precondition has been met as there is no executable bid which includes Dominion Diamond's interest in the Diavik Mine.

(ii) Balancing of Prejudice

24. DDMI is producing, providing, improving, and maintaining all Products, including the DDMI Collateral, at its own risk and expense. The DDMI Collateral ***would not exist*** without DDMI's continued operation of the Diavik Mine - and the Diavik Mine cannot continue to produce unless DDMI continues to make Cover Payments.

25. If the DDMI Collateral or any portion thereof is returned to Dominion Diamond prior to repayment of the Cover Payments and the balance of the DDMI Collateral turns out to be insufficient to repay the Cover Payments, then DDMI will not be able to subsequently recover such loss from Dominion Diamond because it is insolvent.

26. It would be unfair and prejudicial to force DDMI to choose between either: (i) completely foregoing the benefits of the ongoing operation of the Diavik Mine; or, (ii) providing diamonds to Dominion Diamond in the face of Dominion Diamond's insolvency and the fact that it is unable to and will not pay post-filing obligations in respect of the Diavik Mine.

(iii) JVA Rights / PPSA

27. Absent the CCAA stay, DDMI would be able to assert common law, contractual and statutory lien rights against the DDMI Collateral that would entitle it to maintain possession of and sell Dominion Diamond's share of production. Specifically, section 9.4(c) of the JVA provides, in part:

> "… Upon default being made in the payment of the indebtedness referred to in Section 9.4 (b) when due ***the non-defaulting Participant may*** on 30 days' notice to the defaulting Participant ***exercise any or all of the rights and remedies available to it as a secured party*** at common law, by statute or hereunder ***including the right to sell the property subject to a mortgage and charge hereunder*** …" [emphasis added]

[TAB 1]

28. The 30 day notice period set out in section 9.4(c) has been abridged upon the insolvency of Dominion Diamond, pursuant to section 3(d) of the Diavik Joint Venture Amending Agreement (No. 2), which states in relevant part that:

> "Notwithstanding anything to the contrary in this Agreement or in the Original JVA, **all of the notice required in Section 9.4 of the Original JVA as amended shall be abridged** such that no advance notice is required under any of the provisions of said Section 9.4 in the event that: **…**
>
> (ii) if a Participant becomes or acknowledges that it is insolvent, makes a voluntary assignment under the *Bankruptcy and Insolvency Act* or files a proposal under the *Bankruptcy and Insolvency Act* or seeks protection under the *Companies' Creditors Arrangement Act*, or any other debt moratorium or restructuring legislation; or **…**" [emphasis added]

[TAB 1]

29. The Realization Process, while dealing with a very unique type of collateral, is modelled on the basic and well-understood principles encompassed within personal property security legislation. Section 56(2) of the PPSA codifies that where (as here) a debtor is in default in the provisions of a security agreement, the rights of the secured creditor include both the rights arising under the security agreement and Part V of the PPSA.

30. Section 63 of the PPSA establishes the broad jurisdiction of the Court to make orders relating to realization and enforcement:

> **63.** (1) In this section, "secured party" includes a receiver.
>
> (2) On application by a debtor, a creditor of a debtor, a secured party, a Sheriff or any person with an interest in the collateral, the Supreme Court may
>
> (a) make any order, including a binding declaration of a right and injunctive relief, that is necessary to ensure compliance with this Part or sections 17, 36, 37, 37.1 and 38;

(b) give directions to any person regarding the exercise of rights or the discharge of obligations under this Part or sections 17, 36, 37, 37.1 and 38;

(c) relieve a person from compliance with the requirements of this Part or sections 17, 36, 37, 37.1 and 38;

(d) stay enforcement of rights provided in this Part or sections 17, 36, 37, 37.1 and 38;

(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

PPSA, at s. 63 [TAB 6].

31. Part V of the Northwest Territories PPSA is substantially identical to Part 5 of the *Personal Property Security Act* (Alberta).

32. The jurisdiction for the relief sought by DDMI is clear and unambiguous. Part V of the PPSA authorizes a secured party to take possession of the collateral (s. 58(2)(a)), to dispose of the collateral once seized (s. 59(2)), to dispose by public or private sale (s. 59(3) and to dispose or all or part of the collateral (s. 59(3)). It also permits the secured party to delay the disposition of the collateral (s. 59(5)). All of the actions that will or may occur under the Realization Process (i.e., DDMI may delay disposition based on market conditions) are expressly contemplated by Part V of the PPSA.

33. The transparency and value optimization that will occur within and as part of the Realization Process will provide for an enforcement process that is at once commercially reasonable and good faith. Those basic protections that will be afforded to all stakeholders in these CCAA proceedings are also requirements imposed by section 65(3) of the PPSA.

(iv) Dominion's Right of Redemption

34. Redemption rights in respect of personal property are codified by section 62 of the PPSA. The section permits either a debtor or a subordinate secured creditor, at any time prior to disposition, to redeem the collateral by tendering payment of the monetary obligations secured by the collateral and associated enforcement expense. If Dominion Diamond or other creditors elect, they can redeem; there is no restriction on it doing so.

35. Section 60(2) of the PPSA provides, in relevant part, that: "Where a security agreement secures an indebtedness and the secured party … *has disposed of it in accordance with section 59 or otherwise*, any surplus shall, … be accounted for and paid". It must be noted that PPSA provides for the payment of surplus funds to subordinate parties only ***after*** realization, when values have been crystallized. There is no mechanism in the PPSA by which a secured creditor is required to pre-emptively account for potential proceeds; or, to appraise and return property to the debtor on the basis that the expected proceeds ***may*** some day be in excess of the secured obligations (which, in the present circumstances, is unlikely with respect to the Dominion Diamond product).

PPSA, at s. 60(2) [TAB 6].

36. The Realization Process proposed by DDMI is wholly consistent with the aforementioned principles. DDMI is the first-ranking, senior secured creditor of Dominion Diamond (subject only to the priority charges granted in the within proceedings), to the extent of the Cover Payment indebtedness. The proceeds of any DDMI Collateral should first be applied to Dominion Diamond's outstanding Cover Payment indebtedness, in accordance with the priority in respect of such proceeds, before flowing to any other person. Further, the 2.5% handling, sorting, sales and cash collection fee from the proceeds prior to applying such proceeds to Dominion Diamond's indebtedness is modeled by section 59 of the PPSA. Such amount is consistent with that charged by affiliates of DDMI's parent company, Rio Tinto plc, to arm's-length third parties for similar services. The Realization Process has been designed to optimize recoveries in respect of the diamond collateral, which is to the benefit of Dominion Diamond and all of its stakeholders. If, upon realization - when the value of the DDMI Collateral is certain and Dominion Diamond's right of redemption extinguished - the Cover Payment indebtedness becomes fully satisfied, ***then at that time*** it will be appropriate to flow any excess funds to subordinate parties.

PPSA, at s. 59(2)(a)-(b) [TAB 6]; Croese Affidavit #4, at para. 9(f).

(v) The DICAN Valuation

37. Mr. Croese has deposed in detail as-to the current market uncertainty in the diamond market and corresponding lack of confidence in recent price projections. Diamonds are not a readily tradable commodity; the DICAN Gross Valuation provided by Diamonds International Canada Limited ("**DICAN**") is required by Northwest Territories law to estimate future royalty

obligations and is used to establish a ***provisional*** holding value for the diamond production. The Mining Regulations acknowledge that the valuation provided by a royalty valuer may differ from the actual realizable value of such diamonds. Section 69 of the Mining Regulations provides that where the operator and valuer cannot agree on the market value of precious stones, the market value shall be, "the maximum amount that could be realized from the sale of the stones on the open market after they are sorted into market assortments".

Mining Regulations, at ss. 69(9), 77(2), (3), (4), (6), 77.1 [TAB 7];
Affidavit #3 of Thomas Croese, sworn on June 16, 2020 at para. 20 ["Croese Affidavit #3"];
Croese Affidavit #4, at paras. 15, 16(a).

38. DDMI's experience has been that the DICAN Gross Valuation does not match realized gross value in sales to third parties. In each of 2017, 2018 and 2019, DICAN's average valuation of DDMI's share of Diavik diamonds under the DICAN Gross Valuation was higher than the actual realized gross value in sales to third parties. The average overvaluation exceeded 10% in the second half of 2019 and grew further still in the first half of 2020. The difficulty in estimating the gross value of diamonds in such volatile markets is further demonstrated by gross sales of DDMI's share of Diavik Mine production to third parties in September and October being in excess of the DICAN Gross Valuation. Further, as noted in Mr. Croese's evidence, the DICAN Gross Valuation does not account for fees or expenses of any type. These associated fees and expenses were described as follows in the Sixth Report of the Monitor:

> Sales are shown after deducting profit margin in Belgium, sorting expenses in India, Government Royalties, Private Royalties and CZ NCI partner portion of sale which is assigned to cash calls receivable

Sixth Report of the Monitor, dated September 22, 2020 [the "Sixth Monitor's Report"], at Appendix "A", Note 1; Croese Affidavit #4, at paras. 13, 15, 16(a).

39. Dominion Diamond has not provided information on the fees and expenses associated with its net recoveries. However, as demonstrated by Dominion Diamond's recent sales and highlighted in the Affidavit of Frederick Vescio, sworn on October 7, 2020 (the "**Vescio Affidavit**"), there is often a substantial difference between the gross and net value of diamonds, due to such fees and expenses. Mr. Frederick Vescio's evidence shows that the net sales margins for the first tranche of Dominion Diamond's September 2020 sale was 87% (implying fees and expenses of 13%, which are not accounted for in the DICAN Gross Valuation). Mr Vescio's analysis goes

on to forecast a net sales margin of 80% on future sales (implying fees and expenses of 20%), indicating that such a level would not be unreasonable to assume. The chart below summarizes the fees and expenses that Dominion Diamond would have paid on the recent sales based on the evidence in Mr. Vescio's affidavit:

Dominion Sale Fee and Expense Summary (millions)			
Fees and Expenses (%)	**Fees and Expenses ($)**	**Gross Value**	**Net Value**
13%	$7.9	$60.9	$53.0

40. Dominion Diamond's recent diamond sales are illustrative of the challenges in the current market due to the COVID-19 pandemic, which has had a significant negative effect on liquidity and pricing in the diamond markets. In her affidavit sworn on September 18, 2020, Ms. Kaye testified that the Applicants were selling diamonds with a book value of $58 million USD. At the date of her affidavit, a first tranche of diamonds had been sold for gross $46 million USD. A second tranche with an estimated gross value of $8 million USD was due to be sold the week after her affidavit. Without the results of the second sale it is hard to be sure, but her testimony implies that the diamonds were likely to have been sold at $4 million USD, or 7%, below their book value. In the Vescio Affidavit, various liquidity analyses have been prepared that are stated to use information provided by Dominion Diamond. The liquidity analyses assume that future diamond sales are carried out at a 10% discount to book value (before the deduction of fees and expenses as described above). Dominion Diamond does not appear to have obtained book value in its recent transactions, and its largest creditor does not expect that book value will be obtained upon sale of the remaining diamond inventory.

Affidavit of Frederick Vescio, sworn on October 7, 2020, at Exhibit "B".

41. Because the DICAN Gross Valuation is not carried out at the point of sale, in light of the significant degree of uncertainty at present regarding the trajectory of the diamond market, there is a material risk that the realizable value of the DDMI Collateral will decline between the date of valuation and the date of sale. Specifically: (i) the DICAN Gross Valuation often occurs months before final sale of the subject product; (ii) liquidity in the diamond market has greatly declined due to the COVID-19 pandemic; and, (iii) as described in further detail below, the diamond market is currently subject to downward price pressures, which make take years to reverse. There is also further uncertainty associated with a "second wave" of the COVID-19 pandemic.

Croese Affidavit #4, at para. 16(b).

42. A secured creditor who faces a circumstance where its debtor is in default should not be (and is not typically) required to return a portion of its collateral based on estimated value. This is inherently unfair to the secured creditor. It does not accord with basic principles of security enforcement, as codified in Part V of the PPSA, where the debtor may redeem by payment of the debt in full but is not entitled to reclaim a portion of its property by suggesting that the creditor may be paid in full at a later date. In such circumstances, given the current state of the diamond market, Dominion Diamond's insolvency, and the recent material adverse changes in the within proceedings, DDMI would be significantly and likely irreversibly prejudiced.

43. The Affidavit of Jennifer Alambre, sworn October 4, 2020, contains (at Exhibit "**R**") a September 14, 2020 article entitled "Diamond market faces rough ride as fears of second coronavirus wave mount" published by S&P market. The article describes a: "long, slow, painful journey out of the kind of miasma the market has managed to get itself mired into, just because there is so much inventory around." In light of this, Dominion Diamond is also not committed to taking its own product to market – it recognizes the current uncertainty and indicates that it will only sell if there are favourable market conditions. As is noted in the Sixth Report of the Monitor:

> "Operating receipts include the proceeds of diamond sales during the week ending September 18, 2020. The Fourth Cash Flow Statement does not include proceeds of sales that may occur during the week ending September 25, 2020 or any future sales that may occur during the forecast period **due to uncertainty around the size and pricing that may be realized from such sales**. As noted above, the Applicants may consider additional diamond sales, should the economics be favourable." [emphasis added].

Sixth Monitor's Report, at para. 31(a).

44. WWW Diamond Forecasts Ltd. ("**WWW Forecasts**"), an affiliate of WWW International Diamond Consultants Limited (which is in turn one of the two DICAN joint venturers) has recently stated that: "The diamond market is under extreme stresses across the entire pipeline ... Economic uncertainty is unlikely to dissipate in the near-term which will continue to be a drag on any recovery in diamond jewellery sales." Further, in June 2020, WWW Forecasts recognized that "[t]here are so many variables in play that forecasting what might happen in the retail markets this year is akin to reading the tea leaves at the bottom of a tea cup".

Croese Affidavit #4, at paras. 18, 22 and Confidential Exhibits "2" and "3".

45. ALROSA and De Beers, the world's two largest diamond producers, have seen drastic declines in diamond sales in 2020. ALROSA's diamond sales in the second quarter of 2020 were 92% lower than first quarter sales and 91% lower than 2019 second quarter sales. De Beers experienced similar 2020 second quarter decreases of 94% (as compared to 2020 first quarter sales) and 96% (as compared to 2019 second quarter sales). On a combined basis, ALROSA and De Beers account for approximately seventy percent of global rough diamond sales by value.

Croese Affidavit #4, at para. 23.

46. The DICAN Gross Valuation also does not account for obligations that may rank ahead of the security granted under the Diavik JV. In this regard, the SARIO granted five separate priority charges in favour of various beneficiaries. Two of those charges (being the Administration Charge in the amount of $3.5 million and the Directors' Charge in the amount of $4.0 million) rank in priority to DDMI's security under the Diavik JVA. DDMI appreciates that there may not be amounts outstanding on the charges and that, to the extent there is an amount owing, it may not be fair or appropriate to allocate such amount to the DDMI Collateral given the nature of the within proceedings. The priority charges are further examples of claims that may not be accounted for by the DICAN Gross Valuation and the flaws arising from attempting to equate realizable value of collateral to the DICAN Gross Valuation. Such charges may reduce DDMI's recovery on Cover Payment indebtedness owing to it.

47. In these circumstances, the DICAN Gross Valuation is likely to materially overstate realizable value. As the DDMI Collateral represents DDMI's sole readily available and realizable collateral for the Cover Payments (which were made on Dominion Diamond's behalf and directly funded the costs to extract and produce the DDMI Collateral), any continued reliance on the DICAN Gross Valuation will significantly and irreversibly prejudice DDMI. Dominion Diamond will suffer no such corresponding prejudice if the Realization Process is approved.

VI. RELIEF REQUESTED

48. DDMI respectfully requests that this Honourable Court grant the relief sought by DDMI in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2020

McCarthy Tétrault LLP

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

VII. LIST OF AUTHORITIES

Evidence

1. Excerpts from the JVA;

2. Transcript of proceedings in Action No. 2001-05630 (June 19, 2020);

Cases

3. *Canada North Group Inc. (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, rev'd on other grounds 2019 ABCA 314, leave to appeal to SCC granted March 26, 2020 (38871);

4. *Re Pacific National Lease Holding Corp* (1992), 1992 CanLII 427 (BC CA), 15 CBR (3d) 265, 72 BCLR (2d) 368 (CA);

Legislation

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

6. *Personal Property Security Act*, S.N.W.T. 1994, c.8;

7. *Mining Regulations*, N.W.T. Reg. 015-2014.

TAB 1

JVA PROVISIONS
(AS AMENDED)

1.5 “Assets” means the Properties, Products and all other personal property (which for greater certainty shall include all goods, intangibles, securities, money, documents of title, instruments and chattel paper together with all proceeds of and accessions to the foregoing) now or hereafter held by the Manager for the benefit of the Participants including without limitation all monies advanced from time to time by the Participants to the Manager pursuant to Section 9.2 hereof.

1.6 “Budget” means a detailed estimate of all Costs to be incurred by the Participants with respect to a Program.

…

1.8 “Costs” means all items of outlay and expense whatsoever, direct or indirect, with respect to Operations including without limitation those detailed in Sections 2.1 to 2.14 inclusive of the Accounting Procedures.

…

1.26 "Products" means all ores, minerals and mineral resources produced from the Properties under this Agreement including, without limitation, diamonds.

1.27 “Program” means a description in reasonable detail of the scope, direction and nature of the Operations to be conducted and objectives to be accomplished by the Manager for a year or any other reasonable period.

1.28 "Properties" means those mining claims described in Part 1 of Schedule A and all mining leases which may replace the same and all other interests in real property which are acquired and held subject to this Agreement, including without limitation the interests in, under and by virtue of the Underlying Agreements.

…

9.2 Cash Calls

Prior to the last day of each month the Manager shall submit to each Participant which has elected to contribute to the Program and Budget then in effect a billing for such Participant's share of estimated Costs for the next month. Within 20 days after receipt of each billing, each Participant shall advance to the Manager such estimated amount. Time is of the essence of payment of such billings. If the amount billed for the estimated Costs was less than the actual Costs incurred or charged during that month, the Manager may bill the Participants for the difference at any time, which the Participants will pay within ten days following receipt of billing. With the concurrence of the Management Committee, the Manager may establish more frequent billing cycles to minimize account balances.

…

9.4 Default in Making Contributions

(a) If a Participant elects to contribute to an approved Program and Budget and then defaults in its obligation to pay a contribution or cash call hereunder, the [non-defaulting Participant], by notice to the defaulting Participant, may at any time, but shall not be obligated to, elect to make such contribution or meet such cash call on behalf of the defaulting Participant (a "Cover Payment").

(b) Each Cover Payment shall constitute indebtedness due from the defaulting Participant to the [non-defaulting Participant], which indebtedness shall be payable upon demand and shall bear interest from the date incurred to the date of payment at the rate specified in Section 9.3.

(c) Each Participant hereby grants to the other, as security for repayment of the indebtedness referred to in Section 9.4 (b) above together with interest thereon, reasonable legal fees and all other reasonable costs and expenses incurred in collecting payment of such indebtedness and enforcing such security interest, a mortgage of and security interest in such Participant's right, title and interest in, to and under, whenever acquired or arising, its Participating Interest and the Assets. Each Participant hereby represents and warrants to the other that such mortgage and security interest ranks and will rank at all times prior to any and all other mortgages and security interests granted by or charging the property of such Participant. Each Participant hereby agrees to take all action necessary to perfect such mortgage and security interest and irrevocably appoints the other Participant as its attorney-in-fact to execute, file and record all financing statements and any other documents necessary to perfect or maintain such mortgage and security interest or otherwise give effect to the provisions hereof. Upon default being made in the payment of the indebtedness referred to in Section 9.4 (b) when due the non-defaulting Participant may on 30 days' notice to the defaulting Participant exercise any or all of the rights and remedies available to it as a secured party at common law, by statute or hereunder including the right to sell the property subject to a mortgage and charge hereunder. The non-defaulting Participant shall remain liable for any deficiency after any sale by the defaulting Participant of the property subject to the mortgage and charge. In the event the non-defaulting Participant enforces the mortgage or security interest pursuant to the terms of this section, the defaulting Participant waives any available right of redemption from and after the date of judgment, any required valuation or appraisement of the mortgaged or secured property prior to sale, any available right to stay execution or to require a marshalling of assets and any required bond in the event a receiver is appointed. Nothing in this Section 9.4(c) shall constitute a waiver or abridgement of any right of a lender to whom a Participant has granted security, provided, however, that nothing in this sentence shall limit the effectiveness of that waiver as against the Participant, or as against such a secured lender to the Participant or any other person to the extent the secured lender or other person is asserting a right of the Participant which the Participant has waived.

DIAVIK JOINT VENTURE AMENDING AGREEMENT (NO.2)

3. **...** (d) Abridgement of Notice Periods

Notwithstanding anything to the contrary in this Agreement or in the Original JVA, all of the periods of notice required in Section 9.4 of the Original JVA as amended shall be abridged such that no advance notice is required under any of the provisions of said Section 9.4 in the event that:

(i) a receiver and/or manager, liquidator, trustee, administrator or any other person with like powers for all or any part of the assets of a Participant shall be appointed, or if an order is made or a resolution passed for the winding up, dissolution or liquidation of a Participant or if a Participant ceases or demonstrates an intention to cease to carry on its business;

(ii) if a Participant becomes or acknowledges that it is insolvent, makes a voluntary assignment under the *Bankruptcy and Insolvency Act* or files a proposal under the *Bankruptcy and Insolvency Act* or seeks protection under the *Companies' Creditors Arrangement Act*, or any other debt moratorium or restructuring legislation; or

(iii) if proceedings are commenced against a Participant under the *Bankruptcy and Insolvency Act* or any similar legislation; or

(iv) if any person holding an encumbrance, lien, security interest or charge on the Participating Interest of a Participant, takes steps to enforce same against all or any portion of the Participating Interest.

TAB 2

Action No.: 2001-05630
E-File Name: CVQ20DOMINION
Appeal No.:_____

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

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

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

P R O C E E D I N G S

Calgary, Alberta
June 19, 2020

Transcript Management Services
Suite 1901-N, 601 – 5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

stay being extended to then, and I find that the company has been working in good faith. Despite all the mud that's been thrown Dominion's way, none has been thrown to the extent that it would bar me from finding that the stay should be allowed to be extended.

All right. So then the next -- the next part, 14, 15, there's no particular issue.

The next issue is in paragraph 16, and that brings up some of the issues that DDMI was arguing, and that -- that is dealing with segregation of the -- and the holding of the Dominion products from the Diavik Mine. DDMI has argued that they should have the ability to hold the whole 40 percent production that is coming in light of their cover payments that they're making, which are sort of like a DIP, as I had indicated in my prior judgment on this. But it seems to me right now, based on the evidence that I have in front of me, that it's not necessary for DDMI to have the ability to hold all of the 40 percent of the diamonds and that just the amounts that can be determined by the independent evaluator should be held, the -- the amounts that should cover the cover payments. And I understand that this is a moving target, so to the extent that we need to revisit this issue down the road, well, then DDMI, when it's appropriate -- because we'll come to that -- can raise this as an issue. But they have security with the diamonds to cover their cover payments, and they -- and they also have security in the mine, the -- the mine -- the 40 percent that Dominion owns in the mine. So without further and more specific evidence on this, I'm -- I'm loathe to change what would be the status quo, so I would keep section 16, that part of it, the same.

Now I'm just looking at 16(e). There was also argument -- there is the part that deals with the different times that DDMI can make an application dealing with these products, perhaps to enforce the terms of the charge, perhaps to try to sell the diamonds, et cetera, et cetera. So I'm comfortable with the deadlines that have been put in here, and I discussed with the monitor we can add to that (v) where it says that it could be on -- on application with leave of the Court so that there's an opening there which would probably be there anyways, but let's make it explicit in case something happens that is outside these times. But obviously, the intent is that -- and I think Mr. Collins was clear that he wasn't going to come back on Monday with another application. The intent is for the SISP process to get going, and this will limit the numbers of applications hopefully.

With respect to the rest of this, there's not that many changes we get to -- paragraph 41 I think is the next section we have to look at, and I'm just scrolling down. If everybody's scrolling at the time, would be good. It gets into this -- starting at after paragraph 37, the SISP procedure, stalking horse bid, which will now be APA, and break-up fee and expense charges. I believe there was qualification on paragraph 41 that is mentioned in the table that shows up in paragraph -- page 4-272 of the monitor's report. That's been accepted, so I don't need to deal with that. And there was also other changes that were accepted in

TAB 3

Court of Queen's Bench of Alberta

Citation: Canada North Group Inc (*Companies' Creditors Arrangement Act*), 2017 ABQB 550

Date: 20170911
Docket: 1703 12327
Registry: Edmonton

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

AND

In the Matter of a Plan of Arrangement of
Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Applicants

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

Introduction

[1] This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* [1](*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

[2] Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which

[1] RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

subordinate its deemed trust claims arising under the *Income Tax Act (ITA)*[2], *Canada Pension Plan Act*[3] *(CPP Act)*, and *Employment Insurance Act*[4] *(EI Act*) (collectively, the Fiscal Statutes)[5].

[3] CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

[4] In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

[5] For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

[6] No surprise given the nature of the proceedings, matters have unfolded quickly.

[7] The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*)[6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

[8] The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

---

[2] RSC, 1985, c 1 (5th Supp) 6.
[3] RSC 1985, c C-8.
[4] SC 1996, c 23.
[5] Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.
[6] RSC 1985, c B-3.

[9] On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

[10] On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

[11] On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

[12] By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

[13] Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

[14] Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

[15] On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

[16] Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

[17] On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The *CCAA* and Judicial Decision Making

[18] The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

[19] The *CCAA* process "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."[7]

[20] When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival.[8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, ***Sun Indalex Finance, LLC v United Steelworkers,***[9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.[10]

[21] The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail.[11] Typically, this requires balancing multiple interests.

[22] *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in ***Century Services***, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring.[12]

[23] The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in ***Century Services***:

> 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

[7] ***Century Services Inc v Canada (Attorney General***), 2010 SCC 60 at para 77, [2010] 3 SCR 379.
[8] ***Century Services*** at paras 15, 17.
[9] ***Sun Indalex Finance, LLC v United Steelworkers,*** 2013 SCC 6 at para 205, [2013] 1 SCR 271.
[10] ***Indalex*** at para 105.
[11] ***Hong Kong Bank of Canada v Chef Ready Foods Ltd*** (1990), [1991] 2 WWR 136 at 140, 51 BCLR (2d) 84 (BCCA).
[12] ***Century Services*** at paras 64-66.

achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit[13].

[24] In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play.[14]

A Brief History of Deemed Trust Litigation

[25] While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with ***Royal Bank of Canada v Sparrow Electric Corp***.[15]

[26] The contest in ***Sparrow Electric*** was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act*[16] and the Alberta *Personal Property Security Act.*[17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently, CRA's deemed trust had no property to attach to when it later arose. In response to ***Sparrow Electric,*** Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

[27] The next noteworthy case is ***First Vancouver Finance v MNR***,[18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

[28] The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);

b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);

c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and

d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in ***Sparrow Electric***) (at para 27-28).

[29] The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

---

[13] ***Century Services*** at para 70.
[14] ***Century Services*** at paras 65 and 70.
[15] ***Royal Bank of Canada v Sparrow Electric Corp,*** [1997] 1 SCR 411.
[16] SC 1991, c 46.
[17] SA 1988, c P-4.05.
[18] ***First Vancouver Finance v MNR,*** 2002 SCC 49, [2002] 2 SCR 720.

> ... to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

[30] ***First Vancouver*** was considered in the 2007 decision, ***Temple City Housing Inc (Companies' Creditors Arrangement Act)***,[19] and again in June 2017 in ***Re Rosedale Farms Limited, Hassett Holdings Inc, Resurgame Resources***.[20]

[31] In ***Temple City***, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

[32] Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

[33] The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

[34] Next is the seminal decision in ***Century Services***, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA).[21] Despite the different deemed trust at issue, ***Century Services*** is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

[35] ***Rosedale Farms*** concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of ***Temple City***. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

[36] I will return to the conflicting views expressed in ***Temple City*** and ***Rosedale Farms*** in the context of the priority analysis.

The Statutory Provisions

[37] The relevant statutory provisions are set out below. All emphasis is mine.

[38] *CCAA* s 2(1) defines the term, "secured creditor" as including:

---

[19] ***Temple City Housing Inc (Companies' Creditors Arrangement Act),*** 2007 ABQB 786, 42 CBR (5th) 274, leave to appeal denied ***Canada v Temple City Housing Inc***, 2008 ABCA 1, 43 CBR (5th) 35.

[20] ***Re Rosedale Farms Limited, Hassett Holdings Inc, Resurgame Resources,*** 2017 NSSC 160.

[21] RSC 1985, c E-15.

> **a holder of ... a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

[39] *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

> **any interest in**, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

[40] The *EI Act* and *CPP Act* cross-reference these definitions.

[41] The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) **The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**

[42] *CCAA* s 37, previously s 18.2, reads:

> 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.
>
> (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 (each of which is in this subsection referred to as a "federal provision")… .

[43] *ITA* ss 227(4) and (4.1) read:

> **(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.
>
> (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 and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) 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 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
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, 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 such a security interest

> **and is property beneficially owned by Her Majesty** notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[44] *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

[45] With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

[46] The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[47] The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

[48] The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause.[22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

[49] CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

[50] Recourse through the comeback clause is available when circumstances change. As explained in ***Re Pacific National Lease Holding Corp***:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems.[23] [emphasis added]

---

[22] ***Re Muscletech Research & Development*** (2006), 19 CBR (5th) 54 (ONSC) at para 5; ***Re Comstock Canada Ltd***, 2013 ONSC 4756, 4 CBR (6th) 47 at para 49; ***Re Fairview Industries Ltd*** (1991), 109 NSR (2d) 12, 11 CBR (3d) 43 (SCTD); ***Re CanaSea PetroGas Group Holdings Ltd*** (2014), 18 CBR (6th) 283 at paras 13-14.

[23] ***Re Pacific National Lease Holding Corp*** (1992), 15 CBR (3d) 265, 72 BCLR (2d) 368 (CA) at para 30.

[51] Likewise, in ***Re Royal Oak Mines Inc,*** Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring.[24]

[52] Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause.[25]

[53] An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence.[26]

[54] Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

[55] Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of ***Re Algoma Steel Inc***,[27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

[56] Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in ***Temple City***.[28]

[57] Next, I will discuss service and timing concerns.

Service

[58] It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence.[29]

[59] As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

[60] Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of

---

[24] ***Re Royal Oak Mines Inc*** (1999), 6 CBR (4th) 314 (ONSCJ GD) at para 28.
[25] ***Re CanaSea PetroGas Group Holdings Ltd***.
[26] ***Elias v Hutchison*** (1980), 12 Alta LR (2d) 241 (at para 6), 35 CBR (NS) 30 (QB), aff'd (1981), 121 DLR (3d) 95, 37 CBR (NS) 149 (ABCA); ***Christiansen v Paramount Developments Corp***, 1998 ABQB 1005 (at para 24), 8 CBR (4th) 220 ; ***Fitch v Official Receiver*** (1995), [1996] 1 WLR 242 (UK CA); ***Re Lyall*** (1991), 8 CBR (3d) 82 (BCSC).
[27] ***Re Algoma Steel Inc***, [2001] OJ No 1994 (Ont Sup Ct J), leave to appeal refused, 147 OAC 291, 25 CBR (4th) 194 (CA).
[28] At para 14.
[29] ***Re Concrete Equities Inc***, 2012 ABCA 266 at paras 19, 24.

business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

[61] Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

[62] CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

[63] The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

[64] Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

[65] The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

[66] These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

[67] In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, ***Algoma Steel*** supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

[68] While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question."[30]

[69] Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

[70] CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

[71] The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

[72] Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

[73] I turn next to who bears the onus.

The Onus

[74] The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding."[31]

[75] In ***Re General Chemical Canada Ltd***,[32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

[76] In contrast, in ***Re Target Canada Co***, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied."[33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

[77] Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.

---

[30] ***Muscletech***, at para 5.
[31] ***Royal Oak***, at para 28.
[32] ***Re General Chemical Canada Ltd*** (2005), 7 CBR (5th) 102 (ONSC) at para 2.
[33] ***Re Target Canada Co,*** 2015 ONSC 303, 22 CBR (6th) 323 at para 82.

- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

[78] I now turn to the substantive priority issue.

Who has priority?

[79] It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

[80] Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

[81] CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act... property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

[82] CRA asserts that these words take it beyond a mere secured creditor because they do not just **deem** the Crown to be the owner of the interest, but rather, says that it **is** the owner.

[83] This is the same position CRA advocated in ***Temple City***, where Romaine J distilled these features of tax deemed trusts from ***First Vancouver***:

- The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and
- In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

[84] Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*.[34]

---

[34] ***Temple City,*** at para 13.

[85] Moir J in ***Rosedale Farms*** disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in ***First Vancouver*** was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted.[35]
- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust.[36]
- Reliance on the *ITA* definition of "secured interest" is misguided.[37]

[86] Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in ***First Vancouver***. However, as I read ***Temple City***, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

[87] ***Rosedale Farms*** is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment ... and includes a ... deemed or actual trust ... ."

[88] Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

[89] For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

[90] It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

[91] *ITA* s 227(4.1) opens with these words:

> **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

[35] ***Rosedale Farms***, at para 39.
[36] *Ibid,* para 35.
[37] *Ibid,* para 29.
[38] ***Rizzo & Rizzo Shoes Ltd. (Re),*** [1998] 1 SCR 27 at para 21.

> 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 notwithstanding any security interest in such property … . [emphasis added] (Notwithstanding Provision)

[92] CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in ***Century Services*** (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

[93] While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

[94] CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] … is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[95] The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

[96] In ***Thibodeau v Air Canada***,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

[97] Further, in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ... .

[39] ***Thibodeau v Air Canada***, 2014 SCC 67, [2014] 3 SCR 340.
[40] ***Thibodeau*** at para 92.
[41] ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4, [2006] 1 SCR 140.

> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
>
> As in any statutory interpretation exercise ... courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co***., at para. 102.[42] [emphasis added]

[98] Deschamps J observed in ***Century Services***, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

[99] She also quoted with approval the reasons of Doherty JA in ***Elan Corp v Comiskey***[43] (Doherty JA was dissenting):

> 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.

[100] In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[44]

[101] In ***Indalex***, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> … case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[45]

[102] The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

---

[43] ***Elan Corp v Comiskey*** (1990), 41 OAC 282 (ONCA) at para 57.
[44] Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.
[45] ***Indalex*** at para 59.

[103] Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

[104] Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work – where it has the most significance is at the end.

[105] Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

[106] Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> ... priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

[107] CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": ***First Vancouver*** at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

[108] The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

[109] CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

[110] The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

[111] It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

[112] I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority **only** to those

charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over **all other** security interests, but those ordered under ss 11.2, 11.51, and 11.52.

[113] A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

[114] For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Heard on the 11th day of August, 2017.
Dated at the City of Edmonton, Alberta this 11th day of September, 2017.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Darren R Bieganek, QC
Duncan Craig LLP
for Monitor, Ernst & Young

George F Body
Department of Justice Canada
for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue

Jeffrey Oliver
Cassels Brock & Blackwell LLP
for the Business Development Bank of Canada

Stephanie A Wanke
DLA Piper (Canada) LLP
for the Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

TAB 4

DATE OF RELEASE:
November 4, 1992

No. CA016047
Vancouver Registry

COURT OF APPEAL FOR BRITISH COLUMBIA

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE
MR. JUSTICE MACFARLANE
IN CHAMBERS

Vancouver, B.C.

October 22, 1992

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT R.S.C. 1985, C. C-36

AND:

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, C.59

AND:

IN THE MATTER OF PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC. and PAC NAT EQUITIES CORPORATION

PETITIONERS

H.C. Ritchie Clark and
D.D. Nugent — counsel for the petitioners (appellants)
W.E.J. Skelly — Sun Life Trust Company
M.P. Carroll — Mutual Life Assurance Company of Canada
W.C. Kaplan — Commcorp Financial Services Inc. and National Trust
H.W. Veenstra — National Bank of Canada

---

1 This is an application for leave to appeal an order of Mr. Justice Brenner pronounced the 17th day of August, 1992, pursuant to the ***Companies Creditors Arrangement Act*** R.S.C. 1985, c. C-36 (the "C.C.A.A.").

2 The petitioners had become insolvent prior to July 22, 1992, when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a re-organization of their affairs as contemplated by the C.C.A.A..

3 Mr. Justice Brenner made an *ex parte* order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

4 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000.00, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and officers from potential personal liability under the ***Employment Standards Act*** S.B.C. 1979, c.10 for failing to make the payments mandated by that statute.

5 On July 31, 1992, Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the *ex parte* stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not, without further order of the Court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

6 The merits were argued in August and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

7 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners

to compel payment of statutory severance payments are stayed.

9 The appeal concerns the order made under the first paragraph of the order, not against the stay granted in the second paragraph.

10 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in ***Westar Mining Ltd.***, unreported reasons for judgment, August 11, 1992 (which dealt with a similar issue), and the application of that principle to the facts of this case.

11 The essential facts are that the petitioners are a group of inter-related companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000.00 in lease portfolios under administration. They had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his

reasons on August 17, 1992, had been reduced to 60. The provisions of the ***Employment Standards Act*** had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

12 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000.00 and for vacation pay in an amount of approximately $150,000.00 for a total potential liability of $1,000,000.00. I understand from counsel that once the Funders are repaid there may be as much as $61,000,000.00 available to meet other liabilities.

13 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000.00 is required.

14 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other

respondents, who are 27 other financial institutions, referred to in the material as the "Funders". The Funders advanced monies and took security, in part by way of assignment of the lease revenue stream. The monies advanced by the Funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

15 The arrangements with the Funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the Funders.

16 The petitioners got into financial difficulties, which they revealed to the Funders. The Funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought protection under the C.C.A.A..

17 The appellants seek an order of this Court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the ***Employment Standards Act***) and permitting them to continue to maintain the Trust Funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

18 The petitioners assert that Mr. Justice Brenner erred:-

1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the ***Employment Standards Act***, requiring the appellants to pay all the statutory payments in full, and thereby order the appellants to breach a mandatory statute regarding statutory payments.

2. In ruling that he had the inherent jurisdiction under the ***Companies Creditors Arrangement Act*** or otherwise to order the appellants to breach the ***Employment Standards Act*** regarding statutory payments and thereby order the petitioners to commit offences under such statute.

3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.

4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.

5. In suspending the provisions of the July 23, 1992 order authorizing the Trust Fund.

6. In failing to provide any protection to the directors and officers of the appellants by way of the Trust Fund when ordering the petitioners to breach the ***Employment Standards Act***, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

19 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted re-organization of the affairs of a company, and which is intended to prevent a

creditor obtaining a preference which it would not have if the attempted re-organization fails, and bankruptcy occurs.

20 I think that the answer is given in ***Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*** (1990), B.C.L.R. (2d) 84. In that case Mr. Justice Gibbs, at pp.88-89, said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the Court is called upon to play a kind of supervisory role to preserve the status quo to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, 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.

21 In the same case, at p.92, Mr. Justice Gibbs considered whether security given under the ***Bank Act*** gave preference to the Bank over other creditors, despite the provisions of the C.C.A.A.. He said:

> It is apparent from these excerpts and from the wording of the statute, that in contrast with ss. 178 and 179 of the ***Bank Act*** which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors,

> creditors and employees. If a bank's right in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

22 Mr. Justice Brenner, after reviewing that and other authorities, said:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
> (3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company.
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

Counsel do not suggest that statement of principles is incorrect.

23 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in ***Westar***, and concluded:

> In my view, to allow the Petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

24 He said earlier that he did not understand Mr. Justice Macdonald to be saying in ***Westar*** that in no case should a court ever authorize severance payments when a company is operating under the C.C.A.A.

25 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a re-organization was being attempted under the C.C.A.A.

26 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. 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 C.C.A.A. 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 re-organization is being attempted.

27 So far as the directors and officers are concerned, they were personally liable for potential claims under the ***Employment Standards Act*** before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

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

29 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

30 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

31 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than

a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

32 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

33 In all the circumstances I would refuse leave to appeal.

"A.B.M. JA"

October 28, 1992
Victoria, B.C.

TAB 5

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to October 5, 2020

Last amended on November 1, 2019

À jour au 5 octobre 2020

Dernière modification le 1 novembre 2019

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

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

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to October 5, 2020. The last amendments came into force on November 1, 2019. Any amendments that were not in force as of October 5, 2020 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 5 octobre 2020. Les dernières modifications sont entrées en vigueur le 1 novembre 2019. Toutes modifications qui n'étaient pas en vigueur au 5 octobre 2020 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, 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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has 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.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) 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 10 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*;

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

TAB 6

PERSONAL PROPERTY SECURITY ACT

S.N.W.T. 1994,c.8
In force May 7, 2001;
Except s.1(1), 42, 43(1.1), 71 which came into force April 27, 2001;
SI-004-2001

LOI SUR LES SÛRETÉS MOBILIÈRES

L.T.N.-O. 1994, ch. 8
En vigueur le 7 mai 2001, à l'exception de ses articles 42 et 71 et de ses paragraphes 1(1) et 43(1.1) qui sont entrés en vigueur le 27 avril 2001;
TR-004-2001

AMENDED BY

S.N.W.T. 1997,c.15
In force April 1, 1998;
SI-006-98
S.N.W.T. 1998,c.5
S.N.W.T. 1999,c.5
S.N.W.T. 2003,c.5
S.N.W.T. 2006,c.23
S.N.W.T. 2007,c.21
In force April 1, 2008;
SI-006-2007
S.N.W.T. 2009,c.12
S.N.W.T. 2009,c.14
In force August 1, 2009;
SI-005-2009
S.N.W.T. 2010,c.16
S.N.W.T. 2011,c.23
In force April 1, 2012
S.N.W.T. 2012,c.18
S.N.W.T. 2018,c.18
S.N.W.T. 2018,c.15
In force February 15, 2019
Except sections 1-2, 4-6, 8-11, 13-15 and 18-29
SI-001-2019

MODIFIÉE PAR

L.T.N.-O. 1997, ch. 15
En vigueur le 1er avril 1998;
TR-006-98
L.T.N.-O. 1998, ch. 5
L.T.N.-O. 1999, ch. 5
L.T.N.-O. 2003, ch. 5
L.T.N.-O. 2006, ch. 23
L.T.N.-O. 2007, ch. 21
En vigueur le 1er avril 2008;
TR-006-2007
L.T.N.-O. 2009, ch. 12
L.T.N.-O. 2009, ch. 14
En vigueur le 1er août 2009;
TR-005-2009
L.T.N.-O. 2010, ch. 16
L.T.N.-O. 2011, ch. 23
En vigueur le 1er avril 2012
L.T.N.-O. 2012, ch. 18
L.T.N.-O. 2018, ch. 18
L.T.N.-O. 2018, ch. 15
En vigueur le 15 février 2019 sauf les articles 1-2, 4-6, 8-11, 13-15 et 18-29, TR-001-2019

This consolidation is not an official statement of the law. It is an office consolidation prepared by Legislation Division, Department of Justice, for convenience only. The authoritative text of statutes can be ascertained from the *Revised Statutes of the Northwest Territories, 1988* and the Annual Volumes of the Statutes of the Northwest Territories.

Any Certified Bills not yet included in the Annual Volumes can be obtained through the Office of the Clerk of the Legislative Assembly.

Certified Bills,copies of this consolidation and other G.N.W.T. legislation can be accessed on-line at

https://www.justice.gov.nt.ca/en/browse/laws-and-legislation/

La présente codification administrative ne constitue pas le texte officiel de la loi; elle n'est établie qu'à titre documentaire par les Affaires législatives du ministère de la Justice. Seules les lois contenues dans les *Lois révisées des Territoires du Nord-Ouest (1988)* et dans les volumes annuels des Lois des Territoires du Nord-Ouest ont force de loi.

Les projets de loi certifiés ne figurant pas dans les volumes annuels peuvent être obtenus en s'adressant au bureau du greffier de l'Assemblée législative.

Les projets de loi certifiés, copies de la présente codification administrative et autres lois du G.T.N.-O. sont disponibles en direct à l'adresse suivante :

https://www.justice.gov.nt.ca/en/browse/laws-and-legislation/

Payment from Consolidated Revenue Fund

(5) When an award of damages has been made in favour of a claimant and the time for appeal has expired, or when an appeal is taken and disposed of in whole or in part in favour of the claimant, the Comptroller General shall authorize payment out of the Consolidated Revenue Fund, subject to subsection (1), of the amount specified in the judgment.

Paiement sur le Trésor

(5) Lorsque des dommages-intérêts ont été accordés et que le délai d'appel est expiré ou qu'un appel a été accueilli en faveur du réclamant en tout ou en partie, le contrôleur général autorise le paiement sur le Trésor, sous réserve du paragraphe (1), du montant précisé par le jugement.

PART V
RIGHTS AND REMEDIES ON DEFAULT

PARTIE V
DROITS ET RECOURS EN CAS DE DÉFAUT

Where Part does not apply

55. (1) This Part does not apply to

(a) a transaction referred to in subsection 2(2); or

(b) a transaction between a pledgor and a pawnbroker.

Non-application de la présente partie

55. (1) La présente partie ne s'applique pas :

a) à l'opération visée au paragraphe 2(2);

b) à l'opération conclue entre un prêteur et un emprunteur sur gage.

Rights and remedies cumulative

(2) The rights and remedies referred to in this Part are cumulative.

Droits et recours cumulatifs

(2) Les droits et recours prévus à la présente partie sont cumulatifs.

Definition: "secured party"

(3) In this section, "secured party" includes a receiver.

Définition : «créancier garanti»

(3) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Choice of procedure

(4) Subject to any other Act or rule of law to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may

(a) proceed under this Part as to the personal property; or

(b) proceed as to both the land and the personal property in which case

(i) the rights, remedies and duties of the secured party in respect of the land apply to the personal property with such modifications as the circumstances require as if the personal property were land, and

(ii) sections 63 and 64 apply to the personal property but this Part does not otherwise apply.

Choix de la procédure

(4) Sous réserve de toute autre loi ou règle de droit à l'effet contraire, lorsque la même obligation est garantie par un intérêt dans un bien-fonds et par une sûreté régie par la présente loi, le créancier garanti a le choix entre :

a) d'une part, les recours prévus à la présente partie quant aux biens meubles;

b) d'autre part, les recours dont il dispose quant au bien-fonds et aux biens meubles, auquel cas :

(i) ses droits, ses recours et ses obligations à l'égard du bien-fonds s'appliquent aux biens meubles, avec les adaptations nécessaires, comme si ceux-ci étaient des biens-fonds,

(ii) à l'exception des articles 63 et 64 qui s'appliquent aux biens meubles, la présente partie ne s'applique pas.

Rights of other secured parties

(5) Paragraph (4)(b) does not limit the rights of a secured party who has a security interest in the personal property taken before or after the security interest referred to in subsection (4).

Droits des autres créanciers garantis

(5) L'alinéa (4)b) n'a pas pour effet de limiter les droits d'un créancier garanti qui a obtenu une sûreté sur les biens meubles avant ou après la constitution de la sûreté mentionnée au paragraphe (4).

Further rights

(6) A secured party referred to in subsection (5)

(a) has standing in proceedings taken in accordance with paragraph (4)(b), and

Droits supplémentaires

(6) Le créancier garanti visé au paragraphe (5) :

a) a qualité pour participer aux instances introduites en conformité avec l'alinéa (4)b);

(b) may apply to the Supreme Court for the conduct of a judicially supervised sale under paragraph (4)(b) and the Supreme Court may grant the application.

b) peut demander à la Cour suprême de tenir une vente judiciaire en vertu de l'alinéa (4)b), auquel cas la Cour suprême peut accueillir la demande.

Allocation of price to land and personal property

(7) For the purpose of distributing the amount received from the sale of the land and personal property where the purchase price is not allocated to the land and the personal property separately, the amount of the purchase price that is attributable to the sale of the personal property is that proportion of the total price that the market value of the personal property at the time of the sale bears to the market value of the land and the personal property.

Allocation du prix au bien-fonds et aux biens meubles

(7) Aux fins de la distribution du montant obtenu par suite de la vente du bien-fonds et des biens meubles dans le cas où le prix de vente n'est pas alloué au bien-fonds et aux biens meubles séparément, le montant du prix de vente qui est attribuable à la vente des biens meubles correspond au pourcentage du prix total que représente la valeur marchande des biens meubles au moment de la vente par rapport à la valeur marchande du bien-fonds et des biens meubles.

No merger

(8) A security interest does not merge merely because a secured party has reduced the claim to judgment. S.N.W.T. 2009,c.12,s.15(7).

Confusion

(8) Le jugement obtenu par un créancier garanti pour une partie de sa créance n'opère pas confusion de sûreté.

Definition: "secured party"

56. (1) In this section, "secured party" includes a receiver.

Sens de «créancier garanti»

56. (1) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Rights and remedies

(2) Where the debtor is in default under a security agreement

(a) except as provided by subsection (3), the secured party has against the debtor only
  (i) the rights and remedies provided in the security agreement,
  (ii) the rights, remedies and obligations provided in this Part and sections 36, 37, 37.1 and 38, and
  (iii) when in possession or control of the collateral, the rights, remedies and obligations provided in sections 17 and 17.1; and

(b) the debtor has against the secured party
  (i) the rights and remedies provided in the security agreement,
  (ii) the rights and remedies provided by any other Act or rule of law not inconsistent with this Act, and
  (iii) the rights and remedies provided in this Part and in sections 17 and 17.1.

Droits et recours

(2) Lorsque le débiteur est en défaut aux termes d'un contrat de sûreté :

a) sous réserve du paragraphe (3), le créancier garanti n'a contre le débiteur :
  (i) que les droits et recours stipulés dans le contrat de sûreté,
  (ii) que les droits, recours et obligations prévus par la présente partie et par les articles 36, 37, 37.1 et 38,
  (iii) s'il est en possession des biens grevés ou qu'il en a la maîtrise, que les droits, recours et obligations prévus par les articles 17 et 17.1;

b) le débiteur a contre le créancier garanti :
  (i) les droits et recours stipulés dans le contrat de sûreté,
  (ii) les droits et recours prévus par toute autre loi ou règle de droit compatible avec la présente loi,
  (iii) les droits et recours prévus par la présente partie et les articles 17 et 17.1.

Limitation on waiver of rights

(3) Except as provided in sections 17 and 17.1, 59, 60 and 62, no provision of sections 17 and 17.1 or 58 to 65, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise. S.N.W.T. 2009,c.14,s.107(27).

Restriction à la renonciation aux droits

(3) Sous réserve des articles 17 et 17.1, 59, 60 et 62, les droits conférés au débiteur et les obligations imposées au créancier garanti en vertu des articles 17 et 17.1 ou 58 à 65 ne peuvent faire l'objet d'une renonciation ou d'une modification, notamment par contrat. L.T.N.-O. 2009, ch. 14, art. 107(27).

Definition: "secured party"

57. (1) In this section, "secured party" includes a receiver.

Collection of payments

(2) Where a debtor is in default under a security agreement, a secured party is entitled

(a) if the debtor has assigned an intangible, chattel paper, instrument or security to the secured party, to notify the assignee on the intangible or chattel paper or the obligor on the instrument or security to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification;

(b) to take control of any proceeds to which the secured party is entitled under section 28; and

(c) to apply any security in the form of a debt obligation, money, account or instrument taken as collateral to the satisfaction of the obligation secured by the security interest.

Deduction for expenses

(3) A secured party may deduct reasonable expenses of collection from money held as collateral or an amount collected from a debtor on an intangible or chattel paper or from an obligor under an instrument or security.

Notice to debtor

(4) A secured party who enforces a security interest in an intangible, security, chattel paper or instrument under paragraph (2)(a) or (b) shall give notice to the debtor not later than 15 days after doing so.

Definition: "secured party"

58. (1) In this section, "secured party" includes a receiver.

Right of seizure or repossession

(2) Subject to sections 36, 37, 37.1 and 38 and subsection (3) of this section, on default under a security agreement

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law;

(b) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate storage facilities are not readily available, the collateral may be seized without removing it from the debtor's

Sens de «créancier garanti»

57. (1) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Recouvrement des paiements

(2) Lorsqu'un débiteur est en défaut aux termes d'un contrat de sûreté, le créancier garanti a le droit :

a) si le débiteur lui a cédé un bien meuble incorporel, un acte mobilier, un effet ou une valeur mobilière, d'aviser le cessionnaire du bien meuble incorporel ou de l'acte mobilier, ou l'obligé de l'effet ou de la valeur mobilière, qu'il doit payer le créancier garanti, que le cédant ait, avant l'avis perçu ou non des paiements que les biens grevés;

b) de prendre possession du produit auquel il a droit en vertu de l'article 28;

c) d'utiliser tout argent, compte, effet ou valeur mobilière sous forme de titre de créance pris sur les biens grevés pour l'exécution de l'obligation garantie par la sûreté.

Déduction des frais de recouvrement

(3) Le créancier garanti peut déduire les frais normaux de perception sur les sommes détenues à titre de biens grevés ou sur tout montant perçu auprès du débiteur en vertu d'un bien meuble incorporel ou d'un acte mobilier ou du débiteur d'un effet ou valeur mobilière.

Avis au débiteur

(4) Le créancier garanti qui fait réaliser une sûreté sur un bien meuble incorporel, une valeur mobilière, un acte mobilier ou un effet en vertu de l'alinéa 2a) ou b) doit, 15 jours au plus tard après l'avoir fait, en aviser le débiteur.

Sens de «créancier garanti»

58. (1) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Droit de saisie ou de reprise de possession

(2) Sous réserve des articles 36, 37, 37.1 et 38 et du paragraphe (3) du présent article, en cas de défaut aux termes d'un contrat de sûreté :

a) le créancier garanti a, sauf convention contraire, le droit de prendre possession des biens grevés ou d'exécuter autrement le contrat de sûreté par tout moyen permis par la loi;

b) si l'intérêt du créancier garanti est rendu opposable par enregistrement, les biens grevés, lorsqu'ils consistent en des objets de nature difficile à enlever des locaux du débiteur ou sont de nature telle qu'il n'est pas facile de trouver des

premises in any manner by which a Sheriff may seize without removal, if the interest of the secured party is perfected by registration;

(c) where paragraph (b) applies, the secured party may dispose of collateral on the debtor's premises but, in doing so, shall cause the person in possession of the premises no greater inconvenience or cost than is necessarily incidental to the disposal;

(d) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and a method of enforcement that is available with respect to the document of title is also available, with all necessary modifications, with respect to the goods covered by it.

installations d'entreposage convenables, peuvent être saisis sans être enlevés des locaux du débiteur de toutes les manières mises à la disposition d'un shérif pour effectuer une saisie sans déplacer les objets;

c) le créancier garanti peut, si l'alinéa b) s'applique, aliéner les biens grevés qui se trouvent dans les locaux du débiteur, auquel cas il doit faire en sorte que la personne en possession des locaux ne subisse pas plus de dérangement et ne fasse pas plus de frais qu'il ne faut;

d) si les biens grevés sont des titres, le créancier garanti peut procéder soit quant aux titres, soit quant aux objets qu'ils visent, et les moyens qui sont à sa disposition relativement aux titres peuvent également être utilisés, avec les adaptations nécessaires, relativement aux objets visés par ces titres.

Persons authorized to seize

(3) Subject to an order made under section 63, seizure of property to enforce rights under a security agreement, other than seizure by a receiver, shall be made only by the Sheriff or a person authorized in writing to do so by the Sheriff.

(3) Sous réserve de toute ordonnance rendue en application de l'article 63, la saisie de biens en vue de l'exercice de droits prévus par un contrat de sûreté, à l'exclusion d'une saisie faite par un séquestre, ne peut être effectuée que par le shérif ou par la personne qu'il autorise par écrit à cette fin.

Personnes autorisées à effectuer une saisie

Definition: "Sheriff"

(4) In subsections (5) to (19), "Sheriff" includes a person authorized to seize property under subsection (3).

(4) Aux paragraphes (5) à (19), «shérif» s'entend notamment de la personne autorisée à saisir des biens en vertu du paragraphe (3).

Sens de «shérif»

Warrant to seize

(5) No seizure shall be made unless the secured party or the agent of the secured party has executed and delivered to the Sheriff a warrant in the prescribed form.

(5) Le shérif n'effectue une saisie que si le créancier garanti ou son mandataire a signé un mandat en la forme réglementaire et le lui a remis.

Mandat de saisie

Security

(6) Where a warrant is delivered for execution, the Sheriff may refuse to make or continue a seizure unless he or she has been provided with the security he or she considers reasonably sufficient to indemnify him or her in respect of his or her fees, charges and expenses and any claims for damages, including claims by the debtor or a third party, in respect of the seizure and anything done in relation to the seizure.

(6) Lorsqu'un mandat lui est remis en vue de son exécution, le shérif peut refuser de faire une saisie ou de la poursuivre à moins qu'on ne lui fournisse le cautionnement qu'il estime normalement suffisant pour couvrir ses frais et toute réclamation en dommages-intérêts, y compris la réclamation du débiteur ou d'un tiers, à l'égard de la saisie et des actes liés à la saisie.

Cautionnement

Assignment of bond

(7) Where a bond of indemnity is provided under subsection (6), the bond is assignable to any person, other than the debtor, who claims an interest in the property seized and must contain a condition that the persons executing the bond are liable for the damages, costs and expenses

(a) that the Sheriff or a person claiming an

(7) Le cautionnement fourni en vertu du paragraphe (6) peut être cédé à toute personne, à l'exception du débiteur, qui prétend avoir un intérêt dans les biens saisis. Il doit comporter une disposition qui prévoit que les cautions sont responsables des dommages et des frais :

a) que le shérif ou la personne qui prétend

Cession du caution-nement

interest in the property might incur by reason of the seizure and any subsequent proceedings including interpleader proceedings, if any; and

(b) that are not recovered from any other persons who are liable for the payment of those damages, costs and expenses.

avoir un intérêt dans les biens pourraient subir du fait de la saisie et de toute autre procédure subséquente, y compris les procédures d'entreplaiderie;

b) qui ne sont pas recouvrés des autres personnes qui sont tenues de les payer.

Reference to judge of Supreme Court

(8) Where a difference arises as to the bond to be provided pursuant to subsection (6), the Sheriff shall, on the request of the creditor, refer the matter to a judge of the Supreme Court for determination.

(8) Lorsqu'un différend survient relativement au cautionnement qui doit être fourni en vertu du paragraphe (6), le shérif est tenu, à la demande du créancier, de renvoyer la question à un juge de la Cour suprême pour que celui-ci en décide.

Renvoi à un juge de la Cour suprême

Seizure

(9) To make a seizure of property, the Sheriff may

(a) take physical possession of the property;

(b) give to the debtor or the person in possession of the collateral a notice of seizure in the prescribed form;

(c) post in a conspicuous place on the premises on which the property is located at the time of seizure a notice of seizure in the prescribed form; or

(d) in the case of property in the form of goods, affix to the goods a sticker in the prescribed form.

(9) Afin d'effectuer une saisie, le shérif peut, selon le cas :

a) prendre possession physique des biens;

b) donner au débiteur ou à la personne en possession des biens grevés un avis de la saisie en la forme réglementaire;

c) afficher à un endroit bien en vue dans les locaux, où les biens se trouvent au moment de la saisie, un avis de la saisie en la forme réglementaire;

d) dans le cas de biens sous forme d'objets, placer sur ceux-ci un autocollant en la forme réglementaire.

Saisie

Seizure of licence

(9.1) Where the collateral is a licence, the Sheriff may seize the collateral by giving notice to the debtor and to the grantor, or where there is a successor to the grantor, to the successor of the grantor.

(9.1) Lorsque les biens grevés sont des licences, le shérif peut saisir les biens grevés en avisant le débiteur et le concédant, ou lorsqu'il y a un successeur au concédant, en avisant le successeur de ce dernier.

Saisie de la licence

Continuing seizure

(10) A seizure by the Sheriff made under subsection (9) or (9.1) continues until possession of the property is surrendered to the secured party, or the agent of the secured party, or the seizure is released.

(10) La saisie visée au paragraphe (9) ou (9.1) se poursuit jusqu'à ce que la possession des biens soit remise au créancier garanti ou à son mandataire ou qu'il soit donné mainlevée de la saisie.

Poursuite de la saisie

Entry into buildings to effect seizure

(11) For the purpose of making a seizure of property or obtaining the possession of property that has previously been seized, the Sheriff may, where it is not possible otherwise to effect the seizure or to obtain possession of the goods previously seized, either by himself or herself or with the assistance of the persons that he or she may request, break open the door of any building, other than a private dwelling-house, in which the property liable to seizure are contained and, on the order of a judge of the Supreme Court, may similarly break open the door of a private dwelling-house.

(11) Afin d'effectuer une saisie de biens ou de prendre possession de biens déjà saisis, le shérif peut, lorsqu'il est impossible d'agir autrement, soit seul soit avec l'aide des personnes à qui il fait appel, forcer la porte de tout bâtiment, à l'exclusion d'une maison d'habitation privée, dans lequel se trouvent les biens pouvant être saisis. Il peut, de la même façon, forcer la porte d'une maison d'habitation privée sur ordonnance d'un juge de la Cour suprême.

Accès aux lieux

Where entry effected

(12) Where a building or dwelling-house is broken into under subsection (11), the person so doing shall ensure that the building or dwelling-house is properly

(12) La personne qui force la porte d'un bâtiment en vertu du paragraphe (11) fait en sorte que le bâtiment ou la maison d'habitation privée soit bien

Obligation du saisissant

secured after the property has been seized or possession has been obtained.

fermé après la saisie ou la prise de possession des biens.

Appointment of bailee by Sheriff

(13) The Sheriff may, at any time after making a seizure, appoint the debtor or some other person in possession of the property seized as bailee of the Sheriff, where the debtor or such other person executes a written undertaking in the prescribed form to hold the property as bailee for the Sheriff and to deliver up possession of the property to the Sheriff on demand, and property held by a bailee is deemed to be held under seizure by the Sheriff.

(13) Le shérif peut, en tout temps après la saisie, nommer le débiteur ou une autre personne en possession des biens saisis à titre de dépositaire, si le débiteur ou l'autre personne signe un engagement en la forme réglementaire selon lequel il détiendra les biens à titre de dépositaire du shérif et en remettra la possession à celui-ci, sur demande. Dans un tel cas, les biens sont réputés être détenus sous saisie par le shérif.

Nomination d'un dépositaire par le shérif

Delivery of list of property

(14) Where a seizure is made, the Sheriff shall, on the written request of a person who has reasonable grounds to believe that he or she has an interest in or a right to property seized by the Sheriff, deliver to such person a list of items of property seized that fall within the general description of property in or to which such person claims to have an interest or right.

(14) Si une saisie est effectuée, le shérif remet, à la personne qui lui en fait la demande par écrit et qui a des motifs raisonnables de croire qu'elle a un intérêt ou un droit relatif aux biens saisis une liste des différents éléments saisis qui entrent dans la description générale des biens pour lesquels la personne prétend avoir un intérêt ou un droit.

Remise d'une liste des biens

Surrender of possession

(15) Where a seizure is made, the Sheriff may surrender possession or the right of possession of the property seized to the secured party or to a person designated in writing by the secured party.

(15) Si une saisie est effectuée, le shérif peut remettre la possession ou le droit de possession des biens saisis au créancier garanti ou à la personne que celui-ci désigne par écrit.

Remise de la possession

Notice of proposed release

(16) The Sheriff may, before or after seizure of property, give to the secured party named in the warrant under which the seizure was made a notice stating that the seizure shall be released on a date specified in the notice unless before that date the secured party takes possession of the property seized.

(16) Le shérif peut, avant ou après la saisie des biens, donner au créancier garanti nommé dans le mandat de saisie un avis indiquant qu'il sera donné mainlevée de la saisie à la date qui y est précisée, sauf si le créancier prend possession des biens saisis avant cette date.

Avis concernant la mainlevée projetée de la saisie

Release of seizure

(17) If the person to whom the notice is given under subsection (16) does not take possession of the property referred to in the notice on or before the date specified, the Sheriff may release the seizure.

(17) Le shérif peut accorder mainlevée de la saisie si la personne à qui il donne l'avis visé au paragraphe (16) ne prend pas possession des biens qui y sont mentionnés au plus tard à la date qui y est précisée.

Mainlevée de la saisie

No liability

(18) After possession of the property is surrendered under subsection (15) or seizure is released under subsection (17), the Sheriff is not liable for any loss or damage to the property or for any unlawful interference with the rights of the debtor or any other person who has an interest in or a right to the property that occurs after the surrender or release.

(18) Lorsqu'il remet la possession des biens en application du paragraphe (15) ou qu'il accorde mainlevée de la saisie en application du paragraphe (17), le shérif n'est pas responsable des pertes ou des dommages causés aux biens ou des entraves illicites aux droits du débiteur ou de toute autre personne ayant un intérêt ou un droit relatif aux biens et qui se produisent après que la possession des biens soit remise ou que la mainlevée de la saisie soit accordée.

Immunité

Effect of seizure

(19) A seizure made under this section does not affect the interest of a person who, under this Act or under any other law, has priority over the rights of the secured party. S.N.W.T. 1998,c.5,s.26(2).

(19) La saisie faite en vertu du présent article ne porte pas atteinte à l'intérêt d'une personne qui, en vertu de la présente loi ou de toute autre loi, a préséance sur les droits du créancier garanti. L.T.N.-O. 1998, ch. 5, art. 26(2).

Effet de la saisie

Definition: "mobile home"

58.1. (1) In this section, "mobile home" means

(a) a vacation trailer or house trailer; or

(b) a structure, whether ordinarily equipped with wheels or not, that is constructed or manufactured to be moved from one point to another by being towed or carried and to provide living accommodation for one or more persons.

Sens de «maison mobile»

58.1. (1) Au présent article, l'expression «maison mobile» s'entend :

a) soit d'une remorque qui sert de local d'habitation à titre permanent ou pour les loisirs;

b) soit d'une construction, habituellement munie ou non de roues, construite de façon à pouvoir être déplacée d'un point à un autre et à servir de local d'habitation pour une ou plusieurs personnes.

Application for order

(2) Where a mobile home is seized to enforce a security agreement, if

(a) the mobile home is occupied by the debtor or any other person, and

(b) the occupant fails, on demand, to deliver up possession of the mobile home,

the person who has authorized the seizure or a receiver, on notice of motion to the occupant, may apply to a judge of the Supreme Court who may make an order directing the occupant to deliver up possession of the mobile home.

Demande d'ordonnance judiciaire

(2) Lorsque l'occupant, qu'il s'agisse du débiteur ou d'une autre personne, d'une maison mobile saisie afin que soit exécuté un contrat de sûreté refuse de se plier à la demande formelle qui lui est faite de remettre la possession de la maison mobile, la personne qui a autorisé la saisie ou un séquestre, à la condition de faire parvenir un avis de sa requête à l'occupant, peut demander à un juge de la Cour suprême de rendre une ordonnance enjoignant à l'occupant de remettre la possession de la maison mobile.

Contents of order

(3) The order referred to in subsection (2) must provide that

(a) if the occupant fails to deliver up possession of the mobile home within the time specified in the order, the Sheriff shall eject and remove the occupant together with all goods and chattels the occupant may have in the mobile home; and

(b) if it is not possible otherwise to obtain possession, the person charged with the execution of the order may, either by himself or herself or with the assistance of the persons that he or she may request, break open the door of the mobile home.

Contenu de l'ordonnance

(3) L'ordonnance visée au paragraphe (2) doit prévoir que :

a) si l'occupant refuse de remettre la possession de la maison mobile avant l'expiration du délai fixé dans l'ordonnance, le shérif procédera à son expulsion et à l'enlèvement de ses objets et chatels qui se trouvent à l'intérieur de la maison mobile;

b) s'il est impossible d'agir autrement, la personne chargée de l'exécution de l'ordonnance peut, seule ou avec l'aide des personnes à qui elle fait appel, forcer la porte de la maison mobile.

Authority to possess

(4) On there being filed with the Sheriff an affidavit

(a) showing service of the order referred to in subsection (2) on the occupant, and

(b) stating that the occupant has failed to deliver up possession of the mobile home as required by the order,

the Sheriff shall, with the assistance that he or she may require, proceed without delay to obtain possession of the mobile home as authorized by the order.

Droit de prise de possession

(4) Lorsqu'un affidavit, faisant état de la signification à l'occupant de l'ordonnance visée au paragraphe (2) et du fait que l'occupant n'a pas remis la possession de la maison mobile en conformité avec l'ordonnance, est déposé auprès du shérif, celui-ci peut, avec l'aide qu'il peut demander, procéder sans délai à la prise de possession de la maison mobile en conformité avec l'ordonnance.

Definition: "secured party"

59. (1) In subsections (2), (5), (14) and (16), "secured party" includes a receiver.

Sens de «créancier garanti»

59. (1) Aux paragraphes (2), (5), (14) et (16), «créancier garanti» s'entend notamment du séquestre.

Disposition of collateral by secured party

(2) After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to

(a) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and

(b) the satisfaction of the obligations secured by the security interest of the secured party disposing of the collateral,

and any surplus shall be dealt with in accordance with section 60.

Aliénation des biens grevés par le créancier garanti

(2) Après avoir saisi les biens grevés ou en avoir repris possession, le créancier garanti peut les aliéner dans l'état dans lequel ils se trouvent ou après leur réparation, leur transformation ou leur préparation aux fins de l'aliénation. Le produit de l'aliénation est affecté selon l'ordre suivant :

a) aux frais normaux de saisie, de reprise de possession, de garde, de réparation, de transformation, de préparation aux fins de l'aliénation et d'aliénation des biens grevés et aux autres dépenses normales que le créancier garanti a engagées;

b) à l'exécution des obligations garanties par la sûreté du créancier garanti qui aliène les biens grevés.

Tout excédent est traité en conformité avec l'article 60.

Method of disposal

(3) Collateral may be disposed of

(a) by private sale;

(b) by public sale, including a public auction and sale by closed or open tender;

(c) as a whole or in parts or in commercial units; or

(d) if the security agreement so provides, by lease.

Mode d'aliénation

(3) Les biens grevés peuvent être aliénés :

a) par vente privée;

b) par vente publique, y compris une vente aux enchères et une vente par appel d'offres ouvert ou restreint;

c) comme tout ou en parties ou en unités commerciales;

d) par location, si le contrat de sûreté le prévoit.

Deferral of payment

(4) Where the security agreement so provides, the payment for the collateral being disposed of may be deferred.

Paiement différé

(4) Si le contrat de sûreté le prévoit, il est permis de différer le paiement des biens grevés aliénés.

Delay of disposition

(5) The secured party may delay disposition of all or part of the collateral.

Report de l'aliénation

(5) Le créancier garanti peut reporter l'aliénation de tout ou partie des biens grevés.

Disposal of licence

(5.1) Notwithstanding any other provision of this Part, where the collateral is a licence, it may be disposed of only in accordance with the terms and conditions under which the licence was granted or that otherwise pertain to it.

Aliénation de licences

(5.1) Malgré toute autre disposition de la présente partie, lorsque les biens grevés sont des licences, ils peuvent être aliénés seulement en conformité avec les modalités qui se rattachent ou qui sont relatives à l'octroi des licences.

Notice of disposition by secured party

(6) Not less than 20 days prior to disposition of the collateral, the secured party shall give a notice to

(a) the debtor and any other person who is known by the secured party to be an owner of the collateral;

(b) a person with a security interest in the collateral whose security interest is subordinate to that of the secured party where

(i) prior to the day on which the notice is given to the debtor, the person has registered a financing statement according to the name of the debtor or according to the serial number of

Avis de l'aliénation

(6) Au moins 20 jours avant l'aliénation des biens grevés, le créancier garanti donne un avis :

a) au débiteur et à quiconque le créancier garanti sait être propriétaire des biens grevés;

b) à toute personne qui détient une sûreté sur les biens grevés, dont la sûreté est subordonnée à celle du créancier garanti, lorsque :

(i) avant le jour où l'avis est donné au débiteur, la personne a enregistré un état de financement d'après le nom du débiteur ou selon le numéro de série des biens grevés, dans le cas

the collateral in the case of goods of a kind prescribed as serial numbered goods, or

(ii) the security interest is perfected by possession at the time the secured party seized or repossessed the collateral;

(c) a creditor whose interest in the collateral is subordinate to that of the secured party where, prior to the day on which notice is given to the debtor, the creditor has registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed as serial numbered goods; and

(d) any other person with an interest in the collateral who has given a written notice to the secured party of the interest of that person in the collateral prior to the day on which the notice of disposition is given to the debtor.

Contents of notice

(7) The notice referred to in subsection (6) must contain

(a) a description of the collateral;

(b) a statement of the amount required to satisfy the obligation secured by the security interest;

(c) a statement of the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement, and a brief description of any default, other than non-payment, and a reference to the provision of the security agreement the breach of which resulted in the default;

(d) a statement of the amount of the applicable expenses referred to in paragraph (2)(a) or, where the amount of the expenses has not been determined, a reasonable estimate;

(e) a statement that, on payment of the amount due under paragraphs (b) and (d), any person entitled to receive the notice may redeem the collateral;

(f) a statement that, on payment of the sums in arrears, exclusive of the operation of any acceleration clause in the security agreement, or the curing of any other default, as the case may be, together with the amount due under paragraph (2)(a), the debtor may reinstate the security

d'objets qui sont, en vertu des règlements, des objets portant un numéro de série,

(ii) la sûreté est opposable par possession au moment où le créancier garanti a saisi les biens grevés ou en a repris possession;

c) au créancier dont l'intérêt dans les biens grevés est subordonné à celui du créancier garanti lorsque, avant le jour où l'avis est donné au débiteur, le créancier a enregistré un état de financement d'après le nom du débiteur ou selon le numéro de série des biens grevés, dans le cas d'objets qui sont, en vertu des règlements, des objets portant un numéro de série;

d) à quiconque détient un intérêt dans les biens grevés et a fait parvenir un avis écrit de cet intérêt au créancier garanti avant le jour où l'avis d'aliénation est donné au débiteur.

Contenu de l'avis

(7) L'avis visé au paragraphe (6) contient les renseignements suivants :

a) une description des biens grevés;

b) le montant requis pour que soit exécutée l'obligation garantie par la sûreté;

c) l'arriéré, exception faite de l'arriéré exigible par application d'une clause de déchéance du terme figurant dans le contrat de sûreté, ainsi qu'une indication sommaire de tout défaut autre que le non-paiement et une mention de la disposition du contrat de sûreté dont la violation a occasionné le défaut;

d) le montant des frais et dépenses applicables visés à l'alinéa (2)a) ou une estimation de ce montant, s'il n'a pas été déterminé;

e) une déclaration portant que, sur paiement de la somme exigible en vertu des alinéas b) et d), quiconque a le droit de recevoir l'avis peut racheter les biens grevés;

f) une déclaration portant que le débiteur peut rétablir le contrat de sûreté en payant l'arriéré, exclusion faite de l'arriéré exigible par application d'une clause de déchéance du terme figurant dans le contrat de sûreté, ou en remédiant à tout autre défaut, et en versant la somme exigible en vertu de l'alinéa (2)a);

agreement;

(g) a statement that unless the collateral is redeemed or the security agreement is reinstated, it will be disposed of and the debtor may be liable for a deficiency; and

(h) the date, time and place of any sale by public auction or the place to which tenders may be delivered and the date after which tenders will not be accepted or the date after which any private disposition of the collateral is to be made.

g) une déclaration portant que les biens grevés seront aliénés et que le débiteur pourra être responsable de toute insuffisance de fonds, à moins que les biens grevés ne soient rachetés ou que le contrat de sûreté ne soit rétabli;

h) les date, heure et lieu de la vente aux enchères ou le lieu où les offres peuvent être déposées ainsi que la date limite d'acceptation des offres ou la date après laquelle une aliénation privée des biens grevés doit être faite.

Information not required

(8) Where the notice required in subsection (6) is given to a person other than the debtor, it need not contain the information specified in paragraphs (7)(c), (f) and (g) and, where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in paragraphs (7)(c) and (f).

(8) Il n'est pas nécessaire que l'avis visé au paragraphe (6) contienne les renseignements prévus aux alinéas (7)c), f) et g) dans le cas où il est donné à une autre personne que le débiteur. Il n'est pas nécessaire qu'il contienne les renseignements prévus aux alinéas (7)c) et f) dans le cas où il est donné au débiteur, si celui-ci n'a pas le droit de rétablir le contrat de sûreté.

Renseignements non nécessaires

No reference to liability for deficiency

(9) A statement referred to in paragraph (7)(g) must not contain a reference to any liability on the part of the debtor to pay a deficiency if, under any Act or rule of law, the secured party does not have the right to collect the deficiency from the debtor.

(9) La déclaration prévue à l'alinéa (7)g) ne peut indiquer que le débiteur est responsable d'une insuffisance de fonds si, en vertu d'une loi ou d'une règle de droit, le créancier garanti n'a pas le droit de percevoir les fonds qui manquent auprès de lui.

Mention de la responsabilité à l'égard d'une insuffisance de fonds

Notice of disposition by receiver

(10) Not less than 20 days prior to the disposition of the collateral, a receiver shall give a notice to

(a) the debtor and, where the debtor is a corporation, a director of the corporation;

(b) any other person who is known by the receiver or the secured party to be an owner of the collateral;

(c) a person referred to in paragraph (6)(b);

(d) a creditor referred to in paragraph (6)(c); and

(e) any other person with an interest in the collateral who has given a written notice to the receiver of that interest prior to the date that the notice of disposition is given to the debtor.

(10) Au moins 20 jours avant l'aliénation des biens grevés, le séquestre donne un avis :

a) au débiteur et, si celui-ci est une personne morale, à un de ses administrateurs;

b) à toute autre personne que le séquestre ou le créancier garanti sait être propriétaire des biens grevés;

c) à quiconque est visé par l'alinéa (6)b);

d) au créancier visé par l'alinéa (6)c);

e) à quiconque a un intérêt dans les biens grevés et a fait parvenir un avis écrit de cet intérêt au séquestre avant que l'avis d'aliénation ne soit donné au débiteur.

Avis de l'aliénation par le séquestre

Contents of notice

(11) The notice referred to in subsection (10) must contain

(a) a description of the collateral;

(b) a statement that unless the collateral is redeemed it will be disposed of; and

(c) the date, time and place of any sale by public auction or the place to which tenders may be delivered and the date after which tenders will not be accepted or after which any private disposition of

(11) L'avis visé au paragraphe (10) contient les renseignements suivants :

a) une description des biens grevés;

b) une déclaration portant que les biens grevés seront aliénés à moins qu'ils ne soient rachetés;

c) les date, heure et lieu de la vente aux enchères ou le lieu où les offres peuvent être déposées ainsi que la date limite d'acceptation des offres ou la date après

Contenu de l'avis

the collateral is to be made.

laquelle une aliénation privée des biens grevés doit être faite.

Service of notice

(12) The notice required in subsection (6) or (10) may be given or delivered in accordance with section 68 or, where it is to be given or delivered to a person who has registered a financing statement, by email or registered mail addressed to the contact address of the person to whom it is to be given or delivered as it appears on the financing statement.

(12) L'avis visé au paragraphe (6) ou (10) peut être donné ou livré en conformité avec l'article 68 ou, s'il doit être donné ou livré à une personne qui a enregistré un état de financement, par courriel ou courrier recommandé à l'adresse du destinataire telle qu'elle paraît dans l'état de financement.

Signification de l'avis

Purchase by secured party

(13) The secured party may purchase the collateral or any part of it only at a public sale, as referred to in paragraph (3)(b), and only for a price that bears a reasonable relationship to the market value of the collateral.

(13) Le créancier garanti peut acheter les biens grevés en tout ou en partie uniquement à l'occasion de la vente publique visée à l'alinéa (3)b) et uniquement à un prix raisonnable par rapport à la valeur marchande des biens grevés.

Achat par le créancier garanti

Interest of purchaser

(14) When a secured party disposes of collateral to a purchaser who acquires the interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the secured party,

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are, as regards the purchaser, deemed to be performed for the purposes of paragraphs 49(7)(a) and 50(3)(a).

(14) Lorsque le créancier garanti cède, par aliénation, les biens grevés à un acheteur qui acquiert l'intérêt contre prestation et de bonne foi et qui en prend possession, cet acheteur acquiert les biens grevés libres de l'intérêt du débiteur, de tout intérêt subordonné à celui du débiteur et de tout intérêt subordonné à celui du créancier garanti, que les exigences prévues au présent article aient été remplies ou non par le créancier garanti, et toutes les obligations garanties par ces intérêts subordonnés sont, à l'égard de l'acheteur, réputées être exécutées pour l'application des alinéas 49(7)a) et 50(3)a).

Intérêt de l'acheteur

No effect on rights where deemed registered

(15) Subsection (14) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 73 who has not been given a notice under this section.

(15) Le paragraphe (14) ne porte pas atteinte aux droits d'une personne ayant une sûreté réputée enregistrée en vertu de l'article 73 et qui n'a pas reçu l'avis visé au présent article.

Sûreté réputée enregistrée

Effect of transfer where guarantee, endorsement, etc.

(16) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or who is subrogated to the rights of the secured party has thereafter the rights and duties of the secured party, and the transfer of collateral is not a disposition of the collateral.

(16) La personne obligée envers le créancier garanti, notamment en vertu d'une garantie, d'un endossement, d'un engagement ou d'une convention de rachat, et à qui le créancier garanti a transféré les biens grevés ou qui est subrogée dans les droits de celui-ci, possède, par la suite, les droits et les obligations du créancier garanti. Le transfert ne constitue pas une aliénation des biens grevés.

Effet de certains transferts

Circumstances when notice not required

(17) The notice referred to in subsection (6) or (10) is not required where

(a) the collateral is perishable;

(b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if not disposed of immediately after default;

(c) the cost of care and storage of the

(17) L'avis visé au paragraphe (6) ou (10) n'est pas nécessaire dans les cas suivants :

a) les biens grevés sont périssables;

b) le créancier garanti a des motifs raisonnables de croire que les biens grevés perdront une grande partie de leur valeur s'ils ne sont pas aliénés immédiatement après le défaut;

Circonstances dans lesquelles l'avis n'est pas nécessaire

collateral is disproportionately large relative to its value;

(d) the collateral is of a type that is to be disposed of by sale on an organized market that handles large volumes of transactions between many sellers and many buyers;

(e) the collateral is money, other than a medium of exchange authorized by or under an Act of the Parliament of Canada;

(f) the Supreme Court on *ex parte* application is satisfied that a notice is not required; or

(g) after default, each person entitled to receive the notice consents to the disposition of the collateral without notice.

S.N.W.T. 2003,c.5,Sch.G,s.2; S.N.W.T. 2018,c.15, s.17.

c) le coût de la conservation et de l'entreposage des biens grevés est disproportionné par rapport à leur valeur;

d) les catégories de biens grevés qui doivent être aliénés par vente dans un marché organisé où ont lieu un grand nombre d'opérations entre de nombreux vendeurs et de nombreux acheteurs;

e) les biens grevés sont de l'argent, à l'exclusion d'un moyen d'échange autorisé en vertu d'une loi du Parlement du Canada;

f) la Cour suprême, saisie d'une demande sans préavis, est convaincue que l'avis n'est pas nécessaire;

g) après le défaut, chacune des personnes ayant le droit de recevoir l'avis consent à ce que les biens grevés soient aliénés sans que l'avis soit donné.

L.T.N.-O. 2018, ch. 15, art. 17.

Definition: "secured party"

60. (1) In this section, "secured party" includes a receiver.

Sens de «créancier garanti»

60. (1) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Distribution of proceeds of disposition

(2) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57 or has disposed of it in accordance with section 59 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested parties, be accounted for and paid, in the following order, to

(a) a person who has a subordinate security interest in the collateral

(i) and who has, prior to the distribution of the proceeds, registered a financing statement using the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed as serial numbered goods, or

(ii) whose security interest was perfected by possession at the time the collateral was seized,

(b) any other person with an interest in the surplus, if the other person has given a written notice of that interest to the secured party prior to the distribution, and

(c) the debtor or any other person who is known by the secured party to be an owner of the collateral,

but the priority of claim of any person referred to in

Distribution du produit

(2) Dans le cas où le contrat de sûreté garantit une créance et que le créancier garanti a traité les biens grevés en conformité avec l'article 57 ou les a aliénés en conformité avec l'article 59 ou d'une autre façon, il est tenu, à moins que la loi ne prévoit le contraire ou que toutes les parties intéressées ne s'entendent autrement, de rendre compte de l'excédent et de le distribuer selon l'ordre suivant :

a) à toute personne qui a une sûreté subordonnée sur les biens grevés et, selon le cas :

(i) qui a, avant la distribution du produit, enregistré un état de financement d'après le nom du débiteur ou selon le numéro de série des biens grevés, dans le cas d'objets qui sont, en vertu des règlements, des objets portant un numéro de série,

(ii) dont la sûreté était opposable par possession au moment de la saisie des biens grevés;

b) à toute autre personne qui a un intérêt dans l'excédent, si cette personne a fait parvenir un avis écrit de cet intérêt au créancier garanti avant la distribution;

c) au débiteur ou à toute autre personne que le créancier garanti sait être propriétaire des biens grevés.

paragraph (a), (b) or (c) is not prejudiced by payment to anyone under this section.

Toutefois, aucun paiement fait en vertu du présent article ne porte atteinte à la préséance de la réclamation d'une personne visée aux alinéas a), b) ou c).

Written accounting

(3) The secured party shall give to a person referred to in subsection (2) a written accounting, within 30 days after receipt of a written request for such an accounting, of

(a) the amount received from the disposition of collateral under section 59 or otherwise or the amount collected under section 57;
(b) the manner in which the collateral was disposed of;
(c) the amount of expenses as provided in sections 17, 57 and 59;
(d) the distribution of the amount received from the disposition or collection; and
(e) the amount of any surplus.

Compte rendu écrit

(3) Le créancier garanti donne à toute personne visée au paragraphe (2), dans les 30 jours suivant la réception d'une demande écrite en ce sens, un compte rendu écrit concernant :

a) le montant obtenu par suite de l'aliénation des biens grevés en vertu de l'article 59 ou autrement ou le montant perçu en vertu de l'article 57;
b) le mode d'aliénation des biens grevés;
c) le montant des frais prévus aux articles 17, 57 et 59;
d) la distribution du montant obtenu par suite de l'aliénation ou de la perception;
e) le montant de tout excédent.

Surplus paid into Court

(4) Where there is a question as to who is entitled to receive payment under subsection (2), the secured party may pay the surplus into the Supreme Court and the surplus shall not be paid out except on an application under section 66 by a person claiming an entitlement to it.

Consignation de l'excédent à la Cour suprême

(4) En cas de contestation quant aux personnes qui ont le droit de recevoir un paiement en vertu du paragraphe (2), le créancier garanti peut consigner l'excédent à la Cour suprême, auquel cas l'excédent ne peut être versé que par suite de la présentation de la demande visée à l'article 66 par une personne qui prétend avoir droit à cet excédent.

Deficiency

(5) Unless otherwise agreed or otherwise provided in this or any other Act, the debtor is liable to pay to the secured party any deficiency. S.N.W.T. 2003,c.5,Sch.G,s.2.

Insuffisance de fonds

(5) Sauf convention contraire ou disposition contraire de la présente loi ou d'une autre loi, le débiteur est tenu de verser au créancier garanti les fonds qui manquent.

Proposal to take collateral in satisfaction of obligation secured

61. (1) After default by the debtor, the secured party may propose to take the collateral in satisfaction of the obligation secured by it, and shall give notice of the proposal to

(a) the debtor and any other person who is known by the secured party to be an owner of the collateral;
(b) a person with a security interest in the collateral whose interest is subordinate to that of the secured party where
(i) prior to the day on which notice is given to the debtor, the person has registered a financing statement using the name of the debtor or according to serial number of the collateral in the case of goods of a kind prescribed as serial numbered goods, or
(ii) the security interest is perfected by possession at the time the secured

Dation en paiement des biens grevés

61. (1) Le créancier garanti peut, après que le débiteur est en défaut, offrir d'accepter les biens grevés en paiement de l'obligation qu'ils garantissent. Avis de cette proposition est donné :

a) au débiteur et à quiconque le créancier garanti sait être propriétaire des biens grevés;
b) à toute personne qui détient une sûreté sur les biens grevés, dont la sûreté est subordonnée à celle du créancier garanti lorsque, selon le cas :
(i) la personne a avant le jour où l'avis est donné au débiteur, enregistré un état de financement d'après le nom du débiteur ou selon le numéro de série des biens grevés, dans le cas d'objets qui sont, en vertu des règlements, des objets portant un numéro de série,
(ii) la sûreté était opposable par

party seized or repossessed the collateral;

(c) a creditor whose interest in the collateral is subordinate to that of the secured party where, prior to the day on which notice is given to the debtor, the creditor has registered a financing statement according to the name of the debtor or according to serial number of the collateral in the case of goods of a kind prescribed as serial numbered goods; and

(d) any other person with an interest in the collateral who has given a written notice to the secured party of that interest prior to the day on which the notice is given to the debtor.

possession au moment où le créancier garanti a saisi les biens grevés ou en a repris possession;

c) au créancier dont l'intérêt dans les biens grevés est subordonné à celui du créancier garanti lorsque, avant le jour où l'avis est donné au débiteur, le créancier a enregistré un état de financement d'après le nom du débiteur ou selon le numéro de série des biens grevés, dans le cas d'objets qui sont, en vertu des règlements, des objets portant un numéro de série;

d) à quiconque a un intérêt dans les biens grevés et a fait parvenir un avis écrit de cet intérêt au créancier garanti avant le jour où l'avis est donné au débiteur.

Notice of objection

(2) If any person, who is entitled to a notice under subsection (1) and whose interest in the collateral would be adversely affected by the proposal of the secured party, gives to the secured party a notice of objection within 15 days after the notice under subsection (1) is given, the secured party shall dispose of the collateral in accordance with section 59.

Opposition

(2) Dans le cas où une personne ayant droit à l'avis visé au paragraphe (1) et dont l'intérêt dans les biens grevés serait atteint par la proposition du créancier garanti remet à celui-ci un avis d'opposition dans les 15 jours suivant la date à laquelle l'avis visé au paragraphe (1) est donné, le créancier garanti aliène les biens grevés en conformité avec l'article 59.

Rights of secured party where no notice of objection

(3) If no notice of objection is given, the secured party is, at the expiration of the 15 day period or periods referred to in subsection (2), deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interests of the debtor and any other person entitled to receive notice under

(a) paragraph (1)(b) or (c), or

(b) paragraph (1)(d), where the person's interest is subordinate to that of the secured party,

who has been given the notice and all obligations secured by such interests are deemed performed for the purposes of paragraphs 49(7)(a) and 50(3)(a).

Absence d'avis d'opposition

(3) En l'absence d'avis d'opposition, le créancier garanti est, à l'expiration de la période de 15 jours prévue au paragraphe (2), réputé avoir choisi irrévocablement de conserver les biens grevés en paiement complet de l'obligation garantie. Le créancier peut garder les biens grevés ou les aliéner, libres et quittes de tous les droits et de tous les intérêts que peuvent avoir le débiteur et toute personne qui a reçu un avis, et qui était habilitée à le recevoir :

a) soit en vertu de l'alinéa (1)b) ou c);

b) soit en vertu de l'alinéa (1)d), lorsque l'intérêt de la personne est subordonné à celui du créancier garanti.

Toutes les obligations garanties par ces intérêts sont réputées exécutées pour l'application des alinéas 49(7)a) et 50(3)a).

Service of notice

(4) The notice required under subsection (1) may be given or delivered in accordance with section 68 or, if it is to be given or delivered to a person who has registered a financing statement, by email or registered mail addressed to the contact address of the person to whom it is to be given as it appears on the financing statement.

Signification de l'avis

(4) L'avis visé au paragraphe (1) peut être donné ou livré en conformité avec l'article 68 ou, s'il doit être donné ou livré à une personne qui a enregistré un état de financement, par courriel ou courrier recommandé à l'adresse du destinataire telle qu'elle paraît dans l'état de financement.

Proof of interest

(5) The secured party may request that any person referred to in subsection (1), other than the debtor, furnish proof of the interest of that person and, unless

Preuve de l'intérêt

(5) Le créancier garanti peut demander à toute personne visée au paragraphe (1), à l'exception du débiteur, qu'elle lui fournisse une preuve de son intérêt

the person furnishes proof not later than 10 days after the request of the secured party, the secured party may proceed as if no objection were received from the person.

et, à défaut par la personne de ce faire dans les 10 jours suivant la demande, le créancier garanti peut disposer des biens grevés comme s'il n'y avait eu aucune opposition de la part de cette personne.

Application to Court

(6) On application by a secured party, the Supreme Court may determine that an objection to the proposal of a secured party is ineffective on the ground that

(a) the person made the objection for a purpose other than the protection of an interest in the collateral or proceeds of a disposition of the collateral; or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

Demande à la Cour suprême

(6) Sur demande du créancier garanti, la Cour suprême peut statuer qu'une opposition à la proposition est sans effet pour l'une des raisons suivantes :

a) la personne a fait une opposition à une fin autre que la protection de son intérêt dans les biens grevés ou dans le produit de l'aliénation des biens grevés;

b) la valeur marchande des biens grevés est inférieure au montant total dû au créancier garanti, additionné des frais de l'aliénation.

Interest of purchaser

(7) Where a secured party disposes of the collateral to a purchaser who acquires an interest in the collateral for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) any interest subordinate to that of the debtor,

(c) any interest subordinate to that of the secured party,

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interest are deemed to be performed for the purposes of paragraphs 49(7)(a) and 50(3)(a).

Intérêt de l'acheteur

(7) Lorsque le créancier garanti cède, par aliénation, les biens grevés à un acheteur qui acquiert l'intérêt contre prestation et de bonne foi et qui en prend possession, cet acheteur acquiert les biens grevés libres de l'intérêt du débiteur, de tout intérêt subordonné à celui du débiteur et de tout intérêt subordonné à celui du créancier garanti, que les exigences prévues au présent article aient été remplies ou non par le créancier garanti, et toutes les obligations garanties par ces intérêts subordonnés sont réputées être exécutées pour l'application des alinéas 49(7)a) et 50(3)a).

No effect on rights where deemed registered

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 73 who has not received a notice under this section. S.N.W.T. 2003, c.5, Sch.G, s.2; S.N.W.T. 2018,c.15,s.17.

Sûreté réputée enregistrée

(8) Le paragraphe (7) ne porte pas atteinte aux droits d'une personne ayant une sûreté réputée enregistrée en vertu de l'article 73 et qui n'a pas reçu l'avis visé au présent article. L.T.N.-O. 2018, ch. 15, art. 17.

Right of redemption

62. (1) At any time before the secured party has disposed of the collateral or contracted for disposition under section 59 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61, any person entitled to receive a notice of disposition under subsection 59(6) or (10) may, unless that person otherwise agrees in writing after default, redeem the collateral by

(a) tendering payment of the monetary obligations secured by the collateral together with a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral

Droit de rachat

62. (1) Avant que le créancier garanti n'ait aliéné les biens grevés ou qu'il ne se soit engagé à les aliéner en conformité avec l'article 59, ou avant que son choix d'accepter les biens grevés ne devienne irrévocable en conformité avec l'article 61, toute personne ayant le droit de recevoir l'avis d'aliénation visé au paragraphe 59(6) ou (10) peut, sauf si elle en a convenu autrement par écrit après que le débiteur est en défaut, racheter les biens grevés :

a) par offres réelles de paiement des obligations pécuniaires garanties par l'ensemble des biens grevés et versement d'une somme égale aux frais normaux de saisie, de reprise de possession, de garde,

for disposition, if such expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement; and

(b) agreeing to fulfill any other obligations secured by the collateral.

de réparation, de transformation et de préparation en vue de l'aliénation, si le créancier garanti a effectivement supporté ces frais, ainsi que des autres frais normaux faits par le créancier garanti à l'occasion de l'exécution du contrat de sûreté;

b) par acceptation d'exécuter toutes autres obligations garanties par les biens grevés.

Right of reinstatement

(2) At any time before the secured party has disposed of the collateral or contracted for disposition under section 59 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61, the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement, and by curing any other default by reason of which the secured party intends to dispose of the collateral together with a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition if such expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

(2) Avant que le créancier garanti n'ait aliéné les biens grevés ou qu'il ne se soit engagé à les aliéner en conformité avec l'article 59, ou avant que son choix d'accepter les biens grevés ne devienne irrévocable en conformité avec l'article 61, le débiteur, à l'exception d'une caution ou d'un garant, peut, sauf s'il en a convenu autrement par écrit après le défaut, rétablir le contrat de sûreté en payant l'arriéré, à l'exclusion de l'arriéré découlant de l'application d'une clause de déchéance de terme figurant dans le contrat de sûreté, en remédiant à tout autre défaut en raison duquel le créancier garanti envisage d'aliéner les biens grevés et en versant une somme égale aux frais normaux de saisie, de reprise de possession, de garde, de réparation, de transformation et de préparation en vue de l'aliénation, si le créancier garanti a effectivement supporté ces frais, ainsi que les autres frais normaux faits par le créancier garanti à l'occasion de l'exécution du contrat de sûreté.

Droit de rétablissement

Limit on right of reinstatement

(3) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party; or

(b) more than twice in each year, if the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

(3) Sauf convention contraire, le débiteur ne peut rétablir le contrat de sûreté :

a) plus de deux fois, si le contrat prévoit un paiement en entier par le débiteur dans les 12 mois suivant la date à laquelle le créancier garanti a fourni une prestation;

b) plus de deux fois par année, si le contrat prévoit des paiements par le débiteur au cours d'une période de plus d'un an suivant la date à laquelle le créancier garanti a fourni une prestation.

Restriction au droit de rétablissement

Definition: "secured party"

63. (1) In this section, "secured party" includes a receiver.

63. (1) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Sens de «créancier garanti»

Powers of Court

(2) On application by a debtor, a creditor of a debtor, a secured party, a Sheriff or any person with an interest in the collateral, the Supreme Court may

(a) make any order, including a binding declaration of a right and injunctive relief, that is necessary to ensure compliance with this Part or sections 17, 36, 37, 37.1 and 38;

(2) Sur demande d'un débiteur, d'un créancier du débiteur, d'un créancier garanti, d'un shérif ou de toute personne qui a un intérêt dans les biens grevés, la Cour suprême peut :

a) rendre toute ordonnance, notamment faire une déclaration de droits et accorder une injonction, qui soit nécessaire pour assurer l'observation de la présente partie

Pouvoirs de la Cour suprême

(b) give directions to any person regarding the exercise of rights or the discharge of obligations under this Part or sections 17, 36, 37, 37.1 and 38;
(c) relieve a person from compliance with the requirements of this Part or sections 17, 36, 37, 37.1 and 38;
(d) stay enforcement of rights provided in this Part or sections 17, 36, 37, 37.1 and 38;
(e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

ou des articles 17, 36, 37, 37.1 et 38;
b) donner des directives à toute personne concernant l'exercice des droits ou l'acquittement des obligations prévus à la présente partie ou aux articles 17, 36, 37, 37.1 et 38;
c) soustraire toute personne aux exigences de la présente partie ou des articles 17, 36, 37, 37.1 et 38;
d) suspendre l'exercice des droits prévus à la présente partie ou aux articles 17, 36, 37, 37.1 et 38;
e) rendre toute ordonnance, notamment faire une déclaration de droits et accorder une injonction, qui soit nécessaire pour assurer la protection des intérêts de toute personne dans les biens grevés.

Appointment of receiver

64. (1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the rights and duties of the receiver.

Nomination d'un séquestre

64. (1) Le contrat de sûreté peut prévoir la nomination d'un séquestre et, sous réserve des autres dispositions de la présente loi ou de toute autre loi, déterminer ses droits et ses fonctions.

Duties of receiver

(2) A receiver shall
(a) take the collateral into his or her custody and control in accordance with the security agreement or order under which the receiver is appointed but, unless appointed a receiver-manager or unless the Supreme Court orders otherwise, shall not carry on the business of the debtor;
(b) open and maintain, in the name of the receiver as receiver, one or more accounts at a bank, credit union or other institution licensed to accept deposits in the Northwest Territories for the deposit of all money coming under the control of the receiver as receiver;
(c) keep records, in accordance with generally accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor;
(d) prepare, at least once in every six month period after the date of the receiver's appointment, financial statements of the administration of the receiver containing the prescribed information;
(e) indicate on every business letter, invoice, contract or similar document used or executed in connection with the receivership that the receiver is acting as a receiver; and

Fonctions du séquestre

(2) Le séquestre est tenu :
a) de prendre les biens grevés sous sa garde et sous sa responsabilité en conformité avec le contrat de sûreté ou l'ordonnance le nommant; toutefois, il ne peut exploiter l'entreprise du débiteur que s'il est nommé séquestre-gérant ou que si la Cour suprême l'ordonne;
b) d'ouvrir et de conserver, en sa qualité de séquestre, un ou plusieurs comptes dans un établissement autorisé à accepter des dépôts dans les Territoires du Nord-Ouest, notamment une banque ou une caisse de crédit, afin d'y déposer toutes les sommes qui viennent en sa possession;
c) de tenir des registres, en conformité avec des principes comptables généralement reconnus, relativement aux reçus, aux dépenses et aux opérations concernant les biens grevés ou d'autres biens du débiteur;
d) de dresser, au moins une fois tous les six mois après la date de sa nomination, des états financiers contenant les renseignements prescrits concernant son administration;
e) d'indiquer sur chaque lettre d'affaires, facture, contrat ou autre document similaire utilisé ou passé dans le cadre de ses fonctions qu'il agit en qualité de

(f) on completion of the duties of the receiver, prepare a final account of the administration containing the prescribed information.

f) à l'achèvement de ses fonctions, de préparer contenant les renseignements prescrits un compte définitif concernant son administration.

Inspection of records

(3) The debtor or, where the debtor is a corporation, a director of the debtor, or the authorized representative of the debtor, may, by a demand in writing delivered to the receiver, require the receiver to make available for inspection the records referred to in paragraph (2)(c) during regular business hours at the place of business of the receiver in the Northwest Territories.

(3) Le débiteur ou, si celui-ci est une personne morale, un de ses administrateurs, ou encore son représentant autorisé, peut, par demande formelle écrite, exiger que le séquestre mette à sa disposition les registres visés à l'alinéa 2c) afin qu'ils puissent être examinés pendant les heures normales d'ouverture à l'établissement du séquestre dans les Territoires du Nord-Ouest.

Examen des registres

Inspection and provision of copies

(4) The debtor or, where the debtor is a corporation, a director of the debtor, a Sheriff or a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of the debtor, Sheriff or person, may, by a demand in writing delivered to the receiver, require the receiver to provide copies of the financial statements referred to in paragraph (2)(d) or the final account referred to in paragraph (2)(f) or to make them available for inspection during regular business hours at the place of business of the receiver in the Northwest Territories.

(4) Le débiteur ou, si celui-ci est une personne morale, un de ses administrateurs, un shérif et toute personne ayant un intérêt dans les biens grevés qui sont sous la garde ou la responsabilité du séquestre, ou encore le représentant autorisé du débiteur, du shérif ou de la personne, peuvent, par demande formelle écrite, exiger que le séquestre leur fournisse des exemplaires des états financiers visés à l'alinéa 2d) ou du compte définitif visé à l'alinéa 2f) ou les mette à leur disposition afin qu'ils puissent être examinés pendant les heures normales d'ouverture à l'établissement du séquestre dans les Territoires du Nord-Ouest.

Examen et fourniture d'exemplaires

Time for compliance

(5) The receiver shall comply with a demand referred to in subsection (3) or (4) not later than 10 days after the day the demand is received.

(5) Le séquestre est tenu de se plier à la demande formelle visée aux paragraphes (3) ou (4) dans les 10 jours suivant sa réception.

Délai

Fee may be levied

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand, but the Sheriff and the debtor, or in the case of an incorporated debtor a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(6) Le séquestre peut exiger qu'un droit réglementaire soit versé d'avance pour chaque demande formelle; toutefois, le shérif et le débiteur ou, si le débiteur est une personne morale, l'un de ses administrateurs, ont le droit d'examiner et de recevoir gratuitement les états financiers et le compte définitif.

Droit

Application to Court

(7) On application by an interested person, the Supreme Court may

(a) appoint a receiver;
(b) remove, replace or discharge a receiver, whether appointed by the Supreme Court or under a security agreement;
(c) give directions on any matter relating to the duties of a receiver;
(d) approve the accounts and fix the remuneration of a receiver;
(e) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a

(7) Sur demande de tout intéressé, la Cour suprême peut :

a) nommer un séquestre;
b) renvoyer, remplacer ou destituer un séquestre, qu'il soit nommé par la Cour suprême ou en vertu d'un contrat de sûreté;
c) donner des directives sur toute question liée aux fonctions d'un séquestre;
d) approuver les comptes et fixer la rémunération d'un séquestre;
e) malgré toute clause du contrat de sûreté ou tout autre document prévoyant la nomination d'un séquestre, rendre une

Demande à la Cour suprême

receiver or a person by or on behalf of whom the receiver is appointed to make good a default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve the person from any default or failure to comply with this Part; and

(f) exercise with respect to a receiver appointed under a security agreement the jurisdiction that it has over receivers appointed by the Supreme Court.

ordonnance exigeant que le séquestre ou que toute autre personne par qui ou au nom de qui il est nommé remédie à tout défaut relativement à la garde, à la gestion ou à l'aliénation des biens grevés du débiteur par le séquestre ou dégage quiconque de tout défaut ou de toute omission concernant l'observation de la présente partie;

f) exercer à l'égard d'un séquestre nommé en vertu d'un contrat de sûreté la compétence qu'elle possède à l'égard des séquestres qu'elle nomme.

Jurisdiction of Court

(8) The powers referred to in subsection (7) and in section 63 are in addition to any other powers the Supreme Court may exercise in its jurisdiction over receivers.

Compétence de la Cour suprême

(8) Les pouvoirs prévus au paragraphe (7) et à l'article 63 s'ajoutent aux autres pouvoirs que la Cour suprême peut exercer dans le cadre de sa compétence sur les séquestres.

Compliance with other requirements

(9) Unless the Supreme Court orders otherwise, a receiver is required to comply with sections 59 and 60 only when the receiver deals with collateral other than in the course of operating the business of a debtor. S.N.W.T. 1998,c.5,s.26(3); S.N.W.T. 2009, c.12,s.15(4).

Observation des autres exigences

(9) Sauf décision contraire de la Cour suprême, le séquestre n'est tenu d'observer les articles 59 et 60 que s'il aliène les biens grevés autrement que dans le cadre de l'exploitation de l'entreprise du débiteur. L.T.N.-O. 1998, ch. 5, art. 26(3); L.T.N.-O. 2009, ch. 12, art. 15(4).

PART VI
MISCELLANEOUS

PARTIE VI
DISPOSITIONS DIVERSES

Definition: "secured party"

65. (1) In this section, "secured party" includes a receiver.

Sens de «créancier garanti»

65. (1) Au présent article, «créancier garanti» s'entend notamment du séquestre.

Supplementary law

(2) The principles of the common law, equity and the law merchant, except in so far as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

Application de la common law à titre subsidiaire

(2) Les principes de la common law, de l'equity et du droit commercial complètent la présente loi et continuent de s'appliquer, sauf en cas d'incompatibilité avec celle-ci.

Proper exercise of rights, duties and obligations

(3) All rights, duties or obligations arising under a security agreement, this Act or any other law applicable under subsection (2) shall be exercised or discharged in good faith and in a commercially reasonable manner.

Exercice des droits en conformité avec les usages du commerce

(3) Les droits, fonctions et obligations découlant d'un contrat de sûreté, de la présente loi ou du droit applicable en vertu du paragraphe (2) doivent être exercés ou assumés de bonne foi et en conformité avec les usages du commerce.

Bad faith

(4) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

Mauvaise foi

(4) Une personne n'agit pas de mauvaise foi du seul fait qu'elle agit en ayant connaissance de l'intérêt d'une autre personne.

Right to recover loss or damage

(5) If a person fails, without reasonable excuse, to discharge any duty or obligation imposed on the person by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

Dommages-intérêts

(5) Lorsqu'une personne omet, sans excuse légitime, de s'acquitter des fonctions ou des obligations qui lui sont imposées par la présente loi, la personne qui en est privée a droit à des dommages-intérêts pour la perte ou les dommages dont on pouvait prévoir qu'ils surviendraient vraisemblablement par suite d'une telle omission.

TAB 7

NORTHWEST TERRITORIES LANDS ACT

MINING REGULATIONS
R-015-2014
In force April 1, 2014

AMENDED BY
R-096-2015
R-087-2018
In force June 1, 2018
R-073-2019

LOI SUR LES TERRES DES TERRITOIRES DU NORD-OUEST

RÈGLEMENT SUR L'EXPLOITATION MINIÈRE
R-015-2014
En vigueur le 1er avril 2014

MODIFIÉ PAR
R-096-2015
R-087-2018
En vigueur le 1er juin 2018
R-073-2019

mine or part of a mine is situated and

(i) that belong to the same owner, or

(ii) if the mine is operated as a joint venture, that are owned exclusively by the members of the joint venture or parties related to the members of the joint venture, regardless of the degree of ownership of each recorded claim or leased claim; (*propriété minière*)

"mining reclamation trust" means, in respect of a mine, a trust created or security posted

(a) for the purposes of subsection 72.11(1) of the *Mackenzie Valley Resource Management Act* (Canada) or subsection 35(1) of the *Waters Act*; or

(b) as a condition of

(i) a lease issued under the *Territorial Lands Regulations* made under the *Territorial Lands Act* (Canada),

(ii) a lease issued under the *Northwest Territories Lands Regulations* made under the Act,

(iii) a contract with the Minister relating to the reclamation or environmental management of a mining property, or

(iv) a permit issued under Part 3 or 4 of the *Mackenzie Valley Resource Management Act* (Canada), the *Territorial Land Use Regulations* made under the *Territorial Lands Act* (Canada), or the *Northwest Territories Land Use Regulations* made under the Act; (*fiducie de restauration minière*)

"Mining Recorder" means the Mining Recorder appointed under subsection 86(2); (*registraire minier*)

"mining royalty valuer" means a mining royalty valuer described in subsection 86(3); (*évaluateur des redevances minières*)

"owner", in respect of a recorded claim, leased claim, mine or mining property, means any person with a legal or beneficial interest in the recorded claim, leased claim, mine or mining property; (*propriétaire*)

"precious stone" means a diamond, a sapphire, an emerald or a ruby; (*pierre précieuse*)

Règlement sur les terres des Territoires du Nord-Ouest pris en vertu de la Loi,

(iii) soit d'un contrat conclu avec le ministre relativement à la restauration ou à la gestion environnementale d'une propriété minière,

(iv) soit d'un permis délivré en vertu de la partie 3 ou 4 de la *Loi sur la gestion des ressources de la vallée du Mackenzie* (Canada), du *Règlement sur l'utilisation des terres territoriales* pris en vertu de la *Loi sur les terres territoriales* (Canada) ou du *Règlement sur l'utilisation des terres des Territoires du Nord-Ouest* pris en vertu de la Loi. (*mining reclamation trust*)

«fraction non amortie»

a) Dans le cas d'une déduction pour amortissement, le coût d'origine des actifs amortissables à l'égard desquels la déduction est réclamée, duquel est soustrait toute déduction pour amortissement réclamée au préalable à leur égard;

b) dans le cas d'une déduction relative à l'aménagement, la fraction non amortie des frais admissibles à la déduction visés à l'alinéa 70(1)i);

c) dans le cas d'une déduction relative à la contribution effectuée au profit d'une fiducie de restauration minière, le total de toutes les contributions effectuées au profit de la fiducie duquel est soustrait toute déduction relative à la contribution réclamée au préalable. (*undeducted balance*)

«frais d'exploration» Toutes les dépenses engagées en vue de déterminer l'existence, l'emplacement, l'étendue, la qualité ou le potentiel économique d'un gisement de minéraux dans les Territoires du Nord-Ouest. Sont exclus de la présente définition les frais de démarrage d'une mine. (*exploration cost*)

«jour ouvrable» Selon le cas, un jour autre que :

a) le samedi ou le dimanche;

b) les jours fériés,

c) le jour où l'enregistrement, le dépôt ou la présentation d'un document ou toute autre

(3) For the purposes of these regulations,

(a) if minerals or processed minerals that have been sold by an operator to a person not related to the operator are later sold to a person related to the operator, those minerals or processed minerals are deemed to have been sold by the operator to a related person; and

(b) if minerals or processed minerals that have been sold by an operator to a person related to the operator are later sold to a person not related to the operator and proof of that sale is provided, those minerals or processed minerals are deemed to have been sold by the operator to a person not related to the operator.

R-087-2018,s.11,20.

(3) Pour l'application du présent règlement :

a) si des minéraux ou minéraux traités ayant été vendus par l'exploitant à une personne qui ne lui est pas liée sont par la suite revendus à une personne qui lui est liée, ils sont réputés avoir été vendus par l'exploitant à la personne qui lui est liée;

b) si des minéraux ou minéraux traités ayant été vendus par l'exploitant à une personne qui lui est liée sont par la suite revendus à une personne qui ne lui est pas liée et qu'une preuve à cet égard est fournie, ils sont réputés avoir été vendus par l'exploitant à la personne qui ne lui est pas liée.

69. (1) Each fiscal year, the owner or operator of a mine shall pay to the Government of the Northwest Territories royalties on the value of the mine's output during that fiscal year in an amount equal to the lesser of

(a) 13% of the dollar value of the output of the mine, and

(b) the sum of the royalties payable set out in Column 2 of the table set out in Schedule 3 for the corresponding dollar value of the output set out in Column 1 of that table.

69. (1) Le propriétaire ou l'exploitant d'une mine verse au gouvernement des Territoires du Nord-Ouest, pour chaque exercice, des redevances sur la valeur de la production de la mine durant l'exercice en cause d'une somme égale à la moins élevée des sommes suivantes :

a) 13 % de la valeur en dollars de la production de la mine;

b) la somme calculée selon le pourcentage de redevance visé à la colonne 2 du tableau de l'annexe 3 applicable selon la valeur en dollars de la production visée à la colonne 1 du même tableau.

(2) The royalties payable to the Government of the Northwest Territories under subsection (1) in respect of a mine accrue during a fiscal year as the output of a mine is produced and must be remitted to the Chief not later than the last day of the fourth month after the end of that fiscal year.

(2) Les redevances s'accumulent pendant l'exercice à mesure que la production avance. Elles sont payées à l'ordre du gouvernement des Territoires du Nord-Ouest et remises au chef au plus tard le dernier jour du quatrième mois suivant la fin de l'exercice en cause.

(3) Subject to paragraph 74(1)(b), any person who was an owner or operator of a mine during the fiscal year in respect of which the royalties were payable is jointly and severally liable for the entire amount of the royalties payable in respect of the period during which that person was an owner or operator.

(3) Sous réserve de l'alinéa 74(1)b), toute personne qui était le propriétaire ou l'exploitant d'une mine pendant un exercice au cours duquel des redevances étaient dues est solidairement responsable du montant total des redevances à payer pour la période pendant laquelle elle était le propriétaire ou l'exploitant.

(4) For the purposes of this section, the value of the output of a mine for a fiscal year must be calculated in accordance with the formula

A + B – C + D + E + F + G + H – I + J

where

A is the total of

(a) the proceeds from sales, during the fiscal year, of minerals or processed minerals produced from the mine to persons not related to the operator, if proof of those sales is provided,

(b) the market value of any minerals or processed minerals produced from the mine that were sold or transferred to a person related to the operator, or to any other person if the proof of that disposition is not provided, and

(c) if the minerals or processed minerals produced from the mine are precious stones that have been cut or polished before their sale or transfer, the market value of those precious stones before they were cut or polished;

B is the market value of any inventories of minerals and processed minerals produced from the mine, as at the end of the fiscal year, determined under subsection (9);

C is the market value of any inventories of minerals and processed minerals produced from the mine, as at the beginning of the fiscal year, determined under subsection (9);

D is the lesser of

(a) the amount of any payment received during the fiscal year that is related to a cost that has been claimed as a deduction or allowance under this section, and

(b) that cost;

E is any excess amount referred to in paragraph 70(5)(b);

F is any amount withdrawn, during the fiscal year, from a mining reclamation trust established in respect of lands to which these regulations apply, up to the maximum of the total of the amounts contributed to the trust;

G is the amount of any proceeds received, during the fiscal year, from insurance on minerals or processed

(4) Pour l'application du présent article, la valeur de la production d'une mine au cours d'un exercice est calculée selon la formule suivante :

A + B - C + D + E + F + G + H - I + J

où :

A représente le total des sommes suivantes :

a) le produit de la vente, pendant l'exercice, des minéraux ou minéraux traités produits par la mine à des personnes non liées à l'exploitant, si la preuve de la vente est fournie,

b) la valeur marchande des minéraux ou minéraux traités produits par la mine qui ont été vendus ou transférés à une personne liée à l'exploitant ou, si la preuve de la disposition n'est pas fournie, à toute autre personne,

c) si les minéraux ou minéraux traités produits par la mine sont des pierres précieuses qui ont été taillées ou polies avant leur vente ou leur transfert, la valeur marchande de ces pierres précieuses avant leur taille ou leur polissage;

B la valeur marchande, déterminée conformément au paragraphe (9), des minéraux et minéraux traités produits par la mine en stock à la fin de l'exercice;

C la valeur marchande, déterminée conformément au paragraphe (9), des minéraux et minéraux traités produits par la mine en stock au début de l'exercice;

D le moindre des montants suivants :

a) tout paiement reçu au cours de l'exercice relativement à des frais pour lesquels une déduction a été réclamée en vertu du présent article,

b) ces frais;

E tout montant excédentaire visé à l'alinéa 70(5)b);

F toute somme retirée, pendant l'exercice, d'une fiducie de restauration minière établie à l'égard de terres visées par le présent règlement jusqu'à concurrence du total des sommes versées à la fiducie;

G toute prestation d'assurance reçue, pendant l'exercice, à l'égard de minéraux et minéraux traités

minerals produced from the mine;

H is the amount of any grants in respect of the mine that were made to the operator, or of any loans to the operator in respect of the mine that were forgiven, by the Government of the Northwest Territories or the Government of Canada during the fiscal year;

I is the total of the deductions and allowances claimed under subsection 70(1); and

J is the total of

(a) the amount by which the sum of the amounts referred to in paragraphs 70(8)(d) and (9)(e) exceeds the undeducted balance of the depreciable assets eligible for a depreciation allowance at the end of the fiscal year, and

(b) the amount by which the sum of the amounts referred to in paragraphs 70(9)(c) and (d) exceeds the undeducted balance of the development allowance at the end of the fiscal year.

(5) For the purpose of determining the value of A in subsection (4), if a mine is operated as a joint venture whose members deliver separate mining royalty returns under subsection 74(1),

(a) a diversion of any or all of the production of the mine from one member of the joint venture to another does not constitute a sale or transfer for the purposes of subsection 77(2), even if consideration is paid for the diversion; and

(b) any consideration paid to the member from whom the production was diverted must be included by that member as proceeds of sale of minerals or processed minerals produced from the mine.

(6) Costs related to the production of or value for minerals or processed minerals from lands other than lands to which these regulations apply may not be taken into account for the purposes of determining the values of A to D, G and I in subsection (4).

(7) In the case of a mining royalty return for the last year of production of a mine, the operator may, for the purpose of determining the value of B in

produits par la mine;

H toute subvention ou tout prêt — pour lequel l'exploitant a été dispensé de remboursement — accordé à l'exploitant par le gouvernement des Territoires du Nord-Ouest ou le gouvernement fédéral relativement à la mine pendant l'exercice;

I le total des déductions réclamées aux termes du paragraphe 70(1);

J le total des sommes suivantes :

a) l'excédent du total des sommes visées aux alinéas 70(8)d) et (9)e) sur la fraction non amortie des actifs amortissables admissibles à la déduction pour amortissement à la fin de l'exercice,

b) l'excédent du total des sommes visées aux alinéas 70(9)c) et d) sur la fraction non amortie de la déduction relative à l'aménagement à la fin de l'exercice.

(5) Dans le calcul de la valeur de l'élément A de la formule figurant au paragraphe (4), si la mine est exploitée en coentreprise dont les membres remettent des déclarations de redevances minières distinctes conformément au paragraphe 74(1) :

a) la réaffectation de la totalité ou d'une partie de la production de la mine par un membre de la coentreprise en faveur d'un autre membre ne constitue pas une vente ni un transfert au titre du paragraphe 77(2), même si une contrepartie est versée pour cette réaffectation;

b) toute contrepartie versée au membre dont la production a été réaffectée doit être incluse par ce membre comme produit de la vente des minéraux ou minéraux traités produits par la mine.

(6) Il peut ne pas être tenu compte, dans le calcul de la valeur des éléments A à D, G et I de la formule figurant au paragraphe (4), de la valeur des minéraux et minéraux traités provenant de terres auxquelles le présent règlement ne s'applique pas et de leur coût de production.

(7) Dans le cas de la déclaration de redevances minières établie pour le dernier exercice de production de la mine, l'exploitant peut, dans le calcul de la valeur

subsection (4), elect to use the actual proceeds from the sale to a party not related to the operator of minerals or processed minerals in inventory at the end of the fiscal year, if proof of that sale is provided, rather than the market value of the inventory of minerals or processed minerals at the end of that fiscal year as required under subsection (4).

(8) An election made under subsection (7) is irrevocable.

(9) If the minerals or processed minerals referred to in paragraphs (b) and (c) of the description of A, and in the descriptions of B and C, in subsection (4) are precious stones, the market value of those precious stones is as follows:

(a) if the mining royalty valuer and the operator agree on a value for the stones, that value; or

(b) if the mining royalty valuer and the operator cannot agree on a value for the stones, the maximum amount that could be realized from the sale of the stones on the open market after they are sorted into market assortments.

(10) For the purpose of subsection (9), the market value must be determined

(a) if the value is calculated for inventory purposes, at the beginning or end of the fiscal year; and

(b) if the value is calculated for any other purpose, as of the last time the precious stones were valued by the mining royalty valuer.

(11) If the minerals and processed minerals referred to in paragraphs (b) and (c) of the description of A, and in the descriptions of B and C, in subsection (4) are not precious stones, their market value is the price that could be obtained from their sale to a person who is not related to the operator.

(12) For the purpose of subsection (11), the market value must be determined

(a) if the value is calculated for inventory purposes, at the beginning or end of the fiscal year; and

(b) if the value is calculated for any other purpose, at the time the minerals or processed minerals are shipped from the mine.

de l'élément B de la formule figurant au paragraphe (4), choisir d'utiliser le produit réel de la vente des minéraux ou minéraux traités en stock à la fin de l'exercice à une personne non liée à l'exploitant, si la preuve de la vente est fournie, au lieu de la valeur marchande des minéraux ou minéraux traités en stock à la fin de l'exercice comme le prévoit le paragraphe (4).

(8) Le choix fait en vertu du paragraphe (7) est irrévocable.

(9) Si les minéraux ou minéraux traités visés aux alinéas b) et c) de l'élément A et aux éléments B et C de la formule figurant au paragraphe (4) sont des pierres précieuses, leur valeur marchande est la suivante :

a) si l'évaluateur des redevances minières et l'exploitant s'entendent sur la valeur des pierres, cette valeur;

b) s'ils ne s'entendent pas, la valeur maximale qui pourrait être obtenue de la vente des pierres sur le marché libre une fois celles-ci triées selon leur classement commercial.

(10) Pour l'application du paragraphe (9), la valeur marchande est calculée :

a) s'il s'agit de déterminer la valeur des stocks, au début ou à la fin de l'exercice;

b) dans les autres cas, au moment de la dernière évaluation de l'évaluateur des redevances minières.

(11) Si les minéraux ou minéraux traités visés aux alinéas b) et c) de l'élément A et aux éléments B et C de la formule figurant au paragraphe (4) ne sont pas des pierres précieuses, leur valeur marchande est égale au prix qui pourrait être obtenu de leur vente à une personne non liée à l'exploitant.

(12) Pour l'application du paragraphe (11), la valeur marchande est calculée :

a) s'il s'agit de déterminer la valeur des stocks, au début ou à la fin de l'exercice;

b) dans les autres cas, au moment où les minéraux ou minéraux traités sont expédiés de la mine.

(3) Notwithstanding subsection (2), a person may disclose information of a confidential nature for use in the development and evaluation of policy for the Government of the Northwest Territories. R-087-2018,s.23.

77. (1) Subject to subsection (2), no person may remove minerals or processed minerals produced from a mine, other than for the purposes of assay and testing to determine the existence, location, extent, quality or economic potential of a mineral deposit in the lands constituting the mining property, until the weight and any other information necessary to establish the value of those minerals or processed minerals has been ascertained and entered in the books of account referred to in subsection 76(1).

(2) Subject to section 77.1, until they have been valued by a mining royalty valuer, precious stones may not be

(a) removed from a mine, other than in a bulk sample or in a concentrate for the purposes of establishing the grade and the value of the stones in a mineral deposit,
(b) cut,
(c) polished,
(d) sold; or
(e) transferred.

(3) The operator of a mine shall provide, in the Northwest Territories, any facilities and equipment, other than computer equipment, necessary for a mining royalty valuer to value any precious stones produced from the mine.

(4) For the purposes of these regulations, facilities referred to in subsection (3) are deemed to be part of the mine and any transfer of the precious stones from one part of the mine to another is deemed not to be a removal of the stones from the mine.

(5) Precious stones may not be presented to the mining royalty valuer until the operator of the mine has cleaned the stones so as to remove all substances from the stones that are not part of them.

(6) As soon as any precious stones have been processed into a saleable form, they shall be presented to a mining royalty valuer for valuation.

(3) Malgré le paragraphe (2), toute personne peut divulguer des renseignements de nature confidentielle afin qu'ils soient utilisés dans le développement et l'examen de politiques pour le gouvernement des Territoires du Nord-Ouest. R-087-2018, art. 23.

77. (1) Sous réserve du paragraphe (2), il est interdit à quiconque de retirer les minéraux ou minéraux traités produits par une mine sauf pour des essais ou des épreuves afin d'établir l'existence, l'emplacement, l'étendue, la qualité et le potentiel économique d'un gisement minier sur les terres faisant partie de la propriété minière, tant que le poids et les autres renseignements nécessaires pour en déterminer la valeur n'ont pas été constatés et consignés dans les livres comptables visés au paragraphe 76(1).

(2) Sous réserve de l'article 77.1, tant que leur valeur n'a pas été établie par un évaluateur des redevances minières, les pierres précieuses ne peuvent pas être :

a) retirées d'une mine, sauf dans un échantillon en vrac ou dans un concentré dans le but de déterminer la teneur et la valeur des pierres dans un gisement minier;
b) taillées;
c) polies;
d) vendues;
e) transférées.

(3) L'exploitant d'une mine fournit, dans les Territoires du Nord-Ouest, les installations et le matériel, autre que le matériel informatique, permettant à l'évaluateur des redevances minières de procéder à l'évaluation des pierres précieuses produites par la mine.

(4) Pour l'application du présent règlement, les installations visées au paragraphe (3) sont réputées faire partie de la mine et les pierres précieuses déplacées d'un endroit de la mine à un autre sont réputées ne pas en avoir été retirées.

(5) L'exploitant est tenu de nettoyer les pierres précieuses afin de les débarrasser de toute substance étrangère avant de les présenter à l'évaluateur des redevances minières.

(6) Dès qu'elles ont été traitées de façon à être vendables, les pierres précieuses sont présentées à un évaluateur des redevances minières pour évaluation.