Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.
(the "APPLICANT")

BOOK OF AUTHORITIES
(re: Allen-Vanguard Motion)

McCarthy Tétrault LLP
Barristers and Solicitors
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel.: (416) 601-7730
Fax: (416) 868-0673

Heather Meredith LSCU# 48354R
Tel.: (416) 601-8342
Fax: (416) 868-0673

Lawyers for Growthworks Canadian Fund Ltd.

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Tab 1

SUPREME COURT OF CANADA

CITATION: Hryniak *v.* Mauldin, 2014 SCC 7

DATE: 20140123
DOCKET: 34641

BETWEEN:

Robert Hryniak
Appellant
and
Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith
Respondents
- and -
Ontario Trial Lawyers Association and Canadian Bar Association
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 96)
Karakatsanis J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring)

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

Robert Hryniak *Appellant*

v.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith *Respondents*

and

Ontario Trial Lawyers Association and Canadian Bar Association *Interveners*

Indexed as: Hryniak *v.* Mauldin

2014 SCC 7

File No.: 34641.

2013: March 26; 2014: January 23.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil Procedure — Summary Judgment — Investors bringing action in civil fraud and subsequently bringing a motion for summary judgment — Motion judge granting summary judgment — Purpose of summary judgment motions — Access to Justice — Proportionality — Interpretation of recent amendments to Ontario Rules of Civil Procedure — Trial management orders — Standard of review for summary judgment motions — Whether motion judge erred in granting summary judgment — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

In June 2001, two representatives of a group of American investors met with H and others to discuss an investment opportunity. The group wired US$1.2 million, which was pooled with other funds and transferred to H's company, Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared. The investors brought an action for civil fraud against H and others and subsequently brought a motion for summary judgment. The motion judge used his powers under Rule 20.04(2.1) of the *Ontario Rules of Civil Procedure* (amended in 2010) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against H. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that H had committed the tort of civil fraud against the investors, and therefore dismissed H's appeal.

Held: The appeal should be dismissed.

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Rule 20 was amended in 2010 to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case. The new powers in rules 20.04(2.1) and (2.2) expand the

number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.

Summary judgment motions must be granted whenever there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The new fact-finding powers granted to motion judges in Rule 20.04 may be employed on a motion for summary judgment unless it is in the interest of justice for them to be exercised only at trial. When the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. The power to hear oral evidence should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard. Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge and to provide a description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Failed, or even partially successful, summary judgment motions add to costs and delay. This risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction. These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

Absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law which should not be overturned, absent palpable and overriding error. Similarly, the determination of whether it is in the interest of justice for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) is also a question of mixed fact and law which attracts deference.

The motion judge did not err in granting summary judgment in the present case. The tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss. In granting summary judgment to the group against H, the motion judge did not explicitly address the correct test for civil fraud but his findings are sufficient to make out the cause of action. The motion judge found no credible evidence to support H's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

Cases Cited

Referred to: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Statutes and Regulations Cited

Code of Civil Procedure, R.S.Q., c. C-25, arts. 4.2, 54.1 *et seq.*, 165(4).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 20.

Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 1-3(2).

Authors Cited

Agrast, Mark David, Juan Carlos Botero and Alejandro Ponce. *World Justice Project Rule of Law Index 2011*. Washington, D.C.: World Justice Project, 2011.

Ontario. Ministry of the Attorney General. *Civil Justice Reform Project: Summary of Findings and Recommendations*. Toronto: The Ministry, 2007.

Walsh, Teresa, and Lauren Posloski. "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2013*. Toronto: Thomson Carswell, 2013, 419.

APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. v. Flesch*), affirming a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

Sarit E. Batner, *Brandon Kain* and *Moya J. Graham*, for the appellant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* and *Jonathan A. Odumeru*, for the respondents.

Allan Rouben and Ronald P. Bohm, for the intervener the Ontario Trial Lawyers Association.

Paul R. Sweeny and David Sterns, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

KARAKATSANIS J.—

[1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[3] Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990,

Reg. 194 (*Ontario Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, address the proper interpretation of the amended Rule 20 (summary judgment motion).

[4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[6] As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

[7] While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

I. Facts

[8] More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital, which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

[9] In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

[10] At the end of June 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos's funds, including the funds contributed by the Mauldin Group, were stolen.

[11] Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

II. Judicial History

A. *Ontario Superior Court of Justice, 2010 ONSC 5490 (CanLII)*

[12] The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

[13] In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank had stolen the Mauldin Group's money.

[14] The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

B. *Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1*

[15] The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

[16] The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

[17] The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

[18] The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

[19] The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

[20] Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

III. Outline

[21] In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally

and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

[22] Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. *Access to Civil Justice: A Necessary Culture Shift*

[23] This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[24] However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The

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[1] For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, or for cases involving certain minority rights (see the Language Rights Support Program).

[2] In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by

cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

[25] Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

[26] In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for

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shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[30] The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **1.04** (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[31] Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).

[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice.

[3] This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312, at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, at para. 12.

Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[33] A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. *Summary Judgment Motions*

[34] The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

[35] Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

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[4] Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

[36] Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

[37] Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.[5] Summary judgment existed to avoid the waste of a full trial in a clear case.

[38] In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.[6] However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".[7]

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[5] For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.

[6] *Ibid.*, at p. 426; for example, see *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242 (H.C.J.).

[7] *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 10.

[39] The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

[40] The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

[41] Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

[42] Rule 20.04 now reads in part:[8]

> **20.04** . . .
>
> (2) [General] The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[43] The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an

[8] The full text of Rule 20 is attached as an Appendix.

unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

[44] The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[9]

[45] These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

[46] I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

(1) When is There no Genuine Issue Requiring a Trial?

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[9] As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[47] Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

[48] The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary

findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[51] Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

(2) The Interest of Justice

[52] The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the

"interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

[53] To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

[54] The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

[55] The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

[56] While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be

adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

[57] On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

[58] This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

[59] In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

[60] The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

(3) The Power to Hear Oral Evidence

[61] Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

[62] The Court of Appeal suggested the motion judge should only exercise this power when

> (1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

[63] This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

[64] Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

[65] Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

(4) The Roadmap/Approach to a Motion for Summary Judgment

[66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[67] Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking

whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

[68] While summary judgment *must* be granted if there is no genuine issue requiring a trial,[10] the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.[11] The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

C. *Tools to Maximize the Efficiency of a Summary Judgment Motion*

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[10] Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial . . .".

[11] Rule 20.04(2.1): "In determining . . . whether there is a genuine issue requiring a trial . . . if the determination is being made by a judge, the judge may exercise any of the following powers . . . 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may . . . order that oral evidence be presented . . .".

(1) Controlling the Scope of a Summary Judgment Motion

[69] The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

[70] The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

[71] Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

[72] I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to

stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

[73] A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

(2) Salvaging a Failed Summary Judgment Motion

[74] Failed, or even partially successful, summary judgment motions add — sometimes astronomically — to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

[75] Rule 20.05(1) and (2) provides in part:

> **20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.
>
> (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just . . .

[76] Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

[77] These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

[78] Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the

matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

> saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

[79] While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

D. *Standard of Review*

[80] The Court of Appeal concluded that determining the appropriate test for summary judgment — whether there is a genuine issue requiring a trial — is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

[81] In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned,

absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

[82] Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

[83] Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

[84] Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

E. *Did the Motion Judge Err by Granting Summary Judgment?*

[85] The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues

this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

(1) The Tort of Civil Fraud

[86] The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

[87] As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

(2) Was There a Genuine Issue Requiring a Trial?

[88] In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

[89] The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this was not disputed in the appellant's factum.

[90] The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US$10.2 million.

[91] The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken . . . for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

[92] The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested US$1.2 million and, but for a small return of US$9,600 in February 2002, lost its investment.

[93] The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

(3) Did the Interest of Justice Preclude the Motion Judge from Using his Powers Under Rule 20.04?

[94] The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter

was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

[95] Despite the fact that the Mauldin group's claims against Peebles and Cassels Brock had to proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by the conclusion that Hryniak clearly was a perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

V. Conclusion

[96] Accordingly, I would dismiss the appeal, with costs to the respondents.

APPENDIX

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 20 SUMMARY JUDGMENT

20.01 [Where Available] (1) [To Plaintiff] A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) [To Defendant] A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

20.02 [Evidence on Motion] (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

20.03 [Factums Required] (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked.

20.04 [Disposition of Motion] (1) [General] Revoked.

(2) The court shall grant summary judgment if,
   (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
   (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) [Only Genuine Issue Is Question Of Law] Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) [Only Claim Is For An Accounting] Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

20.05 [Where A Trial Is Necessarry] (1) [Powers of Court] Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) [Directions And Terms] If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

  (i) there is a reasonable prospect for agreement on some or all of the issues, or

  (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;
(o) for payment into court of all or part of the claim; and
(p) for security for costs.

(3) [Specified Facts] At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) [Order re Affidavit Evidence] In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) [Order re Experts, Costs] If an order is made under clause (2) (k), each party shall bear his or her own costs.

(6) [Failure To Comply With Order] Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

20.06 [Costs Sanctions For Improper Use Of Rule] The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or
(b) the party acted in bad faith for the purpose of delay.

20.07 [Effect Of Summary Judgment] A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

20.08 [Stay Of Execution] Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

20.09 [Application To Counterclaims, Crossclaims And Third Party Claim] Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Appeal dismissed with costs.

Solicitors for the appellant: McCarthy Tétrault, Toronto.

Solicitors for the respondents: Heydary Hamilton, Toronto.

Solicitors for the intervener the Ontario Trial Lawyers Association: Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Solicitors for the intervener the Canadian Bar Association: Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

Tab 2

Court File No.: CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR. JUSTICE T. McEWEN	) THURSDAY, THE 9TH
JUSTICE MCEWEN	) DAY OF JANUARY, 2014

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.

CLAIMS PROCEDURE ORDER

THIS MOTION, made by GrowthWorks Canadian Fund Ltd. (the "**Applicant**") for an order establishing a claims procedure to identify, determine and resolve claims of creditors of the Applicant, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the affidavit of C. Ian Ross sworn on January 6, 2014, and the Fifth Report (the "**Fifth Report**") of FTI Consulting Canada Inc., in its capacity as monitor of the Applicant (the "**Monitor**"), and on hearing the submissions of counsel for the Applicant, the Monitor, Roseway Capital S.a.r.l. ("**Roseway**") and GrowthWorksWV Management Ltd. (the "**Manager**"), no one appearing for any other party although duly served as appears from the affidavit of service.

SERVICE

1. THIS COURT ORDERS that the time for service of this Motion and the Fifth Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS AND INTERPRETATION

2. THIS COURT ORDERS that, for the purposes of this Order establishing a claims process for the Creditors (as defined herein) of the Applicant (and in addition to terms defined elsewhere herein), the following terms shall have the following meanings ascribed thereto:

"**Administration Charge**" has the meaning given to that term in paragraph 37 of the Initial Order.

"**AGTL Shareholders**" means the plaintiffs in the Supreme Court of Nova Scotia action, Court File No. SN296202, against the Applicant and certain other defendants.

"**Allen-Vanguard**" means Allen-Vanguard Corporation.

"**Allen-Vanguard Action**" means the proceedings in Court File No. 08-CV-43544.

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

"**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Toronto, Ontario.

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C36, as amended.

"**CCAA Proceedings**" means the proceedings commenced by the Applicant in the Court at Toronto under Court File No. CV-13-10279-00CL.

"**CCAA Service List**" means the service list in the CCAA Proceedings posted on the Monitor's Website, as amended from time to time.

"**Claim**" means any right or claim of any Person, other than an Excluded Claim, but including an Equity Claim, that may be asserted or made in whole or in part against the Applicant, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by

reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person (including Directors and Officers) to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts prior to the Claims Bar Date, (B) relates to a time period prior to the Claims Bar Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA had the Applicant become bankrupt on the Claims Bar Date.

"**Claimant**" means any Person having a Claim, including a D&O Indemnity Claim, or a D&O Claim and includes the permitted transferee or assignee of a Claim, a D&O Indemnity Claim or a D&O Claim or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through any such Person.

"**Claimants' Guide to Completing the D&O Proof of Claim**" means the guide to completing the D&O Proof of Claim form, in substantially the form attached as Schedule "C-2" hereto.

"**Claimants' Guide to Completing the Proof of Claim**" means the guide to completing the Proof of Claim form, in substantially the form attached as Schedule "B-2" hereto.

"**Claims Bar Date**" means March 6, 2014.

"**Court**" means the Ontario Superior Court of Justice (Commercial List).

"**Creditor**" means any Person having a Claim, D&O Claim and/or a D&O Indemnity Claim and includes, without limitation, the transferee or assignee of a Claim, D&O Claim or D&O

Indemnity Claim transferred and recognized as a Creditor in accordance with paragraph 55 hereof or a trustee, executor, liquidator, receiver, receiver and manager or other Person acting on behalf of or through such Person.

"**Creditors' Meeting**" means any meeting of creditors called for the purpose of considering and/or voting in respect of any Plan, if one is filed, to be scheduled pursuant to further order of the Court.

"**Director**" means any natural person who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a) a director or *de facto* director of the Applicant or b) a Portfolio Company Director.

"**Directors' Charge**" has the meaning given to that term in paragraph 25 of the Initial Order.

"**Dispute Notice**" means a written notice to the Monitor, in substantially the form attached as Appendix "1" to Schedule "E" hereto, delivered to the Monitor by a Person who has received a Notice of Revision or Disallowance, of its intention to dispute such Notice of Revision or Disallowance.

"**D&O Claim**" means (i) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors or Officers that relates to a Claim for which such Directors or Officers are by law liable to pay in their capacity as Directors or Officers, or (ii) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors or Officers, in that capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof, is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal,

equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity from any such Directors or Officers or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts prior to the Claims Bar Date, or (B) relates to a time period prior to the Claims Bar Date, but not including an Excluded Claim.

"**D&O Indemnity Claim**" means any existing or future right of any Director or Officer against the Applicant, which arose or arises as a result of any Person filing a D&O Proof of Claim in respect of such Director or Officer for which such Director or Officer is entitled to be indemnified by the Applicant.

"**D&O Indemnity Claims Bar Date**" has the meaning set out in paragraph 19 hereof.

"**D&O Indemnity Proof of Claim**" means the indemnity proof of claim in substantially the form attached as Schedule "D" hereto to be completed and filed by a Director or Officer setting forth its purported D&O Indemnity Claim and which shall include all supporting documents in respect of such D&O Indemnity Claim.

"**D&O Proof of Claim**" means the proof of claim, in substantially the form attached as Schedule "C" hereto, to be completed and filed by a Person setting forth its D&O Claim and which shall include all supporting documentation in respect of such D&O Claim.

"**Equity Claim**" has the meaning set forth in Section 2(1) of the CCAA.

"**Excluded Claim**" means:

(i) any Claim entitled to the benefit of the Administration Charge;

(ii) the Claims of Roseway pursuant to the Participation Agreement dated May 28, 2010, including the disputed portion of such Claims, which shall be determined separately in these CCAA Proceedings; and,

(iii) any Post-Filing Claims.

"**Filing Date**" means October 1, 2013.

"**Government Authority**" means a federal, provincial, state, territorial, municipal or other government or government department, agency or authority (including a court of law) having jurisdiction over the Applicant.

"**Initial Order**" means the Initial order of the Honourable Justice Newbould made October 1, 2013 in the CCAA Proceedings, as amended and restated on October 29, 2013 and as may be amended, extended, restated or varied from time to time.

"**Manager Claim**" has the meaning ascribed thereto in paragraph 49.

"**Monitor's Website**" means http://cfcanada.fticonsulting.com/gcfl/default.htm.

"**Notice of Revision or Disallowance**" means a notice, in substantially the form attached as Schedule "E" hereto, advising a Claimant that the Monitor has revised or disallowed all or part of a Claim, D&O Claim or D&O Indemnity Claim submitted by such Claimant pursuant to this Order.

"**Notice to Claimants**" means the notice to Claimants for publication in substantially the form attached as Schedule "A" hereto.

"**Officer**" means any natural person who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of the Applicant.

"**Person**" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Government Authority or any agency, regulatory body, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status, and whether acting on their own or in a representative capacity.

"**Plan**" means any proposed plan(s) of compromise or arrangement to be filed by the Applicant pursuant to the CCAA as amended, supplemented or restated from time to time in accordance with the terms thereof.

"**Portfolio Company Directors**" has the meaning given to that term in paragraph 23 of the Initial Order.

"**Portfolio Company Directors' Charge**" has the meaning given to that term in paragraph 26 of the Initial Order.

"**Post-Filing Claims**" means any claims against the Applicant that arose from the provision of authorized goods and services provided or otherwise incurred on or after the Filing Date in the ordinary course of business.

"**Proof of Claim**" means the proof of claim in substantially the form attached as Schedule "B" hereto to be completed and filed by a Person setting forth its purported Claim and which shall include all supporting documentation in respect of such purported Claim.

"**Proof of Claim Document Package**" means a document package that includes a copy of the Notice to Claimants, the Proof of Claim form, the D&O Proof of Claim form, the Claimants' Guide to Completing the Proof of Claim form, the Claimants' Guide to Completing the D&O Proof of Claim form, and such other materials as the Monitor, in consultation with the Applicant, may consider appropriate or desirable.

"**Proven Claim**" means each Claim, D&O Claim or D&O Indemnity Claim that has been proven in accordance with this Order.

3. THIS COURT ORDERS that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. EST on such Business Day unless otherwise indicated herein.

4. THIS COURT ORDERS that all references to the word "including" shall mean "including without limitation", that all references to the singular herein include the plural, the plural include the singular, and that any gender includes all genders.

GENERAL PROVISIONS

5. THIS COURT ORDERS that the Monitor, in consultation with Applicant, is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and the time in which they are submitted, and may, where it is satisfied that a Claim, a D&O Claim or a D&O Indemnity Claim has been adequately proven, waive strict compliance with the requirements of this Order, including in respect of completion, execution and time of delivery of such forms. Further, the Monitor may request any further documentation from a Person that the Monitor, in consultation with the Applicant, may require in order to enable it to determine the validity of a Claim, a D&O Claim or a D&O Indemnity Claim.

6. THIS COURT ORDERS that if any purported Claim, D&O Claim or D&O Indemnity Claim arose in a currency other than Canadian dollars, then the Person making such Claim, D&O Claim or D&O Indemnity Claim shall complete its Proof of Claim, D&O Proof of Claim or D&O Indemnity Proof of Claim, as applicable, indicating the amount of the purported Claim, D&O Claim or D&O Indemnity Claim in such currency, rather than in Canadian dollars or any other currency.

7. THIS COURT ORDERS that a Person making a Claim, D&O Claim or D&O Indemnity Claim shall complete its Proof of Claim, D&O Proof of Claim or D&O Indemnity Proof of Claim, as applicable, indicating the amount of the Claim, D&O Claim or D&O Indemnity Claim, including interest calculated to the Filing Date.

8. THIS COURT ORDERS that the form and substance of each of the Notice to Claimants, Proof of Claim, Claimants' Guide to Completing the Proof of Claim, D&O Proof of Claim, Claimants' Guide to Completing the D&O Proof of Claim, D&O Indemnity Proof of Claim, Notice of Revision or Disallowance and the Dispute Notice attached as Appendix "1" thereto, substantially in the forms attached as Schedules "A", "B", "B-2", "C", "C-2", "D" and "E", respectively, to this Order are hereby approved. Notwithstanding the foregoing, the Monitor, in consultation with the Applicant, may from time to time make non-substantive changes to such forms as the Monitor, in consultation with the Applicant, considers necessary or advisable.

9. THIS COURT ORDERS that copies of all forms delivered by a Creditor or the Monitor hereunder, as applicable, shall be maintained by the Monitor and, subject to further order of the Court, the relevant Creditor will be entitled to have access thereto by appointment during normal business hours on written request to the Monitor.

MONITOR'S ROLE

10. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA and under the Initial Order, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order or incidental thereto.

11. THIS COURT ORDERS that (i) in carrying out the terms of this Order, the Monitor shall have all of the protections given to it by the CCAA, the Initial Order, other orders in the CCAA Proceedings, and this Order, or as an officer of the Court, including the stay of proceedings in its favour, (ii) the Monitor shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, (iii) the Monitor shall be entitled to rely on the books and records of the Applicant and any information provided by the Applicant, the Directors and Officers and any Claimant, all without independent investigation, and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

NOTICE TO CLAIMANTS, DIRECTORS AND OFFICERS

12. THIS COURT ORDERS that:

(a) the Monitor shall, no later than two (2) Business Days following the making of this Order, post a copy of the Proof of Claim Document Package on the Monitor's Website;

(b) the Monitor shall, no later than seven (7) Business Days following the making of this Order, cause the Notice to Claimants to be published once in The Globe and Mail newspaper (National Edition) and any other newspaper or journals as the Monitor, in consultation with the Applicant, considers appropriate, if any;

(c) the Monitor shall, provided such request is received in writing by the Monitor prior to the Claims Bar Date, deliver as soon as reasonably possible following receipt of a request therefor, a copy of the Proof of Claim Document Package to any Person requesting such material; and

(d) the Monitor shall send to any Director or Officer named in a D&O Proof of Claim received on or before the Claims Bar Date a copy of such D&O Proof of Claim, including copies of any documentation submitted to the Monitor by the D&O Claimant, as soon as practicable.

13. THIS COURT ORDERS that within seven (7) Business Days following the making of this Order, the Monitor shall send a Proof of Claim Document Package to all known Creditors, including the Manager and the AGTL Shareholders, other than Allen-Vanguard, in accordance with the Applicant's books and records.

14. THIS COURT ORDERS that, except as otherwise set out in this Order or any other orders of the Court, neither the Monitor nor the Applicant is under any obligation to send or provide notice to any Person holding a Claim, a D&O Claim or a D&O Indemnity Claim, and, without limitation, neither the Monitor nor the Applicant shall have any obligation to send or provide notice to any Person having a security interest in a Claim, D&O Claim or D&O Indemnity Claim (including the holder of a security interest created by way of a pledge or a security interest created by way of an assignment or transfer of a Claim, D&O Claim or D&O Indemnity Claim), and all Persons shall be bound by any notices published pursuant to paragraphs 12(a) and 12(b) of this Order regardless of whether or not they received actual notice, and any steps taken in respect of any Claim, D&O Claim or D&O Indemnity Claim in accordance with this Order.

15. THIS COURT ORDERS that the delivery of a Proof of Claim, D&O Proof of Claim, or D&O Indemnity Proof of Claim by the Monitor to a Person shall not constitute an admission by the Applicant or the Monitor of any liability of the Applicant or any Director or Officer to any Person.

CLAIMS BAR DATE

Claims and D&O Claims

16. THIS COURT ORDERS that Proofs of Claim and D&O Proofs of Claim shall be filed with the Monitor on or before the Claims Bar Date. For the avoidance of doubt, a Proof of Claim or D&O Proof of Claim, as applicable, must be filed in respect of every Claim or D&O Claim, regardless of whether or not a legal proceeding in respect of a Claim or D&O Claim has been previously commenced.

17. THIS COURT ORDERS that, in respect of any Claim, any Person that does not file a Proof of Claim as provided for herein such that the Proof of Claim is received by the Monitor on or before the Claims Bar Date (a) shall be and is hereby forever barred from making or enforcing such Claim against the Applicant and/or the Property (as defined in the Initial Order) and all such Claims shall be forever extinguished, barred, discharged and released as against the Applicant and the Property, and the Applicant shall not have any liability whatsoever in respect thereof; (b) shall be and is hereby forever barred from making or enforcing such Claim as against any other Person who could claim contribution or indemnity from the Applicant and/or against the Property; (c) shall not be entitled to vote such Claim at any Creditors' Meeting in respect of any Plan or to receive any distribution thereunder in respect of such Claim; and (d) shall not be entitled to any further notice of, and shall not be entitled to participate as a Claimant or Creditor in, the CCAA Proceedings in respect of such Claim.

18. THIS COURT ORDERS that, in respect of any D&O Claim, any Person that does not file a D&O Proof of Claim as provided for herein such that the D&O Proof of Claim is received by the Monitor on or before the Claims Bar Date (a) shall be and is hereby forever barred from making or enforcing such D&O Claim against any Director or Officer or the insurers of such Director or Officer, and all such D&O Claims shall be forever extinguished, barred, discharged and released as against the Directors and Officers and the Property and the Directors and Officers shall not have any liability whatsoever in respect thereof; (b) shall be and is hereby forever barred from making or enforcing such D&O Claim as against any other Person who could claim contribution or indemnity from any Director or Officer and/or against the Property; (c) shall not be entitled to receive any distribution in respect of such D&O Claim; and (d) shall

not be entitled to any further notice of, and shall not be entitled to participate as a Claimant or Creditor in, the CCAA Proceedings in respect of such D&O Claim.

D&O Indemnity Claims

19. THIS COURT ORDERS that any Director or Officer wishing to assert a D&O Indemnity Claim shall deliver a D&O Indemnity Proof of Claim to the Monitor in accordance with paragraph 59 hereof so that it is received by no later than fifteen (15) Business Days after the date of deemed receipt of the D&O Proof of Claim pursuant to paragraph 58 hereof by such Director or Officer (with respect to each D&O Indemnity Claim, the "**D&O Indemnity Claims Bar Date**").

20. THIS COURT ORDERS that, in respect of any D&O Indemnity Claim, any Director or Officer that does not file a D&O Indemnity Proof of Claim as provided for herein such that the D&O Indemnity Proof of Claim is received by the Monitor on or before the applicable D&O Indemnity Claims Bar Date: (a) shall be and is hereby forever barred from making or enforcing such D&O Indemnity Claim against the Applicant, and such D&O Indemnity Claim shall be forever extinguished, barred, discharged and released as against the Applicant and the Property and the Applicant shall not have any liability whatsoever in respect thereof; (b) shall be and is hereby forever barred from making or enforcing such D&O Indemnity Claim as against any other Person who could claim contribution or indemnity from the Applicant and/or against the Property; (c) shall not be entitled to vote such D&O Indemnity Claim at any Creditors' Meeting or to receive any distribution in respect of such D&O Indemnity Claim; and (d) shall not be entitled to any further notice of, and shall not be entitled to participate as a Claimant or Creditor in, the CCAA Proceedings in respect of such D&O Indemnity Claim.

Excluded Claims

21. THIS COURT ORDERS that Persons with Excluded Claims shall not be required to file a Proof of Claim in this process in respect of such Excluded Claims, unless required to do so by further order of the Court.

PROOFS OF CLAIM

22. THIS COURT ORDERS that each Person shall include any and all Claims it asserts against the Applicant in a single Proof of Claim.

23. THIS COURT ORDERS that each Person shall include any and all D&O Claims it asserts against one or more Directors or Officers in a single D&O Proof of Claim.

24. THIS COURT ORDERS that each Person shall include any and all D&O Indemnity Claims it asserts against the Applicant in a single D&O Indemnity Proof of Claim.

25. THIS COURT ORDERS that if a Person submits a Proof of Claim and a D&O Proof of Claim in relation to the same matter, then that Person shall cross-reference the D&O Proof Claim in the Proof of Claim and the Proof of Claim in the D&O Proof of Claim.

REVIEW OF PROOFS OF CLAIM & D&O PROOFS OF CLAIM

26. THIS COURT ORDERS that the Monitor, subject to the terms of this Order, shall review all Proofs of Claim and D&O Proofs of Claim filed, consult with the Applicant with respect thereto, and at any time:

(a) may request additional information from a Claimant;

(b) may request that a Claimant file a revised Proof of Claim or D&O Proof of Claim, as applicable;

(c) (i) with the consent of the Applicant and any Person whose liability may be affected or (ii) with Court approval in a further order of the Court, may resolve and settle any issue or Claim arising in a Proof of Claim or D&O Proof of Claim or in respect of a Claim or D&O Claim and/or accept the Claim in a Proof of Claim or D&O Proof of Claim; and

(d) may, in consultation with the Applicant with respect to the Proofs of Claim and the Directors and Officers named in the applicable D&O Proof of Claim with respect to the D&O Proofs of Claim, as applicable, revise or disallow (in whole or in part) any Claim or D&O Claim.

27. THIS COURT ORDERS that where a Claim or D&O Claim has been accepted by the Monitor in accordance with this Order such Claim or D&O Claim, as applicable, shall constitute such Claimant's Proven Claim.

28. THIS COURT ORDERS that where a Claim or D&O Claim is revised or disallowed (in whole or in part), the Monitor (or the Applicant, where applicable) shall deliver to the Claimant a Notice of Revision or Disallowance, attaching the form of Dispute Notice.

29. THIS COURT ORDERS that where a Claim or D&O Claim has been revised or disallowed (in whole or in part), the revised or disallowed Claim or D&O Claim (or revised or disallowed portion thereof) shall not be a Proven Claim until determined otherwise in accordance with the procedures set out in paragraphs 38 to 41 (or, with respect to the Allen-Vanguard Claim and Manager Claim (each as defined below), paragraphs 42 to 46 or 47 to 54, respectively) hereof or as otherwise ordered by the Court.

30. THIS COURT ORDERS that the failure by the Monitor (or the Applicant, where applicable) to send a Notice of Revision and Disallowance shall not result in any Claim or D&O Claim being accepted as a Proven Claim or being deemed to be accepted as a Proven Claim.

REVIEW OF D&O INDEMNITY PROOFS OF CLAIM

31. THIS COURT ORDERS that the Monitor, subject to the terms of this Order, shall review all D&O Indemnity Proofs of Claim filed, and at any time:

(a) may request additional information from a Director or Officer;

(b) may request that a Director or Officer file a revised D&O Indemnity Proof of Claim;

(c) may attempt to resolve and settle any issue or Claim arising in a D&O Indemnity Proof of Claim or in respect of a D&O Indemnity Claim;

(d) may accept (in whole or in part) any D&O Indemnity Claim; and

(e) may, by notice in writing, revise or disallow (in whole or in part) any D&O Indemnity Claim.

32. THIS COURT ORDERS that where a D&O Indemnity Claim has been accepted by the Monitor in accordance with this Order such D&O Indemnity Claim shall constitute such Director or Officer's Proven Claim.

33. THIS COURT ORDERS that where a D&O Indemnity Claim is revised or disallowed (in whole or in part), the Monitor shall deliver to the Director or Officer a Notice of Revision or Disallowance, attaching the form of Dispute Notice.

34. THIS COURT ORDERS that where a D&O Indemnity Claim has been revised or disallowed (in whole or in part), the revised or disallowed D&O Indemnity Claim (or revised or disallowed portion thereof) shall not be a Proven Claim until determined otherwise in accordance with the procedures set out in paragraphs 38 to 41 (or, with respect to the Allen-Vanguard Claim and Manager Claim (each as defined below), paragraphs 42 to 46 or 47 to 54, respectively) hereof or as otherwise ordered by the Court.

35. THIS COURT ORDERS that the failure by the Monitor to send a Notice of Revision and Disallowance shall not result in any D&O Indemnity Claim being accepted as a Proven Claim or being deemed to be accepted as a Proven Claim.

DISPUTE NOTICE

36. THIS COURT ORDERS that a Person who has received a Notice of Revision or Disallowance in respect of a Claim, a D&O Claim or a D&O Indemnity Claim and who intends to dispute such Notice of Revision or Disallowance shall file a Dispute Notice with the Monitor not later than the fifteenth (15th) Business Day following deemed receipt of the Notice of Revision or Disallowance pursuant to paragraph 58 of this Order. The filing of a Dispute Notice with the Monitor in accordance with this paragraph shall result in such Claim, D&O Claim or D&O Indemnity Claim being determined as set out in paragraphs 38 to 41 (or, with respect to the

Allen-Vanguard Claim and Manager Claim (each as defined below), paragraphs 42 to 46 or 47 to 54, respectively) of this Order.

37. THIS COURT ORDERS that where a Claimant that receives a Notice of Revision or Disallowance fails to file a Dispute Notice with the Monitor within the requisite time period provided in this Order, the amount of such Claimant's Claim, D&O Claim or D&O Indemnity Claim, as applicable, shall be deemed to be as set out in the Notice of Revision or Disallowance and such amount, if any, shall constitute such Claimant's Proven Claim (or, if the Claim, D&O Claim or D&O Indemnity Claim, as applicable, is disallowed in full in the Notice of Revision or Disallowance, the applicable Claimant shall be deemed to accept such disallowance and the Claim, D&O Claim or D&O Indemnity Claim, as applicable, shall be deemed to be fully disallowed), and the balance of such Claimant's Claim, D&O Claim, or D&O Indemnity Claim, as applicable, if any, shall be forever extinguished, barred, discharged and released as against the Applicant, the Property and the Directors and Officers, as applicable, and the Property and the Applicant and/or Directors and Officers, as applicable, shall not have any liability whatsoever in respect thereof.

RESOLUTION OF CLAIMS, D&O CLAIMS AND D&O INDEMNITY CLAIMS

38. THIS COURT ORDERS that, as soon as practicable after the delivery of the Dispute Notice to the Monitor, the Monitor shall attempt to resolve and settle the Claim or D&O Claim with the Claimant, subject to the terms of this Order.

39. THIS COURT ORDERS that as soon as practicable after the delivery of the Dispute Notice in respect of a D&O Indemnity Claim to the Monitor, the Monitor shall attempt to resolve and settle the purported D&O Indemnity Claim with the applicable Director or Officer.

40. THIS COURT ORDERS that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Applicant and the applicable Claimant, the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute.

41. THIS COURT ORDERS that any Claims and related D&O Claims and/or D&O Indemnity Claims shall be determined at the same time and in the same proceeding and any

claims of the Applicant against a purported Claimant may, at the option of the Applicant, be determined at the same time and in the same proceeding as the claims by the purported Claimant against the Applicant.

ALLEN-VANGUARD CLAIM

42. THIS COURT ORDERS that, notwithstanding anything in this Order, Allen-Vanguard shall be deemed to have submitted a Proof of Claim in the amount of $650,000,000 of which it states $40,000,000 shall be distributed to Allen-Vanguard in accordance with the terms of the Escrow Agreement (as defined in the Statement of Claim of Allen-Vanguard filed in the Allen-Vanguard Action (the "**Allen-Vanguard Statement of Claim**")) plus pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended and costs on a substantial indemnity basis, in reliance on the grounds set out in the Allen-Vanguard Statement of Claim and Reply of Allen-Vanguard in the Allen-Vanguard Action (the "**Allen-Vanguard Claim**").

43. THIS COURT ORDERS that the Monitor shall be deemed to have delivered a Notice of Revision and Disallowance disallowing the Allen-Vanguard Claim in its entirety in reliance on the grounds set out in the Statement of Defence of the "Offeree Shareholders" in the Allen-Vanguard Action and that Allen-Vanguard shall be deemed to have submitted a Dispute Notice disputing such disallowance in its entirety.

44. THIS COURT ORDERS that, for greater clarity, nothing contained in this Order shall prejudice Allen-Vanguard's rights in respect of the Allen-Vanguard Action (Court File No. 08-CV-43544), related actions involving Allen-Vanguard (Court File Nos. 08-CV-43188 and 08-CV-41899), or the pending motion of Allen-Vanguard in these proceedings, now scheduled for February 11, 2014.

45. THIS COURT ORDERS that, for greater clarity, nothing contained in this Order shall prejudice the Applicant's or the Monitor's rights to object to or otherwise oppose, on any and all bases, the validity and/or amount of the Claims asserted by Allen-Vanguard.

46. THIS COURT ORDERS that, notwithstanding any provision of this Order (except paragraphs 42 to 45, inclusive), the procedure for determining the Allen-Vanguard Claim shall

not be determined until after the hearing or other determination of the pending motion of Allen-Vanguard and cross-motion of the Applicant, now scheduled for February 11, 2014, unless otherwise agreed by the Applicant, the Monitor and Allen-Vanguard, or by further Order of the Court.

MANAGER CLAIM

47. THIS COURT ORDERS that notwithstanding any other term of this Order, the Manager shall, for purposes only of crystalizing its maximum damages claim as against the Applicant, be deemed to have submitted a Proof of Claim in the amount of $18,000,000 pursuant to the letter of Dentons LLP dated and delivered to the Applicant's counsel on November 26, 2013 (the "**Manager's Proof of Claim**").

48. Notwithstanding paragraph 47 and any other term of this Order, the Manager Claim (as defined below) shall be determined in accordance with the procedure set out in paragraphs 49 to 54. For greater certainty, neither the deemed submission of the Manager's Proof of Claim nor any other term of this Order shall operate or be deemed in any way to prejudice the Manager's right to have the Manager Claim determined on the basis of the record and in accordance with such procedure.

49. THIS COURT ORDERS that, in addition of the Manager Proof of Claim, the Manager may deliver a Statement of Claim setting out its claim against the Applicant (collectively with the Manager's Proof of Claim the "**Manager Claim**"), which Statement of Claim shall comply with the rules of pleading in the *Rules of Civil Procedure*(Ontario) (the "**Rules of Pleading**"). The Manager Claim, if any, shall be delivered to the Applicant and the Monitor on or before the Claim Bar Date.

50. THIS COURT ORDERS that, notwithstanding any provision of this Order, the Applicant, in consultation with the Monitor, may revise or disallow the Manager Claim (in whole or in part) and dispute any allegation contained in the Manager Claim, if any, by delivering to the Manager a Notice of Revision or Disallowance in accordance with the terms of this Order, which shall attach a Statement of Defence and Counterclaim setting out the basis for

the revision or disallowance and any counterclaims against the Manager, which Statement of Defence and Counterclaim shall comply with the Rules of Pleading.

51. THIS COURT ORDERS that, to the extent the Manager intends to dispute the Notice of Revision or Disallowance (including any allegations contained in the attached Statement of Defence and Counterclaim), the Manager shall deliver a Notice of Dispute in accordance with the terms of this Order except that it shall have 30 days to file such Notice of Dispute with the Monitor, and shall attach a Reply and Defence to Counterclaim, which shall comply with the Rules of Pleading.

52. THIS COURT ORDERS that, in the discretion of the Applicant, in consultation with the Monitor, the Applicant may deliver to the Manager and the Monitor a Reply to Defence to Counterclaim, which shall comply with the Rules of Pleading.

53. THIS COURT ORDERS that if a dispute in relation to the Manager's Claim and any counterclaim by the Applicant (the "**Manager Dispute**") is not settled within a time period satisfactory to the Monitor in consultation with the Applicant and the Manager (after delivery of the pleadings described in paragraphs 48 to 52) or in a manner satisfactory to the Monitor in consultation with the Applicant and the Manager, then the Applicant, the Manager and the Monitor shall attend before a judge of the Court to set a timetable for all procedural steps necessary for the hearing of the Manager Dispute, which shall include (unless this Court orders otherwise) discoveries, delivery of expert reports (if any), mediation, and a hearing (which shall be before a judge of the Court), among other possible steps.

54. THIS COURT ORDERS that, the pleadings described in paragraphs 48 to 52 shall not be issued by the Court. The pleadings shall form part of the record in the event a Manager Dispute occurs.

NOTICE OF TRANSFEREES

55. THIS COURT ORDERS that neither the Monitor nor the Applicant shall be obligated to send notice to or otherwise deal with a transferee or assignee of a Claim, D&O Claim or D&O Indemnity Claim as the Claimant in respect thereof unless and until (i) actual written notice of the permitted transfer or assignment, together with satisfactory evidence of such transfer or

assignment, shall have been received by the Monitor, and (ii) the Monitor shall have acknowledged in writing such transfer or assignment, and thereafter such transferee or assignee shall for all purposes hereof constitute the "Claimant" in respect of such Claim, D&O Claim or D&O Indemnity Claim. Any such transferee or assignee of a Claim, D&O Claim or D&O Indemnity Claim shall be bound by all notices given or steps taken in respect of such Claim, D&O Claim or D&O Indemnity Claim in accordance with this Order prior to the written acknowledgement by the Monitor of such transfer or assignment.

56. THIS COURT ORDERS that the transferee or assignee of any Claim, D&O Claim or D&O Indemnity Claim (i) shall take the Claim, D&O Claim or D&O Indemnity Claim subject to the rights and obligations of the transferor/assignor of the Claim, D&O Claim or D&O Indemnity Claim, and subject to the rights of the Applicant and any Director or Officer against any such transferor or assignor, including any rights of set-off which the Applicant, Director, or Officer had against such transferor or assignor, and (ii) cannot use any transferred or assigned Claim, D&O Claim or D&O Indemnity Claim to reduce any amount owing by the transferee or assignee to the Applicant, Director or Officer, whether by way of set off, application, merger, consolidation or otherwise.

DIRECTIONS

57. THIS COURT ORDERS that the Monitor, the Applicant and any Person (but only to the extent such Person may be affected with respect to the issue on which directions are sought) may, at any time, and with such notice as the Court may require, seek directions from the Court with respect to this Order and the claims process set out herein, including the forms attached as Schedules hereto.

SERVICE AND NOTICE

58. THIS COURT ORDERS that the Monitor may, unless otherwise specified by this Order, serve and deliver the Proof of Claim Document Package, the D&O Indemnity Proof of Claim, the Notice of Revision or Disallowance, and any letters, notices or other documents to Claimants, Directors, Officers, or other interested Persons, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission to such

Persons (with copies to their counsel as appears on the CCAA Service List if applicable) at the address as last shown on the records of the Applicant or set out in such Person's Proof of Claim, D&O Proof of Claim or D&O Indemnity Proof of Claim. Any such service or notice shall be deemed to have been received: (i) if sent by ordinary mail, on the fourth Business Day after mailing; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by electronic or digital transmission by 6:00 p.m. on a Business Day, on such Business Day, and if delivered after 6:00 p.m. or on a day other than on a Business Day, on the following Business Day. Notwithstanding anything to the contrary in this paragraph 58, Notices of Revision or Disallowance shall be sent only by (i) email or facsimile to a number or email address that has been provided in writing by the Claimant, Director or Officer, or (ii) courier.

59. THIS COURT ORDERS that any notice or other communication (including Proofs of Claim, D&O Proofs of Claims, D&O Indemnity Proofs of Claim and Notices of Dispute) to be given under this Order by any Person to the Monitor shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by prepaid ordinary mail, prepaid registered mail, courier, personal delivery or electronic transmission addressed to:

FTI Consulting Canada Inc., GrowthWorks Canadian Fund Ltd. Monitor

Address:	TD Waterhouse Tower 79 Wellington Street West Suite 2010 P.O. Box 104 Toronto, Ontario Canada M5K 1G8
Fax No.:	(416) 649-8101
Email:	growthworkscanadianfundltd@fticonsulting.com
Attention:	Paul Bishop and Jodi Porepa

Any such notice or other communication by a Person to the Monitor shall be deemed received only upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, the next Business Day.

60. THIS COURT ORDERS that if, during any period during which notices or other communications are being given pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of the Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or electronic or digital transmission in accordance with this Order.

61. THIS COURT ORDERS that, in the event that this Order is later amended by further order of the Court, the Monitor shall post such further order on the Monitor's Website and such posting shall constitute adequate notice of such amendment.

INSURANCE

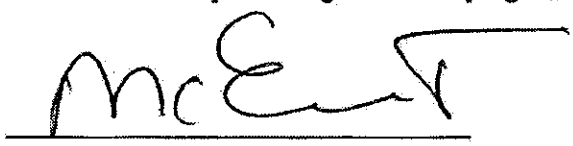
62. THIS COURT ORDERS that, except as provided in paragraph 18 hereof, nothing in this Order shall prejudice the rights and remedies of any Directors, Officers or other Persons under the Directors' Charge or Portfolio Company Directors' Charge, as applicable; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter any defence to such claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or D&O Claim or portion thereof for which the Person receives payment directly from or confirmation that she is covered by the Applicant's insurance or any Director's or Officer's liability insurance or other liability insurance policy or policies that exist to protect or indemnify the Directors, Officers and/or other Persons shall not be recoverable as against the Applicant or Director or Officer, as applicable.

MISCELLANEOUS

63. THIS COURT ORDERS that nothing in this Order shall constitute or be deemed to constitute an allocation or assignment of Claims, D&O Claims, D&O Indemnity Claims, or Excluded Claims into particular affected or unaffected classes for the purpose of a Plan and, for greater certainty, the treatment of Claims, D&O Claims, D&O Indemnity Claims, Excluded Claims or any other claims are to be subject to a Plan or further order of the Court and the class

or classes of Creditors for voting and distribution purposes shall be subject to the terms of any proposed Plan or further order of the Court.

64. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.



SCHEDULE "A"

NOTICE TO CLAIMANTS
AGAINST GROWTHWORKS CANADIAN FUND LTD.
(hereinafter referred to as the "Applicant")

RE: NOTICE OF CLAIMS PROCEDURE FOR THE APPLICANT PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT (the "CCAA")

PLEASE TAKE NOTICE that on January 9, 2014, the Superior Court of Justice of Ontario issued an order (the "Claims Procedure Order") in the CCAA proceeding of the Applicant requiring that all Persons who assert a Claim (capitalized terms used in this notice and not otherwise defined have the meaning given to them in the Claims Procedure Order) against the Applicant, whether unliquidated, contingent or otherwise, and all Persons who assert a claim against Directors or Officers of the Applicant (as defined in the Claims Procedure Order, a "D&O Claim"), **must file a Proof of Claim (with respect to Claims against the Applicant) or D&O Proof of Claim (with respect to D&O Claims) with FTI Consulting Canada Inc. (the "Monitor") on or before 5:00 p.m. (prevailing Eastern time) on March 6, 2014 (the "Claims Bar Date"), by sending the Proof of Claim or D&O Proof of Claim to the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery or electronic transmission at the following address:**

FTI Consulting Canada Inc., GrowthWorks Canadian Fund Ltd. Monitor
Address: **TD Waterhouse Tower**
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario Canada, M5K 1G8
Fax No.: **(416) 649-8101**
Email: **growthworkscanadianfundltd@fticonsulting.com**
Attention: **Paul Bishop and Jodi Porepa**

Pursuant to the Claims Procedure Order, Proof of Claim Document Packages, including the form of Proof of Claim and D&O Proof of Claim will be sent to known Creditors as specified in the Claims Procedure Order by mail, on or before January 20, 2014. Claimants may also obtain the Claims Procedure Order and a Proof of Claim Document Package from the website of the Monitor at http://cfcanada.fticonsulting.com/gcfl/default.htm, or by contacting the Monitor by telephone (1-855-431-3185).

Only Proofs of Claim and D&O Proofs of Claim actually received by the Monitor on or before **5:00 p.m. (prevailing Eastern time) on March 6, 2014** will be considered filed by the Claims Bar Date. **It is your responsibility to ensure that the Monitor receives your Proof of Claim or D&O Proof of Claim by the Claims Bar Date.**

CLAIMS AND D&O CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

DATED this • day of •, 2014.

SCHEDULE "B"

PROOF OF CLAIM FORM FOR CLAIMS AGAINST GROWTHWORKS CANADIAN FUND LTD.
(hereinafter referred to as the "Applicant")

1. Original Claimant (the "Claimant")

Legal Name of Claimant _____ Name of Contact _____

Address Title _____

_____ Phone # _____

_____ Fax # _____

City _____ Prov /State _____ email _____

Postal/Zip Code _____

2. Assignee, if claim has been assigned

Legal Name of Assignee _____ Name of Contact _____

Address _____ Phone # _____

_____ Fax # _____

City _____ Prov /State _____ email: _____

Postal/Zip Code _____

3 Amount of Claim

The Applicant was and still is indebted to the Claimant as follows:

Currency	Original Currency Amount	Unsecured Claim	Secured Claim
		☐	☐
		☐	☐
		☐	☐
		☐	☐
		☐	☐

4. Documentation

Provide all particulars of the Claim and supporting documentation, including amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the Claim, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the Applicant to the Claimant and estimated value of such security.

_____

5. Certification

I hereby certify that:

1. I am the Claimant or authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this Claim against the Applicant as set out above.
4. Complete documentation in support of this claim is attached.

Signature: _____	Witness:
Name: _____	_____ (signature)
Title: _____	_____ (print)
Dated at _____ this _____ day of _____ , 2014	

6. Filing of Claim

This Proof of Claim must be received by the Monitor by 5:00 p.m. (prevailing Eastern time) on March 6, 2014 by prepaid ordinary mail, registered mail, courier, personal delivery or electronic transmission at the following address:

FTI Consulting Canada Inc., GrowthWorks Canadian Fund Ltd. Monitor
Address: TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario Canada, M5K 1G8
Attention: Paul Bishop and Jodi Porepa
Email: growthworkscanadianfundltd@fticonsulting.com
Fax No.: (416) 649-8101

For more information see http://cfcanada.fticonsulting.com/gcfl/default.htm, or contact the Monitor by telephone at 416-649-8087 or toll-free at 1-855-431-3185.

SCHEDULE "B-2"

CLAIMANT'S GUIDE TO COMPLETING THE PROOF OF CLAIM FORM FOR CLAIMS AGAINST GROWTHWORKS CANADIAN FUND LTD.

This Guide has been prepared to assist Claimants in filling out the Proof of Claim form for Claims against GrowthWorks Canadian Fund Ltd. (the "Applicant"). If you have any additional questions regarding completion of the Proof of Claim, please consult the Monitor's website at http://cfcanada.fticonsulting.com/gcfl/default.htm or contact the Monitor, whose contact information is shown below.

Additional copies of the Proof of Claim may be found at the Monitor's website address noted above.

Please note that this is a guide only, and that in the event of any inconsistency between the terms of this guide and the terms of the Claims Procedure Order made on January 9, 2014 (the "Claims Procedure Order"), the terms of the Claims Procedure Order will govern.

SECTION 1 – ORIGINAL CLAIMANT

1. A separate Proof of Claim must be filed by each legal entity or person asserting a claim against the Applicant.

2. The Claimant shall include any and all Claims it asserts against the Applicant in a single Proof of Claim.

3. The full legal name of the Claimant must be provided.

4. If the Claimant operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

5. If the Claim has been assigned or transferred to another party, Section 2 must also be completed.

6. Unless the Claim is assigned or transferred, all future correspondence, notices, etc. regarding the Claim will be directed to the address and contact indicated in this section.

SECTION 2 – ASSIGNEE

7. If the Claimant has assigned or otherwise transferred its Claim, then Section 2 must be completed.

8. The full legal name of the Assignee must be provided.

9. If the Assignee operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

10. If the Monitor in consultation with the Applicant is satisfied that an assignment or transfer has occurred, all future correspondence, notices, etc. regarding the Claim will be directed to the Assignee at the address and contact indicated in this section.

SECTION 3 - AMOUNT OF CLAIM OF CLAIMANT AGAINST APPLICANT

11. Indicate the amount the Applicant was and still is indebted to the Claimant.

Currency, Original Currency Amount

12. The amount of the Claim must be provided in the currency in which it arose.

13. Indicate the appropriate currency in the Currency column.

14. If the Claim is denominated in multiple currencies, use a separate line to indicate the Claim amount in each such currency. If there are insufficient lines to record these amounts, attach a separate schedule indicating the required information.

Unsecured Claim

15. Check this box ONLY if the Claim recorded on that line is an unsecured claim.

Secured Claim

16. Check this box ONLY if the Claim recorded on that line is a secured claim.

SECTION 4 - DOCUMENTATION

17. Attach to the Proof of Claim form all particulars of the Claim and supporting documentation, including amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the Claim, and amount of invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by the Applicant to the Claimant and estimated value of such security.

SECTION 5 - CERTIFICATION

18. The person signing the Proof of Claim should:

    (a) be the Claimant or authorized representative of the Claimant.

    (b) have knowledge of all the circumstances connected with this Claim.

    (c) assert the Claim against the Applicant as set out in the Proof of Claim and certify all supporting documentation is attached.

    (d) have a witness to its certification.

19. By signing and submitting the Proof of Claim, the Claimant is asserting the claim against the Applicant.

SECTION 6 - FILING OF CLAIM

20. The Proof of Claim **must be received by the Monitor by 5:00 p.m. (prevailing Eastern time) on March 6, 2014 (the "Claims Bar Date") by prepaid ordinary mail,**

registered mail, courier, personal delivery or electronic transmission at the following address:

FTI Consulting Canada Inc., GrowthWorks Canadian Fund Ltd. Monitor

Address:	**TD Waterhouse Tower** **79 Wellington Street West** **Suite 2010, P.O. Box 104** **Toronto, Ontario Canada, M5K 1G8**
Attention:	**Paul Bishop and Jodi Porepa**
Email:	**growthworkscanadianfundltd@fticonsulting.com**
Fax No.:	**(416) 649-8101**

Failure to file your Proof of Claim so that it is actually received by the Monitor by 5:00 p.m., on the Claims Bar Date will result in your claim being barred and you will be prevented from making or enforcing a Claim against the Applicant. In addition, you shall not be entitled to further notice in and shall not be entitled to participate as a creditor in these CCAA proceedings.

SCHEDULE "C"

PROOF OF CLAIM FORM FOR CLAIMS AGAINST DIRECTORS OR OFFICERS OF GROWTHWORKSCANADIAN FUND LTD. (the "D&O Proof of Claim")

This form is to be used only by Claimants asserting a claim against the Directors and/or Officers of GrowthWorks Canadian Fund Ltd. and NOT for claims against GrowthWorks Canadian Fund Ltd. itself. For claims against GrowthWorks Canadian Fund Ltd., please use the form titled "Proof Of Claim Form For Claims Against GrowthWorks Canadian Fund Ltd.", which is available on the Monitor's website at http://cfcanada.fticonsulting.com/gcfl/default.htm.

1. Original Claimant (the "Claimant")

Legal Name of Claimant _____

Address

_____

_____

City _____ Prov /State _____

Postal/Zip Code _____

Name of Contact _____

Title _____

Phone # _____

Fax # _____

email _____

2. Assignee, if claim has been assigned

Legal Name of Assignee _____

Address _____

_____

City _____ Prov /State _____

Postal/Zip Code _____

Name of Contact _____

Phone # _____

Fax # _____

email: _____

3 Amount of Claim

The Director(s) or Officer(s) was/were and still is/are indebted to the Claimant as follows:

Name(s) of Director(s) and/or Officers	Currency	Original Currency Amount	Amount of Claim

4. Documentation

Provide all particulars of the D&O Claim and supporting documentation, including amount and description of transaction(s) or agreement(s) or legal breach(es) giving rise to the D&O Claim.

5. Certification

I hereby certify that:

1. I am the Claimant or authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this D&O Claim against the Director(s) and/or Officer(s) as set out above.
4. Complete documentation in support of this claim is attached.

Signature: _____	Witness:
Name: _____	_____ (signature)
Title: _____	_____ (print)
Dated at _____ this _____ day of _____ , 2014	

6. Filing of Claim

This D&O Proof of Claim **must be received by the Monitor by 5:00 p.m. (prevailing Eastern time) on March 6, 2014 by prepaid ordinary mail, registered mail, courier, personal delivery or electronic transmission at the following address:**

FTI Consulting Canada Inc., GrowthWorks Canadian Fund Ltd. Monitor
Address: TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario Canada, M5K 1G8
Attention: Paul Bishop and Jodi Porepa
Email: growthworkscanadianfundltd@fticonsulting.com
Fax No.: (416) 649-8101

For more information see http://cfcanada.fticonsulting.com/gcfl/default.htm, or contact the Monitor by telephone at 416-649-8087 or toll-free at 1-855-431-3185.

SCHEDULE "C-2"

CLAIMANT'S GUIDE TO COMPLETING THE D&O PROOF OF CLAIM FORM FOR CLAIMS AGAINST DIRECTORS OR OFFICERS OF GROWTHWORKS CANADIAN FUND LTD.

This Guide has been prepared to assist Claimants in filling out the D&O Proof of Claim form for claims against the Directors or Officers of GrowthWorks Canadian Fund Ltd. (the "Applicant"). If you have any additional questions regarding completion of the D&O Proof of Claim, please consult the Monitor's website at http://cfcanada.fticonsulting.com/gcfl/default.htm or contact the Monitor, whose contact information is shown below.

The D&O Proof of Claim form is for Claimants asserting a claim against the Directors and/or Officers of GrowthWorks Canadian Fund Ltd., and NOT for claims against GrowthWorks Canadian Fund Ltd. itself. For claims against GrowthWorks Canadian Fund Ltd., please use the form titled "Proof Of Claim Form For Claims Against GrowthWorks Canadian Fund Ltd.", which is available on the Monitor's website at http://cfcanada.fticonsulting.com/gcfl/default.htm.

Additional copies of the D&O Proof of Claim may be found at the Monitor's website address noted above.

Please note that this is a guide only, and that in the event of any inconsistency between the terms of this guide and the terms of the Claims Procedure Order made on January 9, 2014 (the "Claims Procedure Order"), the terms of the Claims Procedure Order will govern.

SECTION 1 – ORIGINAL CLAIMANT

1. A separate D&O Proof of Claim must be filed by each legal entity or person asserting a claim against the Directors or Officers (as defined in the Claims Procedure Order) of the Applicant.

2. The Claimant shall include any and all D&O Claims it asserts against the Directors or Officers of the Applicant in a single D&O Proof of Claim.

3. The full legal name of the Claimant must be provided.

4. If the Claimant operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

5. If the claim has been assigned or transferred to another party, Section 2 must also be completed.

6. Unless the claim is assigned or transferred, all future correspondence, notices, etc. regarding the claim will be directed to the address and contact indicated in this section.

SECTION 2 – ASSIGNEE

7. If the Claimant has assigned or otherwise transferred its claim, then Section 2 must be completed.

8. The full legal name of the Assignee must be provided.

9. If the Assignee operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

10. If the Monitor in consultation with the Applicant is satisfied that an assignment or transfer has occurred, all future correspondence, notices, etc. regarding the claim will be directed to the Assignee at the address and contact indicated in this section.

SECTION 3 - AMOUNT OF CLAIM OF CLAIMANT AGAINST DIRECTOR OR OFFICER

11. Indicate the amount the Director(s) and/or Officer(s) was/were and still is/are indebted to the Claimant and provide all other requested details.

Currency, Original Currency Amount

12. The amount of the claim must be provided in the currency in which it arose.

13. Indicate the appropriate currency in the Currency column.

14. If the claim is denominated in multiple currencies, use a separate line to indicate the claim amount in each such currency. If there are insufficient lines to record these amounts, attach a separate schedule indicating the required information.

SECTION 4 - DOCUMENTATION

15. Attach to the D&O Proof of Claim form all particulars of the claim and supporting documentation, including amount and description of transaction(s) or agreement(s) or legal breach(es) giving rise to the D&O Claim.

SECTION 5 - CERTIFICATION

16. The person signing the D&O Proof of Claim should:

(a) be the Claimant or authorized representative of the Claimant.

(b) have knowledge of all the circumstances connected with this claim.

(c) assert the claim against the Director(s) and/or Officer(s) as set out in the D&O Proof of Claim and certify all supporting documentation is attached.

(d) have a witness to its certification.

17. By signing and submitting the D&O Proof of Claim, the Claimant is asserting the claim against the Director(s) and Officer(s) identified therein.

SECTION 6 - FILING OF CLAIM

18. **The D&O Proof of Claim must be received by the Monitor by 5:00 p.m. (prevailing Eastern time) on March 6, 2014 (the "Claims Bar Date") by prepaid ordinary mail, registered mail, courier, personal delivery or electronic transmission at the following address:**

FTI Consulting Canada Inc., GrowthWorksCanadian Fund Ltd. Monitor
Address: TD Waterhouse Tower
79 Wellington Street West, Suite 2010, P.O. Box 104
Toronto, Ontario Canada, M5K 1G8
Attention: Paul Bishop and Jodi Porepa
Email: growthworkscanadianfundltd@fticonsulting.com
Fax No.: (416) 649-8101

Failure to file your D&O Proof of Claim so that it is actually received by the Monitor by 5:00 p.m., on the Claims Bar Date will result in your claim being barred and you will be prevented from making or enforcing a claim against the Directors and Officers of the Applicant. In addition, you shall not be entitled to further notice in and shall not be entitled to participate as a creditor in these CCAA proceedings.

SCHEDULE "D"

PROOF OF CLAIM FORM FOR INDEMNITY CLAIMS BY DIRECTORS OR OFFICERS OF GROWTHWORKS CANADIAN FUND LTD. (the "D&O Indemnity Proof of Claim")

This form is to be used only by Directors and Officers of GrowthWorks Canadian Fund Ltd. (the "Applicant") who are asserting an indemnity claim against the Applicant in relation to a D&O Claim against them and NOT for claims against the Applicant itself or for claims against Directors and Officers of the Applicant. For claims against the Applicant, please use the form titled "Proof Of Claim Form For Claims Against GrowthWorks Canadian Fund Ltd.". For claims against Directors and Officers of the Applicant, please use the form titled "Proof of Claim Form for Claims Against Directors or Officers of GrowthWorks Canadian Fund Ltd.". Both forms are available on the Monitor's website at http://cfcanada.fticonsulting.com/gcfl/default.htm.

1. Director and/or Officer Particulars (the "Indemnitee")

Legal Name of Indemnitee _____

Address _____

_____

_____

City _____ Prov /State _____

Postal/Zip Code _____

Phone # _____

Fax # _____

email _____

2. Indemnification Claim

Position(s) Held _____

Dates Position(s) Held: From _____ to _____

Reference Number of Proof of Claim with respect to which this D&O Indemnity Claim is made: _____

Indicate whether the D&O Indemnity Claim is asserted as: unsecured claim ☐

secured claim[1] ☐

Particulars of and basis for D&O Indemnity Claim:

_____

_____

_____

_____

[1] A secured claim means a claim secured against the court-ordered Director's Charge or otherwise.

3. Documentation

Provide all particulars of the D&O Indemnity Claim and supporting documentation giving rise to the Claim.

4. Filing of Claim

This D&O Indemnity Proof of Claim and supporting documentation must be received by the Monitor within fifteen (15) Business Days of the date of deemed receipt by the Director or Officer of the D&O Proof of Claim form **by ordinary prepaid mail, registered mail, courier, personal delivery or electronic transmission at the following address:**

FTI Consulting Canada Inc., GrowthWorks Canadian Fund Ltd. Monitor
Address: **TD Waterhouse Tower**
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario Canada, M5K 1G8
Attention: **Paul Bishop and Jodi Porepa**
Email: **paul.bishop@fticonsulting.com and jodi.porepa@fticonsulting.com**
Fax No.: **(416) 649-8101**

Failure to file your D&O Indemnity Proof of Claim in accordance with the Claims Procedure Order will result in your D&O Indemnity Claim being barred and forever extinguished and you will be prohibited from making or enforcing such D&O Indemnity Claim against the Applicant.

DATED at _____, this _____ day of _____, 2014

Per: _____
Name

Signature: (Former Director and/or Officer)

For more information see http://cfcanada.fticonsulting.com/gcfl/default.htm, or contact the Monitor by telephone (1-855-431-3185)

SCHEDULE "E"

NOTICE OF REVISION OR DISALLOWANCE

For Persons that have asserted Claims against GrowthWorks Canadian Fund Ltd., D&O Claims against the Directors and/or Officers of GrowthWorks Canadian Fund Ltd. or D&O Indemnity Claims against GrowthWorks Canadian Fund Ltd.

Claims Reference Number: _____

TO: _____
(the "Claimant")

Defined terms not defined in this Notice of Revision or Disallowance have the meaning ascribed in the Order of the Ontario Superior Court in the CCAA proceedings of GrowthWorksCanadian Fund Ltd. dated January 9, 2014 (the "Claims Procedure Order").

The Monitor hereby gives you notice that it has reviewed your Proof of Claim, D&O Proof of Claim or D&O Indemnity Proof of Claim and has revised or disallowed all or part of your purported Claim, D&O Claim or D&O Indemnity Claim, as the case may be. Subject to further dispute by you in accordance with the Claims Procedure Order, your Proven Claim will be as follows:

	Amount as submitted		**Amount allowed by Monitor**
	Currency		
A. Unsecured Claim		$	$
B. Secured Claim		$	$
C. D&O Claim		$	$
D. D&O Indemnity Claim		$	$
E. Total Claim		**$**	**$**

Reasons for Revision or Disallowance:

_____

_____

_____

SERVICE OF DISPUTE NOTICES

If you intend to dispute this Notice of Revision or Disallowance, you must, no later than 5:00 p.m. (prevailing time in Toronto) on the day that is fifteen (15) Business Days after this Notice of Revision or Disallowance is deemed to have been received by you (in accordance with paragraph 58 of the Claims Procedure Order), deliver a Dispute Notice to the Monitor by ordinary prepaid mail, registered mail, courier, personal delivery or electronic transmission to the address below.

FTI Consulting Canada Inc., GrowthWorksCanadian Fund Ltd. Monitor
Address: TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario Canada, M5K 1G8
Fax No.: (416) 649-8101
Email: growthworkscanadianfundltd@fticonsulting.com
Attention: Paul Bishop and Jodi Porepa

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

The form of Dispute Notice is enclosed and can also be accessed on the Monitor's website at http://cfcanada.fticonsulting.com/gcfl/default.htm.

IF YOU FAIL TO FILE A DISPUTE NOTICE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED this day of , 2014

FTI Consulting Canada Inc., solely in its capacity as Court-appointed Monitor of GrowthWorksCanadian Fund Ltd., and not in its personal or corporate capacity

Per: _____

For more information see http://cfcanada.fticonsulting.com/gcfl/default.htm, or contact the Monitor by telephone at 416-649-8087 or toll-free at 1-855-431-3185.

APPENDIX "1" to SCHEDULE "E"

NOTICE OF DISPUTE OF NOTICE OF REVISION OR DISALLOWANCE

With respect to GrowthWorksCanadian Fund Ltd.

Claims Reference Number: _____

1. **Particulars of Claimant:**

Full Legal Name of Claimant (include trade name, if different)

_____

_____

(the "Claimant")

Full Mailing Address of the Claimant:

_____

_____

Other Contact Information of the Claimant:

Telephone Number: _____

Email Address: _____

Facsimile Number: _____

Attention (Contact Person): _____

2. **Particulars of original Claimant from whom you acquired the Claim, D&O Claim or D&O Indemnity Claim, if applicable:**

Have you acquired this purported Claim, D&O Claim or D&O Indemnity Claim by assignment?

Yes: ☐ No: ☐

If yes and if not already provided, attach documents evidencing assignment.

Full Legal Name of original Claimant(s): _____

3. **Dispute of Revision or Disallowance of Claim, D&O Claim or D&O Indemnity Claim, as the case may be:**

The Claimant hereby disagrees with the value of its Claim, D&O Claim or D&O Indemnity Claim, as the case may be, as set out in the Notice of Revision or Disallowance and asserts a Claim, D&O Claim or D&O Indemnity Claim, as the case may be, as follows:

	Currency	**Amount allowed by Monitor: (Notice of Revision or Disallowance)**	**Amount claimed by Claimant:**
A. Unsecured Claim		$	$
B. Secured Claim		$	$
C. D&O Claim		$	$
D. D&O Indemnity Claim		$	$
E. Total Claim		**$**	**$**

REASON(S) FOR THE DISPUTE:
(Please attach all supporting documentation hereto).

_____

_____

_____

_____

SERVICE OF DISPUTE NOTICES

If you intend to dispute a Notice of Revision or Disallowance, you must, no later than 5 p.m. (prevailing time in Toronto) on the day that is fifteen (15) Business Days after the Notice of Revision or Disallowance is deemed to have been received by you (in accordance with paragraph 58 of the Claims Procedure Order), deliver this Dispute Notice to the Monitor by ordinary prepaid mail, registered mail, courier, personal delivery or electronic or digital transmission to the address below.

FTI Consulting Canada Inc., GrowthWorks Canadian Fund Ltd. Monitor
Address: TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario Canada, M5K 1G8
Fax No.: (416) 649-8101
Email: growthworkscanadianfundltd@fticonsulting.com
Attention: Paul Bishop and Jodi Porepa

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

IF YOU FAIL TO FILE THIS NOTICE OF DISPUTE OF NOTICE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, THE NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED this _____ day of _____, 2014

Name of Claimant: _____

_____
Witness

Per: _____
Name:
Title:
(please print)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.

Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding Commenced at Toronto

CLAIMS PROCEDURE ~~AND STAY EXTENSION~~ ORDER

McCARTHY TÉTRAULT LLP
Barristers and Solicitors
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel.: (416) 601-7730
Fax: (416) 868-0673

Heather Meredith LSUC# 48354R
Tel.: (416) 601-8242
Fax: (416) 868-0673

Lawyers for GrowthWorks Canadian Fund Ltd.

#13033974

Tab 3

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and in the Matter of a Proposed Plan of Compromise or Arrangement with respect to Stelco Inc., and other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under the Companies' Creditors Arrangement

Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set

aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is general ly exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of

its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructurin g efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of

apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to a ct neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partne r I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc.

(Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

Authorities referred to

Driedger, E.A., The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983)

Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --),

Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28

Peterson, D.H., Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis--Butterworths, 1989)

Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002)

APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA") [See Note 1 at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in

being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

Part II -- Additional Facts

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected 11 directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of 20 directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a [page12]capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase

substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and other representatives of Clearwater and Equilibrium met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this

view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20 per cent of the company's common shares. [page13]

[19] At paras. 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40 per cent of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
>
> 18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed

that:

(a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

(b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

(c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [page14] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the

Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III -- Leave to Appeal

[23] Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on [page15] which there is

little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be e vident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV -- The Appeal

The Positions of the Parties

[27] The appellants submit that,

(a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

(b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

(c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and

> therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Re Algoma Steel Inc., [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group -- particular investment funds that have acquired Stelco shares during the CCAA itself -- have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception

of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Re Olympia & York Development Ltd. (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); Re Ivaco Inc., [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; Re Lehndorff General Partners Ltd., [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd., [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the

statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --), vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the docuemnt], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to

control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end fo the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("CBCA"), and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy gr ounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

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

. . . . .

Initial application court orders

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1); [page20]

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

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

Other than initial application court orders

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

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

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

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

. . . . .

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

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

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

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

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

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions [page21]made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in

conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Stephenson v. Vokes, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111 [See Note 4 at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other

applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480 S.C.R.; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

[49] At para. 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

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

[53] The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority. [page24]

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada". [See Note 5 at the end of the document]
>
> SS. 18.172 Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark,

however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They

are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over 14 months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The business judgment rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings -- and courts in general -- will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ... [page27]

[66] In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., this

court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [See Note 6 at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

> There can be no doubt that on an application under s. 234 [See Note 7 at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra; Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd., [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the "business

judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a [page28]situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) -- which describes the directors' overall responsibilities -- and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e., in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 2 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in

appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion -- not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and [page29] flexible supervisory jurisdiction -- a jurisdiction which feeds the creativity that makes the CCAA work so well -- in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of di rectors.

The reasonable apprehension of bias analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual aebias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and

responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30]prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable

apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: The reference is to the decisions in Dyle, Royal Oak Mines and Westar, cited above.

Note 3: See para. 43, infra, where I elaborate on this decision.

Note 4: It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

Note 5: Dennis H. Peterson, Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis -- Butterworths, 1989), at 18-47.

Note 6:Or, I would add, unpopular with other stakeholders.

Note 7: Now s. 241.

Tab 4

Century Services Inc. *Appellant*

v.

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

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

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

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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

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

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

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

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

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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

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

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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

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

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

Cases Cited

By Deschamps J.

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

By Fish J.

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

By Abella J. (dissenting)

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

Statutes and Regulations Cited

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

Jurisprudence

Citée par la juge Deschamps

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

Citée par le juge Fish

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

Citée par la juge Abella (dissidente)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Société Télé-Mobile Co. c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862; *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663.

Lois et règlements cités

Loi d'interprétation, L.R.C. 1985, ch. I-21, art. 2 « texte », 44*f*).

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem*], 11.09 [ad. *idem*], 11.4 [am. *idem*], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [*idem*], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].

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

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

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

Interpretation Act, R.S.C. 1985, c. I-21, ss. 2 "enactment", 44(*f*).

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

Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1 (5^{e} suppl.), art. 227(4), (4.1).

Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence, L.C. 2005, ch. 47, art. 69, 128, 131.

Loi sur l'assurance-emploi, L.C. 1996, ch. 23, art. 86(2), (2.1).

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 67, 81.1, 81.2, 86 [mod. 1992, ch. 27, art. 39; 1997, ch. 12, art. 73; 2000, ch. 30, art. 148; 2005, ch. 47, art. 69; 2009, ch. 33, art. 25].

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11 [mod. 2005, ch. 47, art. 128], 11.02 [aj. *idem*], 11.09 [aj. *idem*], 11.4 [mod. *idem*], 18.3 [aj. 1997, ch. 12, art. 125; abr. 2005, ch. 47, art. 131], 18.4 [*idem*], 20 [mod. 2005, ch. 47, art. 131], 21 [aj. 1997, ch. 12, art. 126; mod. 2005, ch. 47, art. 131], 37 [aj. 2005, ch. 47, art. 131].

Loi sur les arrangements avec les créanciers des compagnies, S.C. 1932-33, ch. 36 [mod. 1952-53, ch. 3].

Loi sur les liquidations, L.R.C. 1985, ch. W-11.

Régime de pensions du Canada, L.R.C. 1985, ch. C-8, art. 23.

Authors Cited

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, 15:15.

Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.

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

Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.

Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of*

Doctrine citée

Canada. Chambre des communes. *Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n^{o} 15, 3^{e} sess., 34^{e} lég., 3 octobre 1991, 15:15.

Canada. Comité consultatif en matière de faillite et d'insolvabilité. *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*. Ottawa : Ministre des Approvisionnements et Services Canada, 1986.

Canada. Comité d'étude sur la législation en matière de faillite et d'insolvabilité. *Faillite et Insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité*. Ottawa : Information Canada, 1970.

Canada. Industrie Canada. Direction générale des politiques-cadres du marché. *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*. Ottawa : Direction des politiques du droit corporatif et de l'insolvabilité, 2002.

Canada. Sénat. Comité sénatorial permanent des banques et du commerce. *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrange-*

the Study Committee on Bankruptcy and Insolvency Legislation. Ottawa: Information Canada, 1970.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.

Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (online: http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php).

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto: Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations*. Toronto: University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto: Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

ments avec les créanciers des compagnies. Ottawa : 2003.

Canada. Sénat. *Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont. : Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal : Thémis, 2009.

Edwards, Stanley E. « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587.

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (en ligne : http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php).

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis Sarra. « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto : Thomson Carswell, 2008, 41.

Jones, Richard B. « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto : Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto : Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations*. Toronto : University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto : Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont. : LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto : Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto : Irwin Law, 2009.

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

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

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

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

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

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

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

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

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

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

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

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

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

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

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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

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

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

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

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

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

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

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

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

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

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

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

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

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

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

222. . . .

. . .

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

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

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

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

18.3 . . .

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

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

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

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

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

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

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

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

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

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

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

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

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

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

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

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

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

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

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

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

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

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

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

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

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

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

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

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

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

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

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

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

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

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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

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

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

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

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

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

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

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

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

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

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

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

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

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

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

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

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

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

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

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 *Express Trust*

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

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

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

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

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

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

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

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

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

The following are the reasons delivered by

FISH J. —

I

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

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

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

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

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

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

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

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

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

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

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

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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

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

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

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

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

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

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI*.

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

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

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

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

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

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

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

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

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

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

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

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

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

1 Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

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.

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

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

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

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

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

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

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

18.3 (1) ... [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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

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

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

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

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

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

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

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

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

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

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

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

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

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

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

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

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

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

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

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

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

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

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

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

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

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

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

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

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

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

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

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

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

[136] I would dismiss the appeal.

APPENDIX

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

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

. . .

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

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

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

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

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

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

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(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

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

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

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

. . .

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

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

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

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

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

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

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

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

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

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

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

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

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

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

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

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

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

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

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

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

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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

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

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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

. . .

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

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

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

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

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

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

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

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

in respect of any related interest, penalties or other amounts.

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

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

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

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

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

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] 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.

11.02 (1) [Suspension : demande initiale] 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 trente 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*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

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

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

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

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

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

. . .

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

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

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

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

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

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

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

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

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

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

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

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

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

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

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

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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

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

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

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

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

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

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

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

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

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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

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

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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

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

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

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

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

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

. . .

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

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

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

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

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

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b.*1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

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

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

*b.*1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

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

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

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

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

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

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

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

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

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

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

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

Tab 5

1991 CarswellOnt 182, 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147

C

1991 CarswellOnt 182, 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147

Citibank Canada v. Chase Manhattan Bank of Canada

CITIBANK CANADA, as agent, CITIBANK CANADA, ABN AMRO BANK CANADA, HONGKONG BANK OF CANADA, PARIBAS BANK OF CANADA, TORONTO-DOMINION BANK, SWISS BANK CORPORATION (CANADA), BANK OF TOKYO CANADA, DAI-ICHI KANGYO BANK (CANADA), CREDIT LYONNAIS (CANADA), BANCA COMMERCIALE ITALIANA OF CANADA, MONTREAL TRUST COMPANY, BALL PACKAGING PRODUCTS, INC. through its receiver, ERNST & YOUNG INC., and BANCO CENTRALE OF CANADA v. CHASE MANHATTAN BANK OF CANADA, BALL PACKAGING PRODUCTS HOLDINGS INC., BALL CORPORATION, LA CAISSE CENTRALE DESJARDINS DU QUEBEC, and UNION BANK OF SWITZERLAND (CANADA)

Ontario Court of Justice (General Division)

Rosenberg J.

Judgment: June 12, 1991
Docket: Doc. 879/91Q

Counsel: *Peter Howard* and *Sean Dunphy*, for receiver, Ernst & Young Inc., and applicants.

Barbara Grossman, for Ball Packaging Products Inc.

Randy A. Pepper, for Ball Corporation (a U.S. corporation).

James H. Grout, for La Caisse Desjardins.

Dana B. Fuller and *W.J. Demers*, for Chase Manhattan Bank of Canada and Union Bank of Switzerland.

Charles F. Scott, for Veriteck.

Subject: Corporate and Commercial; Insolvency; Property

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Application of Act

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Debtors' relief legislation — Companies' Creditors Arrangement Act — Jurisdiction of court under Act given large and liberal interpretation — Purpose of Act being remedial — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Proposals — Effect of proposal — Companies' Creditors Arrangement Act — Plan approved although ordinary creditors paid in full while secured creditors receiving only part payment — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Proposals — Meeting of creditors — Companies' Creditors Arrangement Act — Entitlement to vote — "Holder" including beneficial holders — "Creditor" including those with real economic interest in debt and security — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The company "Ball Canada" manufactured cans and other packaging for food and beverages. Its economic position deteriorated to the point where it was not able to survive as an ongoing entity with its debt load and scope of operations.

Ball U.S. owned 50 per cent of Ball Canada. In the course of restructuring discussions, Ball U.S. offered to purchase the debt of the term secured creditors and the shares of Ball Canada held by the banks pursuant to a share pledge agreement. Negotiations took place between the agent for the lenders, Citibank Canada, and Ball U.S. to formulate an acceptable proposal. One of the secured creditors, Chase Manhattan, opposed the Ball U.S. offer.

Ball Canada applied for a declaration that it was a corporation to which the *Companies' Creditors Arrangement Act* ("CCAA") applied. The agent for the lenders brought a cross-application for the appointment of a receiver. The application was dismissed and the cross-application was granted. The fact that negotiations with Ball U.S. had not reached any finality was considered by the Judge in refusing to allow further time to attempt to finalize the deal.

After appointment of the receiver, Ball U.S. provided further offers. All term secured creditors except Chase were in favour of the Ball U.S. offer. According to the receiver, there was little or no prospect of a going-concern sale of Ball Canada to a party other than Ball U.S., and a liquidation of assets would provide far less to the secured creditors than the Ball U.S. offer. The agent for the lenders applied under the CCAA to have Ball Canada recognized as a corporation to which the CCAA applied and either waiving a meeting of secured creditors or ordering a meeting to vote on the term secured compromise.

Held:

The *Companies' Creditors Arrangement Act* applied to Ball Canada; a meeting of secured creditors was ordered; the compromise plan was approved and authorized.

The CCAA applied to Ball Canada, since it had an outstanding issue of secured bonds issued under a trust deed and the compromise or arrangement that was proposed included a compromise or arrangement between the debtor company and the holders of an issue of secured bonds. The CCAA authorized the court to order a meeting of any class of the company's secured creditors where a compromise or arrangement was proposed between the debtor company and such class of secured creditors. The term secured creditors and Chase, except as to amount, had an identical economic interest in the debtor company, justifying their classification as a single class of creditors, as the amounts owing to each were due under the same loan agreement and secured by the same debentures.

The banks participating in the loan by Chase to Ball Canada were secured "creditors" of Ball Canada. "Secured creditors", as defined in s. 2 of the CCAA, included a "holder" of certain securities. "Holder" must be given a liberal interpretation in keeping with the broad remedial nature of the CCAA and included beneficial holders of any bond or proprietary interest. "Creditors" was to be interpreted to include those with a real economic interest in the debtor company. Since the banks had an equitable proprietary interest in the property of Ball Canada as security for that company's indebtedness, they were entitled to vote on the proposed compromise. The proposal was, therefore, approved

by the necessary percentage of voters in both number and value.

The jurisdiction of the Court under the CCAA should be given a large and liberal interpretation consistent with the remedial nature of the legislation. The purpose of the CCAA was to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including shareholders, creditors and employees.

The compromise plan was approved, although it provided that ordinary creditors be paid in full while secured creditors received only part payment. The evidence demonstrated overwhelmingly that it was in the interest of all the creditors that the proposal be approved and the proposal received the support of all the creditors except Chase.

Cases considered:

Hongkong Bank of Canada v. Chef Ready Foods Ltd., 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — *applied*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed *(*sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of), 1 C.B.R. (3d) 101, 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *followed*

Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, *(*sub nom. *Ultracare Management Inc. v. Gammon)* 1 O.R. (3d) 321 (Gen. Div.) — *applied*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 2 "secured creditors"

s. 3

s. 5

s. 6

s. 8

Personal Property Security Act, 1989, S.O. 1989, c. 16 —

Pt. V

s. 63(4)

s. 67

s. 70

Words and phrases considered:

holder — as used in s. 2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, should be given a liberal interpretation in keeping with the broad remedial nature of the Act and, therefore, includes the beneficial holders of any bond or proprietary interest.

creditors — as used in the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, is to be interpreted so that the voice of the persons with the real economic interest in the debtor company is heard.

Application for a declaration that Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, applied to a corporation and for an order directing a meeting of secured creditors to vote on a compromise proposal.

***Rosenberg J.*:**

Preamble

1 In the months of March and April 1991, I dealt with a number of urgent matters regarding Ball Packaging Products Canada Inc. In some cases the time restrictions were such that there was not time to give oral reasons for my decisions. In one case the matter was finalized within a few minutes of a 12 noon deadline, which will be explained in my reasons.

2 After finalizing the matters and now having finally discharged the receiver, counsel involved requested that I give reasons. I have determined that it is appropriate to do so in case the matter is taken further or in case there are other actions arising out of the various steps taken in the appointment of a receiver and the receivership proceedings. I also felt that it would be advisable to have my reasons recorded for whatever value they may have as a precedent for similar proceedings in the future.

Proceedings

3 In the first application heard on March 28, 1991, Ball Packaging Products Canada Inc. ("Ball Canada") asked for the following relief:

4 (a) A declaration that the applicant is a corporation to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") applies, notwithstanding the existence of a waiver dated December 9, 1988 excluding the CCAA;

5 (b) An order authorizing the applicant to file a formal plan of compromise or arrangement (the "reorganization plan");

6 (c) An order that the applicant call meetings of classes of its creditors and shareholders (the "meetings");

7 (d) An order that the applicant may file the reorganization plan and the notices of meetings by way of affidavit;

8 (e) An order staying all proceedings that have been or might be taken under the *Bankruptcy Act*, R.S.C. 1985, c. B-3;

9 (f) An order restraining other proceedings in existing actions;

10 (g) An order restraining future proceedings against the applicant;

11 (h) An order suspending and postponing the rights of any person, firm, corporation, company or other entity to realize upon or deal with any property of the applicant or security in respect of such property;

12 (i) An order enjoining creditors from making demand for payment on the applicant;

13 (j) An order preventing creditors from exercising any right of set-off against debts owed to the applicant;

14 (k) An order that all parties having agreements with the applicant for the supply of goods or services to the applicant be enjoined until further order of the Court from terminating, determining or cancelling such agreements and, in particular, that the applicant continue to be supplied goods, services and utilities so long as the applicant pays the prices or charges incurred in accordance with the terms negotiated by the applicant from time to time;

15 (l) An order that all parties having other agreements with the applicant be enjoined from terminating, determining or cancelling such agreements without the written consent of the applicant or the Court;

16 (m) An order that the respondents which are parties (or assignees of such parties) to the loan agreement dated November 16, 1988 be enjoined from reducing the credit originally made available to the applicant and that such respondents continue to extend such credit, as is required by the applicant, and as would be available if the applicant were not in default;

17 (n) An order permitting all obligations to unsecured creditors together with all obligations incurred by the applicant after this order to be paid or otherwise satisfied by the applicant;

18 (o) An order permitting the applicant to serve this notice of application, the supporting affidavit, the order requested, the reorganization plan, and notices of meetings by mailing copies thereof to each of the applicant's creditors;

19 (p) An order that the applicant shall render an affidavit to the Court verifying the action taken and decisions reached at the meetings;

20 (q) An order that the applicant shall remain in possession of its undertaking and shall continue to carry on its business and, upon approval, to implement the reorganization plan.

21 Ball Canada also asked for other provisions in the order sought that are not relevant to this decision.

22 The applicants referred to in the style of cause in these present reasons were the respondents in that application. Those respondents brought a cross-application for the appointment of a receiver. The application was dismissed and the cross-application for the appointment of a receiver was allowed. At that time I gave oral reasons for my decision, and there is no need to repeat those at this time except to note that it was clear from the affidavit material submitted on behalf of Ball Canada that:

> Unless there is a restructuring and unless operating funds are made available to the applicant during the restructuring agreement, the applicant cannot continue to carry on business and will have to cease operations immediately. Given the magnitude of the applicant's operations across Canada, this would have a significant adverse effect on a large number of suppliers, customers and employees.

23 At that time the evidence indicated that Ball Corporation ("Ball U.S.") owned 50 per cent of the issued and outstanding common preferred shares of Ball Canada and that negotiations had been continuing with Ball U.S. to finance an arrangement with creditors and invest sufficient capital to allow Ball Canada to continue to operate. The fact that the negotiations had not reached any finality after many months of negotiating was considered by me in refusing to allow further time to attempt to finalize a deal with Ball U.S. The evidence of Ball Canada indicated that they could not carry on without the respondent financial institutions advancing more money, which they were not contractually obliged to do

in view of Ball Canada's default. After the receiver took possession on April 10, 1991, I heard an application by Citibank, which applied amongst other things for:

24 (a) A declaration that the applicant Ball Packaging Products Canada, Inc. is a corporation to which the CCAA applies;

25 (b) An order waiving the requirement for a meeting approving the term secured compromise dated April 9, 1991, annexed hereto as Schedule "A" (the "term secured compromise") on the basis of the consents of the applicants who are term secured creditors filed;

26 (c) In the alternative to (b) above, an order that a meeting of the term secured creditors to vote on the term secured compromise pursuant to s. 5 of the CCAA take place forthwith in the courtroom at which meeting to be chaired by the agent, Citibank Canada, the principal value of term secured debt will be $197,004,139.48 as at March 27, 1991, and the term secured creditors present in person or by proxy will be entitled to vote in the manner and proportionate percentage of value as hereinafter set forth:

1. ABN Amro Bank of Canada	4.16%
2. Citibank Canada	22.90%
3. La Caisse Centrale Desjardins du Quebec	4.17%
4. Hongkong Bank of Canada	4.17%
5. Paribas Bank of Canada	4.17%
6. The Chase Manhattan Bank of Canada	12.50%
7. The Toronto-Dominion Bank	7.92%
8. Swiss Bank Corporation (Canada)	10.42%
9. Banco Centrale of Canada	2.50%
10. Bank of Tokyo Canada	2.08%
11. Dai-Ichi Kangyo Bank (Canada)	4.17%
12. Credit Lyonnais (Canada)	4.17%
13. Banca Commerciale Italiana of Canada	4.17%
14. Union Bank of Switzerland (Canada)	6.25%
15. Montreal Trust Company	4.17%
16. Trust Generale du Canada (per La Caisse Centrale Desjardins du Quebec)	2.08%
	100%

27 At that time I endorsed the application record as follows:

Application for a meeting pursuant to CCAA ordered for 6:00 p.m. April 10th at the offices of Davies, Ward & Beck, 44th floor, First Canadian Place to consider a proposal as set out in the application or as modified at the meeting. Meeting to be chaired by Gregory Daniels of Citibank. A verbatim record of the meeting to be kept. A record shall be kept of how all participants vote but no determination of the tabulation of the vote or percentage in favour of any proposal shall be made until the matter is argued in court. Meeting results to be submitted to the court for consideration at 9:00 a.m. April 11th.

28 The CCAA applies to Ball Canada since it has an outstanding issue of secured bonds issued under a trustee and

the compromise or arrangement that is proposed included a compromise or arrangement between the debtor company and the holders of an issue of secured bonds. (CCAA, ss. 2, 3.)

29 I also relied on CCAA s. 5, which provides that the Court can order a meeting of any class of the company's secured creditors where a compromise or arrangement is proposed between the debtor company and such class of secured creditors.

30 In determining that a meeting should be called, I considered the case of *Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon)* 1 O.R. (3d) 321 (Gen. Div.), where it was held that when there is a reasonable chance that the debtor company can carry on its business as a going concern, the Court should order a meeting of creditors.

31 Further, the term secured creditors and Chase, except as to amount, have an identical economic interest in the debtor company, justifying their classification as a single class of creditors. The amounts owing to each are owing pursuant to the same loan agreement and the security for the obligations is that secured by the same debenture.

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.).

Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) per Trainor J. at 191-192, affirmed (sub nom *Northland Properties Ltd. v. Exelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.).

32 The authority to abridge the time period for the calling of the meeting was exercised by me pursuant to ss. 67 and 70 of the *Personal Property Security Act, 1989*, S.O. 1989, c. 16 ("PPSA").

33 Pursuant to s. 67 of the PPSA, I relieved compliance with Pt. V of the PPSA since it was, in my view, just and reasonable for all concerned parties.

34 The position of the applicants is summarized in the affidavit of Gregory M. Daniels as follows:

As hereinafter described in greater detail, the Applicants and La Caisse Centrale Desjardins du Quebec and Trust Generale are 15 of the 16 Term Secured Creditors to Ball Canada holding $172,382,104.29 or 87.5% of the total principal of Term Secured Debt of $197,004,139.48 outstanding as at March 27, 1991. The balance is held by the lone dissenting Term Secured Creditor The Chase Manhattan Bank of Canada ('Chase'). An offer for the Term Secured Debt has been made by Ball Corporation ('Ball U.S.') in the amount of $120,000,000.00. Ball U.S. is unwilling to allow any person other than itself to hold any of the Term Secured Debt and has made its offer conditional upon the acquisition by it of the Term Secured Debt or the elimination of the Term Secured Debt at a discount to the face amount thereof. *The offer is also conditional upon the acquisition by Ball U.S. of all of the shares of Ball Canada which are pledged to Citibank Canada as collateral for a guarantee of the Term Secured Debt given by Ball Packaging Product Holdings Inc. ('Ball Holdings')*. The Applicants want to accept the offer, Chase does not. This Application under the Companies' Creditors Arrangement Act (the 'CCAA') is made to impose the Ball U.S. offer on Chase for the good of the Applicants, Ball Canada and its employees, suppliers, customers and others affected by the liquidation of Ball Canada. [Emphasis added.]

Ball Canada is a wholly owned subsidiary of Ball Holdings. To the best of my knowledge, Ball Holdings is owned 50% by Ball Corporation and 50% by Onex Corporation ('Onex').

Certain of the original term lenders, including the Agent and Chase, have sold interests in their loans from time to time. These sales have been effected by participation agreements under which certain of the lenders have agreed to share a beneficial interest in the right to receive payments from Ball Canada in respect of the Term Secured Debt and in effect, to share any risk of the failure of Ball Canada to repay the loan in full. At present, to the knowledge of the Agent, the Term Secured Debt is now beneficially held in the following percentages as follows:

1. ABN Amro Bank of Canada	4.16%
2. Citibank Canada	22.90%
3. La Caisse Centrale Desjardins du Quebec	4.17%
4. Hongkong Bank of Canada	4.17%
5. Paribas Bank of Canada	4.17%
6. The Chase Manhattan Bank of Canada	12.50%
7. The Toronto-Dominion Bank	7.92%
8. Swiss Bank Corporation (Canada)	10.42%
9. Banco Centrale of Canada	2.50%
10. Bank of Tokyo Canada	2.08%
11. Dai-Ichi Kangyo Bank (Canada)	4.17%
12. Credit Lyonnais (Canada)	4.17%
13. Banca Commerciale Italiana of Canada	4.17%
14. Union Bank of Switzerland (Canada)	6.25%
15. Montreal Trust Company	4.17%
16. Trust Generale	2.08%

	100%

(the 'Term Secured Creditors'). A list of the Term Secured Creditors as at March 29, 1991 and the percentages and dollar amounts held prepared by the Agent is appended hereto as Exhibit 'A' to this my affidavit.

All Term Secured Creditors have received notice of the several meetings to discuss the various offers of Ball Canada and Ball U.S. and have had the opportunity to participate fully and vote at such meetings.

Ball Canada makes cans and other packaging for food and beverages. For the reasons detailed by the President of Ball Canada, William A. Lincoln in his Affidavit dated March 26, 1991, the business of Ball Canada, has suffered considerably in the last few years to the point where it is clear that the capital structure of Ball Canada no longer makes sense. In the foreseeable future, under any reasonable assumptions, Ball Canada will not be capable of servicing the level of debt held by the Applicants and Chase. It was the recognition of this fact that led all parties to the course of negotiations that are described in the paragraphs that follow. The Affidavit of William A. Lincoln is appended hereto as Exhibit 'B' to this my Affidavit.

Beginning in or around the Summer of 1990, Ball Canada approached the Agent with a view towards restructuring its debt obligations in light of Ball Canada's changing circumstances. In June, 1990 Ball Canada became aware of the fact that it did not comply with certain of the financial covenants contained in the Loan Agreement. Discussions between Ball Canada and the Agent on behalf of all the lenders continued throughout the balance of 1990 and into 1991 on a periodic basis with no success. Without assigning any responsibility for the lack of success, it became clear that Ball U.S. and Onex had differing interests and priorities and similarly each of the Term Secured Creditors

had their own interests, views of the appropriate type of restructuring and the value of Ball Canada.

Throughout the course of all discussions and negotiations, Chase has consistently taken the position that it was not prepared to accept any compromise that was effectively a recognition that its loan participation as a Term Secured Creditor was significantly less valuable than the face amount of that participation or which did not permit it to participate in any possible future increase in the value of Ball Canada.

As the economic position of Ball Canada worsened throughout the Winter 1990 and into 1991, it became apparent that Ball Canada would not be able to survive as an on-going entity with its present debt load and scope of operations. Ball Canada began to sell assets and closed certain plants. However, the financial situation of Ball Canada was obviously such as to require a massive restructuring of the Term Secured Debt. In December, 1990 Ball Canada suspended its scheduled loan payment to the lenders. Beginning in early March 1991, the restructuring discussions took the form of an offer by Ball U.S. to purchase the debt of the Term Secured Creditors and the shares of Ball Canada held by the banks pursuant to the Share Pledge Agreement. Again there was a course of discussions throughout March between the Agent and Ball U.S. to attempt to formulate an acceptable proposal. In this respect, the position of Chase was again consistent and it continually took the position that the offers of Ball U.S. were unacceptable to it.

Throughout March, the operating position of Ball Canada continued to deteriorate to the extent that it became apparent that matters were coming to a head. The operating line of Ball Canada had been capped and cheques were being returned NSF. The projections of the company showed that it was in a substantial deficit position and unable to fund its operations through cashflow. After providing some operating advances, Ball U.S. and Onex refused to provide further operating funds.

On March 22, 1991, the Agent provided Notice of Default to Ball Canada in respect of the Term Secured Debt. Although the Operating Loan was in default and the Agent in a position to demand at any time, this five day notice apparently triggered the Companies' Creditors Arrangement Application brought by Ball Canada returnable on March 27, 1991.

On the morning of the court application the Agent had discussions with Ball U.S. setting forth the terms on which the Agent would be prepared to recommend a proposal by Ball U.S. to all the other Term Secured Creditors. No offer was forthcoming from Ball U.S. until after the court proceedings.

The Companies' Creditors Arrangement Act application application by Ball Canada and the cross-motion by the Agent for the appointment of a Receiver were heard by the Honourable Mr. Justice Rosenberg on March 27 and 28, 1991. In the result, the application by Ball Canada was dismissed and Ernst & Young Inc. appointed as Receiver of Ball Canada. A copy of the endorsement and Order of the Honourable Mr. Justice Rosenberg is appended hereto as Exhibit 'C' to this my Affidavit.

After the appointment of the Receiver, Ball U.S. provided further offers. A copy of the last offer is appended hereto as Exhibit 'D' to this my Affidavit. The Agent convened a meeting of the Term Secured Creditors to consider the offer of Ball U.S. and invited Ball U.S. to make a presentation at the meeting. Eventually 15 of the 16 Term Secured Creditors deter mined that they were prepared to enter into the compromise suggested by Ball U.S. provided that there was no slippage in price and the terms of the agreement were made certain.

Following presentation of the offer to lenders, Chase and Ball U.S. entered into negotiations with a view to allowing Chase to maintain a debtor-creditor relationship with Ball Canada. On April 5, 1991, Citibank was advised that Ball

U.S. had not entered into a deal with Chase and that negotiations were at an end.

Chase was asked to participate with the other Term Secured Creditors for the good of the majority, if not all of the Term Secured Creditors, but refused. On or about April 5, 1991, Chase confirmed that it was not prepared to accept the deal proposed by Ball U.S. The Agent advised Chase that it intended to proceed with an application under the CCAA if all the other Term Secured Creditors so instructed it and the deal with Ball U.S. could be made certain. Chase further confirmed that Ball U.S. had terminated negotiations.

La Caisse Centrale Desjardins du Quebec ('Caisse') has to date voted and participated on behalf of Trust Generale who has not attended the meetings. Caisse is a respondent in this application but has indicated that it will not contest the order being sought and will vote in favour of the Term Secured Compromise at any meeting to be held and sign the required Purchase Agreement if the Order is granted.

A meeting of the Term Secured Creditors was held on April 8, 1991. At that time all Term Secured Creditors, save and except Chase, indicated that they were in the process of obtaining the approvals necessary to accept the Ball U.S. offer subject to final documentation and to proceed with the Application. This Affidavit is provided prior to the receipt of these final approvals because of the urgency involved.

All the participants in the term debt have been advised by the Receiver on April 4 and again on April 8, 1991 of its estimation of the likely realization if there is no deal with Ball U.S. It is fair to say that the affairs and business of Ball Canada are interwoven and inter-dependent on Ball U.S. and that there is little or no prospect of a going concern sale of Ball Canada to a party other than Ball U.S. Ball U.S. of course is interested in the going concern and for that reason is prepared to make arrange ments to continue Ball Canada in the ordinary course of business including allowing Ball Canada to meet its liabilities as they come due. I verily believe the information provided by the Receiver to be accurate and it played an important basis for the Agent and the other applicants seeking approval of the Term Secured Compromise.

For these reasons the Secured Creditors find themselves in the somewhat unusual position of accepting an offer which will see unsecured creditors being paid in full when the Term Secured Creditors are not being paid in full. Based on the estimates of the Receiver, and the realities of the situation, a liquidation of the assets will provide far less to secured creditors than the Ball U.S. offer. In addition, the Applicants are mindful of the benefit achieved by the maintenance of Ball Canada as a going concern to its employees, suppliers and customers.

Chase has indicated its adamant opposition to the Ball U.S. offer and its unwillingness to abide by the determination of the 15 other Term Secured Creditors. For this reason, an Application under the CCAA is the only means available to the Applicants.

Personal Property Security Act, 1989

Part of the Term Secured Compromise is the transfer of the shares of Ball Canada to Ball U.S. The Agent sent a notice pursuant to Section 63 of the PPSA on April 4, 1991. A copy of the said Notice and proof of service is appended hereto as Exhibit 'E' to this my Affidavit.

Onex has taken the position that its consent is necessary to any transfer of the shares. I am informed by Ian Douglas, a partner of Stikeman, Elliott, counsel to the Agent and verily believe that he received letters dated April 3 and 4, 1991 from counsel to Onex to this effect. Appended hereto as Exhibit 'F' to this my Affidavit are copies of the said letters. I am further informed by Ian Douglas and verily believe that the position of Onex is completely untenable as

against the Agent and a copy of his response by letter dated April 4, 1991 is appended hereto as Exhibit 'G' to this my Affidavit. As set out in the letter, Onex has indicated that it does not wish to redeem with Onex so the transfer to Ball U.S. will not have any impact on the issues as between Ball U.S. and Onex.

35 Accordingly, and pursuant to my order of April 10, a meeting was held and the hearing resumed on the morning of April 11. At that time the affidavit evidence disclosed that the offer of Ball U.S. was open for acceptance and court approval only until 12 noon on that date and the reasons for the urgency and the deadline were explained by further affidavit. At that time the further affidavit of William R. Beavers, a vice-president of Ernst & Young Inc. (the "receiver"), attested to the following:

Since its appointment pursuant to the receivership order, the Receiver has had to deal with a number of critical issues in order to ensure the integrity of the business with a view to maximizing the possibility of a sale of all or part of the business as a going concern. For the reasons expressed below, I am of the view that the passage of even a very short time in the absence of a resolution with Ball Canada's 50% parent, Ball Corporation of Muncie, Indiana ('Ball Corp.') will considerably diminish if not preclude the ability of the Receiver to maintain the going-concern value of Ball Canada.

The Receiver has had a number of problems ensuring the supply of raw materials necessary to the continuation of the business. Ball Canada's business is largely a seasonal one. At this phase of its annual business cycle, Ball Canada is primarily in the phase of building up inventories to fulfil sales contracts for delivery in the summer and early fall to the beverage industry and the food packing industry.

Two principal suppliers of Ball Canada have indicated a reluctance to continue supplying the raw materials necessary to continue production unless arrears for previously delivered material are settled. [...] was the primary supplier of aluminium [sic] to Ball Canada. [...] has taken steps to seize certain aluminium [sic] inventories stored in the United States as a result of the default by Ball Canada in paying for such inventories. Other supplies such as [...] have indicated that they are reviewing their commitments to Ball Canada.

In the medium to long term, unless arrangements can be made with [...] to continue the supply of these essential raw materials, the ability of Ball Canada to continue to produce sufficient product to meet sales obligations will be seriously jeopardized. While alternative sources of supply of these materials is possible, it would take time to make arrangements with such suppliers and the terms of supply may be more onerous than those previously enjoyed by Ball Canada.

In addition to supplier problems, the Receiver has had to deal with key customers of Ball Canada in order to reassure them as to the continuity of their supply. Five key customers of Ball Canada accounted for 58% of Ball Canada's 1990 sales. The loss of any one of these accounts would have a devastating effect upon the going concern value of the business of Ball Canada. Some customers account for such a significant portion of production from certain plants that a loss of the customer could result in an immediate plant closure. I have spoken with three of these customers. They have indicated to the Receiver that, unless they receive satisfactory assurances or guarantees of product supply in the next few days, they will have no alternative but to seek alternate sources of supply for their can requirements. In view of the lead time necessary to secure product for these accounts, customers such as [...] require assurances of supply as soon as possible for they may be otherwise unable to obtain product in time for the crucial summer selling season.

The case of [...] has become especially critical. [...] utilizes steel cans in Ontario, one of the few large markets for steel cans remaining in North America. I attach as Exhibit 'B' and 'C' respectively to this my affidavit letters which

the Receiver has received from [...] dated April 2 and April 5, 1991. As appears from these letters [...] has been extremely nervous about the continuity of its supply. [...] has reluctantly extended its deadlines in order to hear from the Receiver and Ball Corp. as to whether Ball Corp's plans to purchase Ball Canada will be proceeding. Another key food industry customer of Ball Canada is taking a similar position.

36 The letter attached as Exhibit "C" contains the following statement:

In an effort to ensure that the [...] system does not experience any supply shortages, please be advised that we will consider the possibility of enacting an alternative supply contingency plan should a positive response from you or your parent corporation not be received by Monday, April 8th, 12 noon E.S.T.

William R. Beavers in his affidavit further stated:

Although I have attempted to assure these three customers that the Term Secured Compromise has received wide support and is progressing quickly, I have been advised by [...] Director of Purchasing at [...] and verily believe that [...] has determined that it must award its contract for supply of cans by April 10, 1991 or April 11 at the very latest and cannot delay any longer. If Ball Canada loses the [...] contract, its Ontario business would be devastated and plant closures would ensue, resulting in significant job losses and eliminating any chance of proceeding with the Term Secured Compromise.

Ball Canada currently owes approximately $1.4 million to certain of its major customers in respect of volume discounts arising out of pre-receivership sales to such customers. In view of the current over-supply in the Canadian and North American can market, the Receiver will be required to honour this unsecured commitment in order to retain the business of these key customers.

The operations of Ball Canada are also largely dependent upon the cooperation of Ball Corp. The two businesses have become interconnected in the last two years. Some of the principal areas of dependency of Ball Canada upon Ball Corp. are as follows:

a. Ball Canada and Ball Corp. are parties to three agreements dated as of December 8, 1988 (the Joint Venture Management and Technical Services Agreement, the Proprietary Technology Licence Agreement and the Metal Container Product Technology Cross-Licence Agreement) pursuant to which Ball Corp. has provided senior management, technical personnel and technology to Ball Canada.

b. Ball Canada currently obtains supply as required of certain finished goods from Ball Corp. in order to meet its supply obligations to customers while production line conversion projects (described below) in Whitby, Ontario and Richmond, British Columbia are in progress. In addition, Ball Corp. supplies any surplus requirements of Molson that the Bay d'Urfe plant is not able to supply. The continuation of these conversion projects is also dependant [sic] upon Ball Corp. technical personnel.

c. Ball Corp. currently supplies all Information Systems used by Ball Canada to manage all of its accounting, purchasing, inventory control, invoicing and operating systems from Ball Corp.'s computer facilities in Indiana. I attach as Exhibit 'D' to this my affidavit a copy of a list which the Receiver has prepared outlining the Ball Canada information systems cur rently being run from Ball Corp.'s computers in Indiana. Continued access to these systems is critical to the continuation of the business of Ball Canada.

d. Ball Canada has been benefiting from volume discounts by joining with Ball Corp. for the purpose of

procuring its requirements in aluminium [sic].

As mentioned above, the Whitby and Richmond plants are currently in the midst of line conversion projects designed to enhance the competitiveness of these two plants and the ability of Ball Canada to compete in the North American marketplace. At the Richmond plant, the line conversion project is designed to increase the line speed to North American standards while the Whitby project is designed to convert to 12 oz can production to meet market demands. Both of these projects are important to the restructuring of Ball Canada to ensure its ability to compete in the North American market which has been largely opened as a result of the Free Trade Agreement and will enhance the value of the business as a whole. In order to continue these projects in the receivership, the Receivership will have to negotiate terms with the contractors on the project who claim lien rights totalling approximately $2 million for arrears of contract fees due but not paid. As previously indicated, the Receiver will also require the cooperation of Ball Corp. in the United States in order to continue to supply its customers while the conversion projects are completed.

The Receiver has been required to deal with a number of other suppliers of goods and services who have been seeking to assert lien claims or to obtain concessions regarding pre-receivership accounts as a condition of future dealing. A customs broker has been refusing to release certain goods imported by Ball Canada from a customs warehouse unless account arrears are settled.

The employees and unions dealing with Ball Canada are naturally extremely anxious about the receivership and the effect that it will have upon their future employment and on their statutory and collective agreement rights to severance and termination amounts. I enclose as Exhibit 'E' correspondence sent to the Receiver by various unions expressing their concerns. These unions are aware that Ball Corp. is endeavouring to acquire Ball Canada on terms which would permit Ball Canada to honour all of its obligations to employees.

We have also prepared preliminary cash flow projections for Ball Canada in receivership for the period ending on April 28, 1991. This cash flow projection and notes, which is attached and marked as Exhibit 'F' to this my affidavit, shows that the Receiver will be required to spend a total of $27.54 million in respect of ongoing operation plus a further possible $6.62 million in respect of arrears which may have to be paid in order to continue operations for a total of $34.16 million. As a result of the receivership and the seasonal nature of the business, cash inflows for this same period are estimated to total $15 million, resulting in a net funding requirement of up to $19.16 million. The Receiver is currently only able to borrow up to $20 million secured by Receiver's Certificates pursuant to the Order of March 28, 1991. The Receiver has arranged temporary funding up to that level, but this arrangement expires on April 30, 1991. In view of the risks and contingencies associated with continuing to run the business, there is considerable doubt as to the ability of the Receiver to access further funds from a bank even if permitted to do so by an amendment to the Order.

While the Receiver is making every effort to stabilize the business and mitigate the risks to the going concern value of the business posed by the difficulties and risk factors mentioned above, it is my view that the ability of the Receiver to maintain that value is uncertain and decreases daily. If the Receiver is not able to provide the marketplace with concrete assurances as to the future direction of Ball Canada, there is a serious risk that the value of the business will decline dramatically in the next few days or weeks.

Term Secured Compromise

I have reviewed the Term Secured Compromise referred to in the Notice of Application under the *Companies' Creditors Arrangement Act* (Canada). The Receiver has been asked to seek certain amendments to the March 28

receivership order in order to implement the Term Secured Compromise. The Receiver unreservedly and unequivocally believes this is the best possible deal in the present circumstances for the reasons outlined below.

The Receiver has reviewed the assets and business of Ball Canada for the purpose of preparing for a possible sale of Ball Canada. The Receiver has not as of yet completed the preparation of an information package for potential purchasers of the business of Ball Canada for the purpose of preparing for a possible sale of Ball Canada. The Receiver has not as yet completed the preparation of an information package for potential purchasers of the business of Ball Canada or commenced any such negotiations. Based upon its review, the price of $120 million for the term debt of Ball Canada proposed on the Term Secured Compromise represents *in excess of the high end* of the Receiver's estimates of the realizable value of the assets of Ball Canada in liquidation even if the Receiver is able successfully to maintain the going concern value of the business. It is the opinion of the Receiver that the business of Ball Canada has special value to Ball Corp. and that Ball Corp. is willing to make this offer for tax and other benefits that are unique to it. Since the Term Secured Compromise does not contemplate any other debt of Ball Canada being compromised, its economic value is far higher than $120 million. In my view, recoveries upon the assets would be considerably lower if the business begins to decline as a result of the loss of significant customer accounts or in the event of production interruptions or other difficulties which may be experienced in the coming days and weeks in view of the risk factors outlined above.

The Term Secured Compromise provides a means for the Receiver to obtain a secure source of operating credit for Ball Canada. As indicated above, the ability of the Receiver to raise the operating funds required to maintain the stability of the business of Ball Canada for the time required to seek out buyers for the business is uncertain. The current financing which the Receiver has negotiated expires at the end of April, 1991.

In the opinion of the Receiver, the Term Secured Compromise is in the best interests of Ball Canada and all of its creditors. As indicated above, it is my opinion that the term secured creditors will receive more under the Term Secured Compromise than they would under a liquidation supervised by the Receiver. Furthermore, as a result of the Term Secured Compromise, Ball Canada will be able to come out of receivership. This will provide a means for the trade creditors, customers, suppliers and employees to be ensured that their claims will be satisfied by Ball Canada in the ordinary course of business. This is in the best interests of the communities in which Ball Canada carries on business and its 1700 employees. An example of these types of concerns, which the Receiver believes are something the Receiver should keep in mind, is articulately expressed in the letter of Bob Speller, the member of Parliament for Haldimand- Norfolk that I attach hereto as Exhibit 'G' to this my affidavit.

If the Term Secured Compromise is approved by this Honourable Court, the Receiver will be required to take the steps outlined below in the interim period between approval of the agreement and its completion expected before April 25, 1991. It is anticipated that Ball Corp. will move to have the Receiver discharged immediately following completion of the Term Secured Compromise and that Ball Canada will resume business in the ordinary course under the control and direction of Ball Corp. thereafter.

In order to implement the Term Secured Compromise, the order appointing the Receiver must be varied in several respects. Firstly, the authority of the Receiver to borrow funds pursuant to paragraph 18 of the Order is required to be increased from $20 million to $30 million. This is required pursuant to clause 9(b)(iii)(A) of the Purchase Agreement contemplated by the Term Secured Compromise in order to ensure that the Receiver and Ball Canada will have authority to access sufficient working capital until closing. As indicated above, the Receiver's current forecasts indicate that the full authorized financing will be utilized in the coming weeks with very little margin of error if no amendment is made. An additional level of borrowing will be required to fund the requirements of Ball

Canada on closing of the Purchase Agreement as referred to in section 10 thereof.

A second required amendment is for this Court to direct and permit the Receiver (i) to permit Ball Corp. to manage Ball Canada and its business in accordance with the existing Joint Venture Management and Technical Services Agreement (the 'Management Agreement') dated December 8, 1988 (a copy of which I attach as Exhibit 'H') to this my affidavit); (ii) to cooperate with officers of Ball Canada to operate the business of Ball Canada in the ordinary course of business as an on-going business with a view to avoiding any material reduction in the value of the business; (iii) not to sell any asset of Ball Canada except in the ordinary course of the business of Ball Canada; and (iv) not to terminate voluntarily the employment of an employee of Ball Canada or any material contract of Ball Canada. This amendment has been required by Ball Corp. in order to provide them with some degree of comfort concerning and control over the occurrence of any material adverse change in the business between the date of the approval of the Term Secured Compromise and the closing of the Purchase Agreement contemplated thereby.

37 Since the hearing of April 11, the orders in accordance with the above two paragraphs were granted.

38 Although the affidavit evidence at the time of the preparation of the applications for April 10 and April 11 indicated that the only dissenting participant was Chase Manhattan, at the hearing there were some other participants who indicated that they were not prepared to approve the proposed plan. However, the necessary percentage in amount and number approved.

Decision

39 The first issue to be determined in assessing the vote at the meeting on the night of April 10 is whether the banks participating in the loan by Chase to Ball Canada (the "participants"), are secured "creditors" of Ball Canada.

40 The CCAA authorizes the court to order a meeting of "unsecured creditors" or "secured creditors" or any class of them for the purpose of voting on a proposed compromise or arrangement between them and the debtor company (see ss. 5 and 6). "Secured creditors" is defined in s. 2 (in part) as meaning:

> *a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company* secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or 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, *and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.*

[Emphasis added.]

41 The participants are the beneficial "holders" of a proprietary interest in Ball Canada which secures the indebtedness of Ball Canada and which the participants have purchased pursuant to the terms of the master participation agreements.

42 The word "holder" as used in this definition should be given a liberal interpretation in keeping with the broad remedial nature of the CCAA and therefore includes the *beneficial* holders of any bond or proprietary interest. As with judicial interpretation relating to the determination of a "class of creditors", the statute's reference to "creditors" is to be interpreted so that the voice of the persons with the real economic interest in the debtor company is heard. The exception

of the trustee under a trust deed from the class of creditors entitled to vote confirms this proposition. The fact that a trustee under a trust deed, although the holder of the legal title to the obligation under the bond and the security is not a secured creditor for the purpose of voting, favours the view that those with the beneficial or real economic interest in the debt and security are the creditors entitled to vote.

43 Section 4(b) of the master participation agreement recognizes that a participant is entitled to "its share" of any amounts received by Chase in a realization by it (or presumably its agent) of its collateral. The participant's share is its percentage ownership interest in the underlying loan obligation purchased. This provision recognizes that the participant has an equitable proprietary interest in the property of the borrower as security for that borrower's indebtedness, and is, therefore, a secured creditor of Ball Canada.

44 The relevant part of s. 4(b) reads:

> Further, the Participant shall not have any rights to or in any collateral, other property or right (including any right of set-off) which may be or becomes available for the payment of any Participated Loan, *except that if any such right is exercised by the Bank ... and the amounts recovered thereby are applied on account of any amount in which the Participant is entitled to share as provided in Section 4(a), the Bank will promptly pay to the Participant its share thereof as provided therein.*

[Emphasis added.]

45 That the participant pursuant to the terms of the master purchase agreement waives vis-à-vis Chase some of the rights that would normally accompany such an assignment (such as the right to give the debtor notice of the assignment) is not of significance in the CCAA proceedings. Section 8 of the CCAA provides that relief under the CCAA is available notwithstanding the terms of any agreement.

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

46 The Court's power to deal with the interests of the participants in the debt owed by Ball Canada is, therefore, unaffected by the master participation agreement or any other instrument.

47 Having accordingly ruled the vote was 86.67 per cent in favour in number and 80.85 per cent in favour on the basis of value and, accordingly, the proposal was approved by the necessary percentage in both number and value.

48 The jurisdiction of the Court under the CCAA should be given a large and liberal interpretation consistent with the remedial nature of the legislation. As recently stated by Doherty J.A. in the Ontario Court of Appeal in his dissenting reasons in the case of *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra, at p. 306 [O.R.]:

> The legislation is remedial in its pures 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.

In the same case Finlayson J.A., with whom Krever J.A. concurred, stated at p. 297 [O.R.]:

> It is well established that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company an its creditors for the benefit of both. Such a resolution can have

> significant benefits for the company, its shareholders and employees. For this reason the debtor companies ... are entitled to a broad and liberal interpretation of the jurisdiction of the court under the *CCAA*.

49 The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. That this is its fundamental purpose is emphasized by the following passage from the reasons of Gibbs J.A. of the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) at p. 91:

> The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed — the Bankruptcy Act and the Winding-up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

The Position of Onex Inc.

50 Onex Inc. held shares in a holding company with Ball U.S. that in effect gave it a 50 per cent interest in the shares of Ball Canada. These shares as previously stated were pledged as part of the loan agreement. Ball U.S.'s offer was conditional upon it obtaining 100 per cent of the shares of Ball Canada. Ordinarily, in an arrangement of this kind, the shares of the company making the arrangement have little or no value. In this case, however, other creditors were being paid in full and the business was to be carried on. It was understandable and appropriate that Ball U.S., in assuming all of the responsibilities and putting in the funds that it was obligated to do under its offer, would want to be in full control of the company. The rights of Onex as against Ball U.S. are not affected by my approving the compromise plan and ordering the shares to be transferred to Ball U.S., since any rights that Onex has under any agreements with Ball U.S. are not being altered, amended or considered as part of these proceedings. In order to comply with the terms of the proposal and the Ball U.S. offer, it was necessary to have the shares conveyed immediately and to implement this conveyance of the collateral security held, I made an order abridging the notice period provided in s. 63(4) of the PPSA. On the date of closing of the term secured compromise with respect to the transfer of the shares of Ball Canada held as security for the guarantee of Ball Holdings pursuant to s. 70 of the PPSA, and pursuant to s. 67 of the PPSA, I authorized and approved the transfer by Citibank Canada as agent of all the right, title to, and interest in the shares of Ball Canada to Ball Corp. pursuant to the term secured compromise. I also relieved the agent from further compliance with Pt. V of the PPSA.

51 I endorsed the record on April 11 as follows:

> In my view the beneficial owners of the security are each entitled to vote their percentage interest. On that basis the vote in favour of the proposal has exceeded the necessary number and value required. Accordingly, the order is to issue in the form approved.

52 The evidence before me demonstrated overwhelmingly that it was in the interest of all of the creditors that the proposal be approved. While it was extraordinary that ordinary creditors be paid in full while secured creditors received only part payment, there was no alternative. This was confirmed by the overwhelming support of the proposal from the creditors, with the notable exception of Chase Manhattan. The evidence put before me with regard to the proposal and

the fact that the proposal was in the best interests of all of the creditors was confirmed by the large number of representatives of financial institutions, officers and directors of same who attended the meeting and voted so overwhelmingly in favour of the compromise. The wishes of these sophisticated financiers should not lightly be discarded by the Court. Accordingly, the compromise plan was approved and implemented even under the most unusual circumstances and time constraints that existed.

Order accordingly.

END OF DOCUMENT

Tab 6

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: MORAWETZ J.

COUNSEL: Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al

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

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD & DECIDED: **JUNE 29, 2009**

ENDORSEMENT

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary...

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

Tab 7

CITATION: Sproule v. Nortel Networks Corporation, 2009 ONCA 833
DATE: 20091126
DOCKET: C50986 and C50988

COURT OF APPEAL FOR ONTARIO

Goudge, Feldman and Blair JJ.A.

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

C50986

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

C50988

AND BETWEEN:

National Automobile, Aerospace, Transportation and General Workers Union of Canada

(CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915

George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

Mark Zigler, Andrew Hatnay and Andrea McKinnon, for the appellants Nortel Networks Former Employees

Barry E. Wadsworth, for the appellant CAW-Canada

Suzanne Wood and Alan Mersky, for the respondents Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Lyndon A.J. Barnes and Adam Hirsh, for the respondents Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

Benjamin Zarnett, for the monitor Ernst & Young Inc.

Gavin H. Finlayson, for the Informal Nortel Noteholder Group

Thomas McRae, for the Nortel Canadian Continuing Employees

Massimo Starnino, for the Superintendent of Financial Services

Alex MacFarlane and Jane Dietrich, for the Official Committee of Unsecured Creditors

Heard: October 1, 2009

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated June 18, 2009, with reasons reported at (2009), 55 C.B.R. (5th) 68.

Goudge and Feldman JJ.A.:

[1] On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36, ("*CCAA*").

[2] In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

[3] The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order

granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

[4] The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

[5] We will address each of the two appeals in turn.

THE UNION APPEAL

Background

[6] The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to

unionized employees who have been terminated or who have severed their employment at Nortel.

[7] Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

[8] The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[1]

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

[9] The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the

[1] The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

CCAA.

[10] The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

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

[11] The Union challenges this conclusion.

[12] In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

[13] Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

[14] Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

[15] In our opinion, this argument must fail.

Analysis

[16] Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

[17] Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

[18] Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

[19] What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.).

[20] Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

[21] The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Police Service Board v. Ontario Municipal Employees Retirement Board et al.* (1999), 45 O.R. (3d) 622 (C.A.) at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

[22] Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. CAW-Canada,* [1993] 2 S.C.R. 230 at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services

being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

[23] In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

[24] The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

[25] The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not

dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

[26] After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

[27] For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

[28] Neither the provincial nor the federal governments responded to the notice on this appeal.

[29] Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> ...
>
> (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court.*
>
> ...
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business. [Emphasis added.]

[30] Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

[31] As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

[32] Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

> 11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1; [the Bankruptcy and Insolvency Act and the Winding Up Act]

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

[33] As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme…

[34] Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination

and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

[35] As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 at para. 43.

[36] The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R.161:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

[2] The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd. (Re)* [2009] O.J. No. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

[37] However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

[38] Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

[39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past

services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[40] The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

[41] In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been

considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

[42] While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

[43] The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need.

This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

[44] However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

[45] Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

[46] Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the

CCAA process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[47] The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

[48] We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

[49] The appeal by the former employees is also dismissed.

RELEASED: November 26, 2009 ("S.T.G.")

"S.T. Goudge J.A."
"K.N. Feldman J.A."
"I agree. R.A. Blair J.A."

Tab 8

SUPREME COURT OF NOVA SCOTIA
Citation: ScoZinc Ltd. (Re), 2009 NSSC 136

Date: 20090403
Docket: Hfx No.305549
Registry: Halifax

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 ScoZinc Ltd.

Applicant

Judge: The Honourable Justice Duncan R. Beveridge

Heard: April 3, 2009 in Halifax, Nova Scotia

Written Reasons of Oral Decision: April 28, 2009

Counsel: John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the applicant
Robert MacKeigan, Q.C., for Grant Thornton

By the Court:

[1] On December 22, 2008 ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s.11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s.11.7 of the *CCAA*.

[2] The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

[3] The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

BACKGROUND

[4] The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

[5] The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

[6] The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

[7] ScoZinc is 100% owned by Acadian Mining Corp. Theso two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

[8] Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

[9] Royal Roads claim was for $579, 964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

[10] Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

[11] The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

[12] The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

[13] The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

[14] The request for directions and the circumstances pose the following issue:

ISSUE

[15] Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

ANALYSIS

[16] The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s.11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

> 11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;

> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
>
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
>
> (iii) at such other times as the court may order;
>
> (c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and
>
> (d) carry out such other functions in relation to the company as the court may direct.
>
> ...

[17] It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

[18] Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

[19] The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

> Determination of amount of claim
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of an unsecured claim shall be the amount
>
> > (i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,
> >
> > (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or
> >
> > (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and
>
> (b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

[20] The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

[21] Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s.135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

[22] In contrast, the *CCAA* does not set out the procedure beyond the language in s.12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

[23] The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

[24] If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

[25] The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont.S.C.J.); *Triton Tubular Components v. Steelcase Inc.*, [2005] O.J. No. 3926 (Ont.S.C.J.); *Muscletech Research & Development Inc.,(Re)*, [2006] O.J. No. 4087 (Ont.S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp.*, Re 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

[26] I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 Commercial Insolvency Reporter 6, endorsed the utilization

of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Clear Creek Contracting v. Skeena Cellulous Inc.*,(2003), 43 C.B.R (4th) 187) (B.C.C.A.) and *Stelco Inc.(Re)*, [2005] O.J. No. 1171 (CA.)).

[27] Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

[28] The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Re Freeman Estate*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c.158. Harris C.J. wrote:

> [17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.
>
> [18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities-- done with despatch.
>
> [19] In the case of the Western &c R. Co. v. Atlanta (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544:--
>
> "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

[29] In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

[30] The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s.11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s.11.7(3)(d)).

[31] In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

POWER OF THE MONITOR

[32] The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

[33] The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

> 9. Upon receipt of a Proof of Claim:
>
> a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
>
> b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and
>
> ...
>
> 10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

[34] Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

[35] The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

[36] Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp.* 2000 ABCA 285. As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

[37] The chambers judge allowed the late and amended claims to be filed. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?

[38] Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Order that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

> [26] Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.
>
> 2000 ABCA 285

[39] The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is

> not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

[40] In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.).

[41] In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3rd) 1 commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

[42] In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to **the manner** to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to **completion** and the **execution** of a Proof of Claim.

[43] Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

[44] In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

[45] Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

[46] To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

[47] The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

[48] In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to conform with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

[49] If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

Beveridge, J.

Tab 9

Azco Mining Inc. *Appellant*

v.

Sam Lévy & Associés Inc. *Respondent*

INDEXED AS: SAM LÉVY & ASSOCIÉS INC. *v.* AZCO MINING INC.

Neutral citation: 2001 SCC 92.

File No.: 27876.

2001: May 15; 2001: December 20.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Courts — Jurisdiction — Trustee presenting petitigon to Quebec Superior Court sitting in bankruptcy seeking to "recuperate" assets held by company with office in British Columbia — Company bringing motion to transfer petition to British Columbia — Whether Superior Court lacked subject matter jurisdiction over petition — Whether Superior Court erred in exercising discretion against making transfer order — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-1, s. 187(7).

The appellant is a company incorporated under the laws of Delaware, offering venture capital services from its office in British Columbia. In 1996, a deal involving the financing of an African gold mine was struck between the appellant and Eagle, a company with offices in Quebec. The parties reduced their agreement to a series of documents, each of which contained a clause stating that the agreement was to be governed by the laws of British Columbia. In September 1997, Eagle was adjudged bankrupt by the Quebec Superior Court sitting in bankruptcy and the respondent firm was appointed trustee in bankruptcy. In January 1999, the respondent trustee presented a petition seeking to "recuperate" the assets of Eagle, including the monetary value of numerous shares held or controlled by the appellant. The appellant then brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy

Azco Mining Inc. *Appelante*

c.

Sam Lévy & Associés Inc. *Intimée*

RÉPERTORIÉ : SAM LÉVY & ASSOCIÉS INC. *c.* AZCO MINING INC.

Référence neutre : 2001 CSC 92.

N° du greffe : 27876.

2001 : 15 mai; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Tribunaux — Compétence — Présentation à la Cour supérieure du Québec siégeant en matière de faillite d'une requête du syndic visant à « recouvrer » des biens retenus par une société ayant un bureau en Colombie-Britannique — Présentation par la société d'une requête sollicitant le renvoi en Colombie-Britannique de la requête en recouvrement de biens — La Cour supérieure était-elle incompétente ratione materiae pour entendre la requête en recouvrement de biens? — La Cour supérieure a-t-elle commis une erreur en exerçant son pouvoir discrétionnaire pour refuser de renvoyer l'affaire? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-1, art. 187(7).

L'appelante est une société constituée sous le régime des lois du Delaware, offrant du capital de risque à partir de son bureau en Colombie-Britannique. En 1996, l'appelante et Eagle, une société ayant des bureaux au Québec, ont conclu une opération concernant le financement d'une mine d'or africaine. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait une clause portant que le contrat était régi par les lois de la Colombie-Britannique. En septembre 1997, Eagle a été déclarée en faillite par la Cour supérieure du Québec siégeant en matière de faillite et la société intimée a été nommée syndic de la faillite. En janvier 1999, le syndic intimé a présenté une requête visant à « recouvrer » des biens de Eagle, y compris la valeur pécuniaire de nombreuses actions détenues ou contrôlées par l'appelante. L'appelante a alors présenté une requête sollicitant le renvoi de la requête en recouvrement de biens « à la Division des faillites de la Cour suprême de

Division of Vancouver". The appellant's motion was dismissed. The Court of Appeal unanimously upheld that decision.

Held: The appeal should be dismissed.

The bankruptcy petition was properly filed in the Quebec Superior Court sitting in bankruptcy. A creditor is required to file a bankruptcy petition in the court having jurisdiction in the judicial district of the locality of the debtor. Eagle carried on business in Quebec and its only connection to British Columbia was that the agreements between itself and the appellant referred to the law of that province. Nothing in the evidence suggested that the bankruptcy court in Quebec lacked subject matter jurisdiction over the petition or personal jurisdiction over Eagle when it made the receiving order. The bankruptcy court thereby acquired jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia. The *Bankruptcy and Insolvency Act* establishes a nationwide scheme for the adjudication of bankruptcy claims. Section 188(1) ensures that orders made by the bankruptcy court sitting in one province can and will be enforced across the country.

The bankruptcy court does not lack subject matter jurisdiction over the dispute because it is a contract case. While a trustee's claim in relation to a "stranger to the bankruptcy" or lacking the "complexion of a matter in bankruptcy" should be brought in the ordinary civil courts, if the contractual dispute properly relates to the subject matter of the bankruptcy proceedings, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction. Here, far from being a "stranger" to the bankruptcy, the appellant is potentially the most significant player in the role of either creditor or debtor, as the case may be. Further, while the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases, the trustee's claim is not properly characterized as a claim in damages but as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant.

The *Bankruptcy and Insolvency Act prima facie* establishes one command centre or "single control" for all proceedings related to the bankruptcy. "Single control" is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" under s. 187(7) to send the trustee scurrying to multiple jurisdictions. The

la Colombie-Britannique à Vancouver ». La requête de l'appelante a été rejetée. La Cour d'appel a confirmé cette décision à l'unanimité.

Arrêt : Le pourvoi est rejeté.

La requête en faillite a été déposée à bon droit devant la Cour supérieure du Québec siégeant en matière de faillite. Le créancier doit déposer une requête de mise en faillite auprès du tribunal compétent dans le district judiciaire de la localité du débiteur. Eagle faisait affaire au Québec et son seul lien avec la Colombie-Britannique tenait au fait que les contrats entre elle et l'appelante renvoyaient aux lois de cette province. Aucun élément de preuve ne laissait croire que le tribunal de faillite du Québec n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre. Le tribunal de faillite a ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique. La *Loi sur la faillite et l'insolvabilité* établit un régime national de règlement des demandes en matière de faillite. Le paragraphe 188(1) prévoit que les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

Le tribunal de faillite ne perd pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. Bien qu'une demande du syndic qui est dirigée contre un « étranger à la faillite » ou qui n'est pas de la « nature d'une affaire de faillite » doive être présentée aux tribunaux civils ordinaires, si le litige contractuel se rapporte bel et bien à la faillite, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite. En l'espèce, loin d'être une « étrangère » à la faillite, l'appelante en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice, selon le cas. De plus, même si le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat, on ne peut qualifier la demande du syndic de simple demande en dommages-intérêts, car il s'agit plutôt d'une demande de recouvrement de biens précis du failli que l'appelante retient sans droit.

La *Loi sur la faillite et l'insolvabilité* établit à première vue un centre de commandement ou un « contrôle unique » pour la totalité des procédures liées à la faillite. Le « contrôle unique » n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant » au sens du par.

motions judge was entitled to conclude that the facts of this case do not show "sufficient cause" to require the transfer to British Columbia.

The relevant agreements to which the appellant and Eagle were parties contained choice of law, not choice of forum provisions, and the Quebec courts are perfectly able to apply the law of British Columbia. Furthermore, arts. 3148 and 3135 of the *Civil Code of Québec* would only apply in bankruptcy court "[i]n cases not provided for in the Act or . . . Rules". Since s. 187(7) of the Act specifically provides that a transfer will not be ordered unless there is satisfactory proof that a proceeding will be "more economically administered" in another division or district or "for other sufficient cause", these particular provisions of the Code can have no application. Where, unlike in this case, a defendant has the benefit of a choice of forum clause, such a clause ought to be taken into careful consideration by a motions judge under s. 187(7) but it is not binding.

Cases Cited

Followed: *Stewart v. LePage* (1916), 53 S.C.R. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; **distinguished:** *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; **referred to:** *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87; *Boily v. McNulty*, [1928] S.C.R. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31; *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246; *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; *Excavations Sanoduc inc. v. Morency*, [1991]

187(7), justifiant que le syndic doive accourir dans plusieurs ressorts. Le juge des requêtes pouvait conclure que les faits ne faisaient pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique.

Les contrats pertinents auxquels l'appelante et Eagle étaient parties contenaient une clause exprimant le choix des lois applicables, et non une clause d'élection de for, et les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Par ailleurs, les art. 3148 et 3135 du *Code civil du Québec* ne s'appliqueraient dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les [. . .] règles ». Étant donné que le par. 187(7) de la Loi prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district ou « pour un autre motif suffisant », ces dispositions particulières du Code ne s'appliquent pas. Lorsqu'un défendeur, contrairement au défendeur en l'espèce, bénéficie d'une clause d'élection de for, le juge des requêtes doit examiner cette clause avec soin en application du par. 187(7), mais il n'est pas lié par elle.

Jurisprudence

Arrêts suivis : *Stewart c. LePage* (1916), 53 R.C.S. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; **distinction d'avec l'arrêt :** *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; **arrêts mentionnés :** *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87; *Boily c. McNulty*, [1928] R.C.S. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31; *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246; *Geoffrion c. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*,

R.D.J. 423; *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143, leave to appeal refused [1997] 2 S.C.R. xiv; *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, aff'd (1992), 9 O.R. (3d) 755, leave to appeal refused [1992] 3 S.C.R. v; *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), aff'd 240 F.3d 148 (2001); *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109; *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (1989).

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2(1) [am. 1997, c. 12, s. 1], 17(1), 30(1)(*d*), 43(5) [rep. & sub. 1992, c. 27, s. 15], 72(1), 183(1)(*b*), (*c*), 187(7), 188(1), (2).

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 [am. SOR/98-240], s. 3.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3148.

Code of Civil Procedure, R.S.Q., c. C-25.

Constitution Act, 1867, ss. 91(21), 92(13).

Authors Cited

Bohémier, Albert. *Faillite et insolvabilité*, vol. 1. Montréal: Thémis, 1992.

Castel, J.-G. *Canadian Conflict of Laws*, 4th ed. Toronto: Butterworths, 1997.

Fletcher, I. F. *Insolvency in Private International Law.* Oxford: Clarendon Press, 1999.

Houlden, L. W., and G. B. Morawetz. *Bankruptcy and Insolvency Law of Canada*, vol. 2, 3rd ed. Toronto: Carswell, 1989 (loose-leaf updated 2001, release 7).

APPEAL from a judgment of the Quebec Court of Appeal, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), dismissing the appellant's appeal from a

[1990] R.J.Q. 6; *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423; *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143, autorisation de pourvoi refusée [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, conf. par (1992), 9 O.R. (3d) 755, autorisation de pourvoi refusée [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), conf. par 240 F.3d 148 (2001); *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109; *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co c. Merrill Lynch*, 885 F.2d 1149 (1989).

Lois et règlements cités

Code civil du Québec, L.Q. 1991, ch. 64, art. 3135, 3148.

Code de procédure civile, L.R.Q., ch. C-25.

Loi constitutionnelle de 1867, art. 91(21), 92(13).

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 2(1) [mod. 1997, ch. 12, art. 1], 17(1), 30(1)*d*), 43(5) [abr. & rempl. 1992, ch. 27, art. 15], 72(1), 183(1)*b*), *c*), 187(7), 188(1), (2).

Règles générales sur la faillite et l'insolvabilité, C.R.C., ch. 368 [mod. DORS/98-240], art. 3.

Doctrine citée

Bohémier, Albert. *Faillite et insolvabilité*, vol. 1. Montréal : Thémis, 1992.

Castel, J.-G. *Canadian Conflict of Laws*, 4th ed. Toronto : Butterworths, 1997.

Fletcher, I. F. *Insolvency in Private International Law.* Oxford : Clarendon Press, 1999.

Houlden, L. W., and G. B. Morawetz. *Bankruptcy and Insolvency Law of Canada*, vol. 2, 3rd ed. Toronto : Carswell, 1989 (loose-leaf updated 2001, release 7).

POURVOI contre un arrêt de la Cour d'appel du Québec, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), rejetant l'appel interjeté par l'appelant

judgment of the Superior Court, [1999] R.J.Q. 1497. Appeal dismissed.

Yves Martineau, for the appellant.

Jean-Philippe Gervais, for the respondent.

The judgment of the Court was delivered by

1 BINNIE J. — The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties

à l'encontre d'un jugement de la Cour supérieure, [1999] R.J.Q. 1497. Pourvoi rejeté.

Yves Martineau, pour l'appelante.

Jean-Philippe Gervais, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — La Cour supérieure du Québec siégeant en matière de faillite a le bras long au point d'avoir atteint l'appelante à Vancouver (Colombie-Britannique) concernant une demande d'actions, de bons de souscription et de paiement d'autres créances auxquels le failli prétend avoir droit et que le syndic de faillite évalue à plus de 4,5 millions de dollars. L'appelante a rétorqué que le litige, qui porte sur le financement d'une mine d'or en Afrique, n'a rien à voir avec le Québec. Elle prétend que la demande du syndic de faillite intimé constitue une demande civile ordinaire, entièrement fondée sur des contrats qui doivent être interprétés en conformité avec les lois de la Colombie-Britannique. Selon elle, ce motif et d'autres raisons de commodité et d'efficacité font en sorte que la demande devrait être entendue en Colombie-Britannique. Le tribunal de faillite et la Cour d'appel du Québec ont rejeté ces arguments et je suis d'avis que le pourvoi interjeté auprès de notre Cour devrait aussi être rejeté.

I. Les faits

L'appelante Azco Mining Inc. (« Azco »), une société constituée sous le régime des lois du Delaware, offrait du capital de risque à partir de son bureau de Vancouver (Colombie-Britannique). En 1996, on l'a mise en contact avec Eagle River International Limited et Eagle River Exchange and Financial Services Inc. (ci-après appelées collectivement « Eagle »), qui avaient des bureaux à Gatineau (Québec). Eagle faisait des démarches en vue d'exploiter des mines d'or prometteuses dans une région de 500 milles carrés située au Mali (Afrique occidentale). Il a été convenu que Eagle continuerait à mettre son expertise au profit de la mise en production de

reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

June 7, 1996 financing agreement

28. The agreement shall be governed by the law of British Columbia.

June 12, 1996 management services agreement

13. **Arbitration**: The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

. . .

20. **Applicable Law**: The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

West African Gold & Exploration S.A. Debenture dated August 9, 1996

17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either

ces mines par l'entremise de filiales au Mali et que Azco fournirait le financement. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait l'une des dispositions suivantes que l'appelante qualifie de clauses d'élection de for, mais qui, selon l'intimée, exprimaient simplement leur choix quant aux lois applicables :

[TRADUCTION]

Contrat de financement conclu le 7 juin 1996

28. Le contrat est régi par les lois de la Colombie-Britannique.

Contrat de services de gestion conclu le 12 juin 1996

13. **Arbitrage** : Les parties conviennent de soumettre à l'arbitrage toute question litigieuse relative au présent contrat conformément à ses stipulations.

. . .

20. **Lois applicables** : Le présent contrat a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci.

Azco invoque en outre les stipulations suivantes du contrat d'emprunt sous forme de débenture qu'elle a conclu avec la filiale de Eagle au Mali (la West African Gold & Exploration S.A.) :

[TRADUCTION]

Contrat d'emprunt sous forme de débenture de West African Gold & Exploration S.A. conclu le 9 août 1996

17. Le présent contrat d'emprunt sous forme de débenture a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci. En outre, la société convient expressément de signer sans délai tous les documents nécessaires pour que le présent contrat d'emprunt sous forme de débenture devienne exécutoire et soit enregistré valablement à l'égard des biens grevés conformément aux lois en vigueur dans la province de la Colombie-Britannique et aux lois en vigueur dans la République du Mali; sans limiter la portée générale de ce qui précède, la société convient en outre de reconnaître, le cas échéant, la juridiction des tribunaux compétents de la province de la Colombie-Bri-

administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of US$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares of Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN$337,500 and the Sanou interest at US$1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., based principally" on the financing agreements to recover about US$3.85 million in the

tannique pour l'application et l'interprétation du présent contrat d'emprunt sous forme de débenture en conformité avec les lois en vigueur dans la province de la Colombie-Britannique.

Il était prévu qu'en bout de ligne, en cas de succès du projet, Azco détiendrait une participation majoritaire dans la Sanou Mining Corporation (« Sanou »), que le syndic a qualifié de société de gestion en coentreprise et dans laquelle Eagle obtiendrait une participation minoritaire.

Entre le 16 mai 1996 et le 1er mai 1997, Azco a versé au total à Eagle la somme de 3 844 858 $US. Pour chaque versement, Eagle a signé un billet à ordre par lequel elle s'engageait à rembourser Azco si elle manquait à ses obligations contractuelles.

Le 12 septembre 1997, Eagle a été déclarée en faillite. La société intimée a été nommée syndic de la faillite. Malgré la faillite de Eagle, le projet du Mali s'est poursuivi et, selon Azco, il est toujours en cours. Le syndic affirme que l'appelante contrôle maintenant la société de gestion Sanou et retient illégalement les 3,5 millions d'actions et les 4 millions de bons de souscription auxquels Eagle avait droit — et auxquels elle a toujours droit.

Le 18 janvier 1999, le syndic intimé a présenté à la Cour supérieure du Québec siégeant en matière de faillite (le « tribunal de faillite ») une requête visant à « recouvrer des biens » de Eagle, y compris la valeur pécuniaire de 125 000 actions de Azco même, ainsi que de 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il considère comme des biens du débiteur retenus illégalement. Le syndic intimé évalue les actions de Azco à 337 500 $CAN et la participation dans Sanou à 1 875 000 $US. Le syndic fait également valoir certaines demandes pécuniaires relativement à diverses créances alléguées.

Le 24 février 1999, l'appelante a présenté une requête sollicitant le renvoi de la requête en recouvrement de biens [TRADUCTION] « à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver ». À l'appui de sa requête, l'appelante a déclaré : [TRADUCTION] « Azco déposera assurément une demande reconventionnelle d'un montant de plus de 5 000 000 $CAN fondée

payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?

A. Yes, it is.

Q. For what amount?

A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars ($3,844,858) plus accrued interest.

Q. That's U.S. currency?

A. That is U.S. currency.

Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?

A. Exactly.

Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

II. Judicial History

A. *Quebec Superior Court*, [1999] R.J.Q. 1497

Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with

principalement » sur les contrats de financement en vue de recouvrer les versements susmentionnés d'environ 3 850 000 $US remis à Eagle, qui étaient garantis par des billets à ordre, comme je l'ai déjà expliqué. Azco a soutenu que, selon les contrats, en cas de non-respect de certaines conditions, les avances de fonds seraient considérées comme un prêt à demande. D'après elle, ces conditions n'ont pas été remplies et elle a droit au remboursement immédiat de toutes les avances de fonds. Azco a prétendu que [TRADUCTION] « [l]a division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande contractuelle contre Azco ». Elle plaide que le dossier doit être renvoyé à la Division des faillites de Vancouver.

9 Le vice-président aux Finances de Azco, Ryan Modesto, qui vit aux États-Unis, a témoigné à l'appui de la requête en renvoi que Azco est un créancier de la faillite :

[TRADUCTION]

Q. Donc, Azco Mining plaide-t-elle qu'elle est le créancier dans le cadre de cette faillite de Eagle River?

R. Oui, c'est ça.

Q. Pour quel montant?

R. Pour trois millions huit cent quarante-quatre mille huit cent cinquante-huit dollars (3 844 858 $) plus les intérêts courus.

Q. C'est en devises américaines?

R. C'est en devises américaines.

Q. Et vous mentionnez les intérêts. Faites-vous référence aux intérêts stipulés dans le billet à ordre?

R. Exactement.

10 Le juge Isabelle de la Cour supérieure du Québec a rejeté la requête de Azco le 6 mai 1999. La Cour d'appel du Québec a confirmé cette décision le 21 février 2000.

II. Historique des procédures judiciaires

A. *Cour supérieure du Québec*, [1999] R.J.Q. 1497

11 Le juge Isabelle a conclu que la Cour supérieure du Québec siégeant en matière de faillite avait

the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

B. *Quebec Court of Appeal*, [2000] R.J.Q. 392

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(*d*) of the Act which empow-

compétence pour entendre la requête en recouvrement de biens présentée par l'intimée. Les dispositions pertinentes de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (la « Loi »), étaient claires et il n'y avait pas lieu d'invoquer le *Code civil du Québec*, L.Q. 1991, ch. 64, ni le *Code de procédure civile* du Québec, L.R.Q., ch. C-25.

Azco n'a pas prétendu que les affaires du failli pouvaient être administrées d'une manière plus efficace en Colombie-Britannique. Il a plutôt soutenu qu'il y avait d'autres motifs « suffisants » de renvoyer l'instance dans cette province, notamment certaines clauses du contrat (reproduites précédemment) qui, selon Azco, exigeaient que le litige soit tranché en Colombie-Britannique. Le juge Isabelle a conclu qu'il s'agissait de clauses portant sur le choix des lois applicables plutôt que de clauses d'élection de for et que, de toute manière, elles n'avaient aucun caractère « impératif ».

Le juge Isabelle a reconnu qu'il pouvait renvoyer l'instance à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver en vertu du par. 187(7) de la Loi. Il n'était pas nécessaire d'appliquer les règles particulières régissant les situations de *forum non conveniens* édictées par l'art. 3135 du *Code civil du Québec*. Compte tenu de l'ensemble des circonstances, toutefois, le juge Isabelle a estimé que le renvoi de l'instance n'était pas justifié. Le législateur a conféré au syndic le pouvoir de gérer les affaires du failli de la façon la plus pratique et la plus économique possible. Vancouver pouvait être commode pour l'appelante, mais l'intérêt de l'ensemble des créanciers l'emportait sur ce qui était commode pour un seul créancier. La requête de l'appelante a donc été rejetée.

B. *Cour d'appel du Québec*, [2000] R.J.Q. 392

La Cour d'appel a rejeté à l'unanimité l'appel de Azco. Le juge Robert, avec l'appui des juges Proulx et Rousseau-Houle, a confirmé que la Cour supérieure du Québec avait compétence sur la faillite de Eagle, soulignant que la société faisait affaire au Québec lorsque la procédure de faillite a été engagée. La requête en recouvrement de biens présentée contre Azco était autorisée par l'al. 30(1)*d*) de la

ers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

III. Relevant Statutory Provisions

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

2. (1) In this Act,

. . .

"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

Loi, qui confère au syndic le pouvoir d'intenter une procédure judiciaire se rapportant aux biens du failli avec la permission des inspecteurs.

Le juge Robert a convenu avec le juge des requêtes qu'il était plus efficace et équitable qu'un seul tribunal supervise l'administration de l'actif du failli malgré le fait que cette centralisation pouvait causer certaines difficultés et certains inconvénients aux parties résidant dans des provinces éloignées du lieu de la faillite. Toutefois, à l'instar du juge Isabelle, il a souligné le caractère discrétionnaire du pouvoir que le par. 187(7) confère aux tribunaux de renvoyer une affaire à une autre division lorsque la preuve établit que l'actif du failli y serait administré d'une façon plus économique ou qu'un autre motif suffisant le justifie. En l'espèce, le juge Robert a conclu que Azco n'avait pas démontré qu'il serait plus économique de s'adresser au tribunal de faillite de la Colombie-Britannique. Quant aux autres circonstances, le juge Robert s'est dit d'avis que les dispositions contractuelles que Azco avait qualifiées de clauses d'élection de for ne liaient pas le syndic de faillite, qui représente l'ensemble des créanciers et qui agit dans leur intérêt collectif. Les clauses en question ne constituaient pas des clauses attribuant une compétence exclusive. Même si tel avait été le cas, la Loi est une loi d'ordre public et ses dispositions doivent être appliquées rigoureusement compte tenu de leurs conséquences sur les droits des débiteurs et des créanciers.

III. Les dispositions législatives pertinentes

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« localité d'un débiteur » Le lieu principal où, selon le cas :

a) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

b) le débiteur a résidé au cours de l'année précédant sa faillite;

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . .

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

43. . . .

(5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

(*b*) in the Province of Quebec, the Superior Court;

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

187. . . .

(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

30. (1) Avec la permission des inspecteurs, le syndic peut :

. . .

d) intenter ou contester toute action ou autre procédure judiciaire se rapportant aux biens du failli;

43. . . .

(5) La pétition est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

72. (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

183. (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

187. . . .

(7) Sur preuve satisfaisante que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division de faillite, ou pour un autre motif suffisant, le tribunal peut, par ordonnance, renvoyer des procédures, que prévoit la présente loi et qui sont pendantes devant lui, à un autre district ou à une autre division de faillite.

188. (1) Une ordonnance rendue par le tribunal, sous le régime de la présente loi, est exécutée dans les

bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (am. SOR/98-240)

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Civil Code of Québec, S.Q. 1991, c. 64

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

. . .

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

. . .

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

IV. Analysis

Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original,

tribunaux ayant juridiction en matière de faillite ailleurs au Canada, de la même manière, à tous les égards, que si l'ordonnance avait été rendue par le tribunal tenu par les présentes de l'exécuter.

(2) Tous les tribunaux, ainsi que les fonctionnaires de ces tribunaux, doivent s'entraider et se faire les auxiliaires les uns des autres en toutes matières de faillite; une ordonnance d'un tribunal demandant de l'aide, accompagnée d'une requête à un autre tribunal, est censée suffisante pour permettre au dernier tribunal d'exercer, en ce qui concerne les affaires prescrites par l'ordonnance, la juridiction que le tribunal qui a présenté la requête ou le tribunal à qui la requête a été présentée, pourrait exercer relativement à des affaires semblables dans sa juridiction.

Règles générales sur la faillite et l'insolvabilité, C.R.C., ch. 368 (mod. DORS/98-240)

3. Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

Code civil du Québec, L.Q. 1991, ch. 64

3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.

. . .

3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants :

. . .

5° Le défendeur a reconnu leur compétence.

Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

IV. Analyse

Le Parlement a conféré au tribunal de faillite la capacité et le pouvoir d'exercer « la juridiction 17

auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?

2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?

de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi » (par. 183(1)). Il est évident que cette disposition vise à conférer au tribunal de faillite les pouvoirs et les obligations correspondant à la compétence qui appartient au législateur fédéral en matière de « faillite » en vertu du par. 91(21) de la *Loi constitutionnelle de 1867*, sauf dans la mesure où le législateur a lui-même limité la compétence du tribunal ou l'a expressément attribuée autrement.

Bien que l'appelante ait demandé simplement dans sa requête que le litige soit renvoyé à la Division de Vancouver de la Cour suprême de la Colombie-Britannique siégeant en matière de faillite (semblant ainsi reconnaître que le litige était considéré à bon droit comme une affaire de faillite), elle a aussi allégué que les demandes du syndic étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). De plus, une bonne partie des arguments avancés oralement par l'appelante laissaient entendre que le litige devait être tranché par les tribunaux civils ordinaires. L'appelante soutient en outre que le Québec n'est pas le lieu où il convient que ce litige soit tranché et que la Cour supérieure du Québec siégeant en matière de faillite n'a pas le bras suffisamment long pour contraindre Azco à amener ses témoins dans l'Est pour débattre du litige. Elle prétend que le lieu approprié est la Colombie-Britannique, car il n'existerait absolument aucun lien important entre la présente affaire et la province de Québec.

Il convient d'examiner dans l'ordre suivant les questions de droit que l'appelante a soulevées :

1. La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?

2. Dans l'affirmative, cette cour a-t-elle ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?

3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?

4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?

5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

1. *Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?*

Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91 of the *Constitution Act, 1867*, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87, *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

The "locality of the debtor" is defined under s. 2(1) as the "principal place"

> (*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

3. Dans l'affirmative, les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?

4. Dans la négative, cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?

5. Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?

1. *La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?*

20 Le Parlement a décidé d'utiliser les cours supérieures des provinces et des territoires pour exercer sa compétence en matière de faillite (art. 183). Il est établi depuis longtemps que, dans les domaines relevant des chefs de compétence énumérés à l'art. 91 de la *Loi constitutionnelle de 1867*, [TRADUCTION] « le Parlement du Canada peut donner compétence aux cours provinciales et réglementer au maximum les procédures devant ces cours » : *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87, le juge Rinfret, p. 100. Les cours mentionnées à l'art. 183 conservent leur statut de cour supérieure de compétence inhérente, mais je les appellerai ici tribunaux de faillite, quoique cette expression soit quelque peu imprécise.

21 Le créancier qui désire obtenir une ordonnance de séquestre contre un débiteur doit déposer une requête de mise en faillite « auprès du tribunal compétent dans le district judiciaire de la localité du débiteur » (par. 43(5)).

22 Le paragraphe 2(1) définit la « localité du débiteur » comme le « lieu principal » où, selon le cas :

> *a*) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

2. *Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?*

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty*, [1928] S.C.R. 182, at p. 186: [TRANSLATION] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved

b) le débiteur a résidé au cours de l'année précédant sa faillite;

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

Le paragraphe 43(5) exprime une règle de compétence qui attribue à l'un ou l'autre des tribunaux nommés au par. 183(1) le pouvoir judiciaire de statuer sur les requêtes de mise en faillite. La preuve a permis de constater que Eagle faisait affaire au Québec, même si elle n'avait pas obtenu de permis le lui permettant. Les contrats entre Azco et Eagle (ainsi que les billets à ordre fondant la demande reconventionnelle de Azco) précisent que Eagle a un bureau au 212, boulevard Labrosse, à Gatineau (Québec). Cette adresse figure dans l'en-tête de son papier à lettres. Le vice-président aux Finances de Azco a témoigné que les rencontres relatives au financement ont été tenues à ce bureau. Rien ne laisse entendre que Eagle ait quitté les lieux avant sa faillite, ni qu'elle ait eu d'autres bureaux au Canada.

Le seul lien apparent entre Eagle et la Colombie-Britannique tient au fait que les contrats susmentionnés renvoient aux lois de cette province. Il est clair que le par. 43(5) n'aurait pas permis le dépôt de la requête de mise en faillite en Colombie-Britannique pour un tel motif. J'estime qu'aucun élément de la preuve ne laisse croire que le tribunal de faillite à Hull n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre le 12 septembre 1997.

2. *Le tribunal de faillite a-t-il ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?*

La Loi établit un régime national de règlement des demandes en matière de faillite. Comme le juge Rinfret l'a souligné dans l'arrêt *Boily c. McNulty*, [1928] R.C.S. 182, p. 186 : « Il s'agit d'une loi fédérale qui concerne tout le pays, et elle envisage le territoire à ce point de vue ». C'est par l'intermédiaire du réseau d'entraide des cours supérieures des provinces et des territoires prévu par l'art.

through the cooperative network of superior courts of the provinces and territories under s. 188: *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (Que. C.A.), *per* Rivard J.A., at p. 246, [TRANSLATION] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S.C.A.), at p. 314, and *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), at p. 1389.

188 que les décisions rendues par un tribunal siégeant dans une province donnée sont exécutées à l'échelle nationale : *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (C.A. Qué.), le juge Rivard, p. 246 : « La *Loi de faillite* est fédérale, et les ordonnances de la Cour Supérieure de la province de Québec, siégeant en vertu de cette loi comme Cour de Faillite, sont exécutoires [en] Ontario ». Voir également : *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (C.A.N.-É.), p. 314, et *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), p. 1389.

The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

Les syndics auront souvent (et peut-être de plus en plus) à composer avec des débiteurs et des créanciers résidant dans différentes régions du pays. Ils ne pourront pas s'acquitter efficacement de leurs fonctions, pour reprendre les mots du juge Idington dans l'arrêt *Stewart c. LePage* (1916), 53 R.C.S. 337, p. 345, [TRADUCTION] « si tous peuvent s'interposer et invoquer leurs propres perceptions de leurs droits quant à la présentation d'une demande en justice ». L'arrêt *Stewart* portait sur la liquidation d'une société de fiducie constituée sous le régime des lois fédérales en Colombie-Britannique. Par suite de la liquidation, un client de l'Île-du-Prince-Édouard a présenté devant la Cour supérieure de cette province une demande de jugement déclaratoire portant que certains des fonds détenus par la société de fiducie faillie étaient détenus en fiducie et que cette société devait être déchue de sa qualité de fiduciaire. Notre Cour a conclu qu'en dépit de son lien très étroit avec l'Île-du-Prince-Édouard, le litige ne pouvait pas être soumis à la cour de cette province sans l'autorisation de la Cour suprême de la Colombie-Britannique. Le juge Anglin a fait remarquer, à la p. 349 :

26

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be

> [TRADUCTION] Il ne fait pas de doute que des inconvénients surgiront dans les cas exceptionnels où, comme en l'espèce, la liquidation de la société a lieu dans une province du Dominion très éloignée de la province de résidence des personnes intéressées en qualité de créancières ou de demanderesses. Mais le législateur a probablement jugé nécessaire dans l'intérêt d'une liquidation prudente et économique que la cour chargée de la liquidation ait le contrôle non seulement de l'actif et des biens se trouvant en la possession de la société mise en

involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remain-

liquidation, mais aussi de l'ensemble des litiges dans lesquels cette société pourrait être engagée. De façon générale, la prépondérance des inconvénients milite probablement en faveur de ce genre de contrôle unique, bien qu'il puisse comporter des désavantages dans certains cas.

Comme je l'ai mentionné, l'arrêt *Stewart* portait sur la liquidation d'une société, mais la politique législative favorisant le « contrôle unique » s'applique également en matière de faillite. Il y va du même intérêt public à la gestion expéditive, efficace et économique des retombées d'un effondrement financier. Par application du par. 188(1), les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

J'ai conclu que les créanciers qui ont demandé la mise en faillite ont fait appel à bon droit à la compétence de la Cour supérieure du Québec siégeant en matière de faillite, mais l'avocat de l'appelante affirme que sa cliente, qui a un bureau en Colombie-Britannique, échappe à la compétence de cette cour. Il plaide, notamment que, quel que soit le pouvoir du Parlement de conférer une compétence nationale à la cour supérieure d'une province, il demeure que cette cour est constituée par la province et que la loi grâce à laquelle elle a le bras long doit être respectée en ce qui concerne la signification des actes de procédure. Les faits révélés par le dossier n'indiquent pas précisément de quelle manière la requête en recouvrement présentée par le syndic a été signifiée à l'appelante, mais si Azco avait des arguments à faire valoir relativement à la validité de la signification de cette requête introductive d'une instance contre elle, elle y a renoncé en ne les soulevant pas dans la requête qu'elle a présentée à Hull. En appel, une bonne partie de l'audience a été consacrée aux arguments portant sur la question de savoir comment un tribunal québécois pouvait acquérir la compétence *ratione personae* sur une société située en Colombie-Britannique et si les règles québécoises de signification *ex juris* s'appliquaient. Je rejette la prétention selon laquelle la Cour supérieure du Québec siégeant en matière de faillite ne peut exercer la compétence *ratione personae* sur les créanciers d'une autre province en vertu de la Loi, et ce pour les motifs déjà exposés qui tiennent à la compétence nationale de la cour. Aucune objection

ing issue with respect to *in personam* jurisdiction was thereby waived.

liée à la signification des actes de procédure ne saurait subsister, étant donné que Azco a non seulement comparu au Québec, mais aussi invoqué la compétence de la Cour supérieure du Québec siégeant en matière de faillite en lui demandant de renvoyer l'instance au tribunal de faillite siégeant à Vancouver par application du par. 187(7). Elle a ainsi renoncé à soulever toute question irrésolue concernant la compétence *ratione personae*.

Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

29 Bien entendu, Azco n'a pas renoncé à contester la compétence *ratione materiae* sur l'objet du présent litige. Il s'agissait d'un élément prépondérant de sa requête. J'aborderai maintenant cette question.

3. *Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?*

3. *Les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?*

The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

30 Dans sa requête, l'appelante a prétendu que les demandes du syndic contre elle étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). La théorie qui sous-tend ces arguments est apparemment la suivante : comme les demandes contractuelles ont trait à « [l]a propriété et [aux] droits civils » au sens du par. 92(13) de la *Loi constitutionnelle de 1867*, ces actions en justice ne relèvent pas de la compétence du tribunal de faillite. Au paragraphe 42 de son mémoire, par exemple, l'appelante soutient que :

[TRANSLATION] Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the BIA such as the application to have preferential payments declared void (see sections 91 to 100 BIA). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

Contrairement à ce qu'affirme la Cour d'appel, le recours du syndic est donc une affaire purement contractuelle, de droit civil. Il ne s'agit pas d'un recours spécifiquement prévu par la LFI tel le recours en annulation de paiement préférentiel (voir articles 91 à 100 LFI). Le simple fait que le demandeur soit un syndic ne change pas la nature du recours et n'en fait pas un litige en matière de faillite.

Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *In re Morris Lofsky* (1947), 28 C.B.R. 164 (Ont. C.A.), *per*

31 Bien entendu, la plupart des questions liées à la faillite concernent de près ou de loin la propriété et les droits civils. Il est cependant vrai que certains des arrêts qui nient la compétence du tribunal de faillite s'appuient sur des motifs à connotation constitutionnelle, p. ex., *In re Morris Lofsky* (1947), 28 C.B.R.

Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (B.C.C.A.), at p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (Que. Sup. Ct.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "Bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31, it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31, Lord Selborne, speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne L.C.'s description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83, at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special

164 (C.A. Ont.), le juge Roach, p. 167; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (C.A.C.-B.), p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (C.S. Qué.), le juge Bernier, p. 94, et *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

Il faut donc se demander ce qu'englobe le terme « faillite » au sens du par. 91(21) de la *Loi constitutionnelle de 1867*.

Dans l'arrêt *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31, p. 46, le juge Rand a déclaré ce qui suit :

> [TRADUCTION] La faillite est une procédure bien connue par laquelle les biens d'un débiteur insolvable passent de façon coercitive sous administration judiciaire principalement dans l'intérêt des créanciers.

Ce concept-clé d'administration coercitive est apparu dès les premiers arrêts de notre jurisprudence en matière de faillite. Dans l'arrêt *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31, le lord Selborne a dit ce qui suit à la p. 36, en parlant des lois de portée générale régissant la faillite et l'insolvabilité : [TRADUCTION] « Les mots décrivent dans leur sens juridique connu les dispositions légales portant sur l'administration des biens des faillis et des personnes insolvables, conformément aux règles et aux définitions prescrites par la loi, y compris, bien sûr, les conditions d'application de la loi, sa procédure d'application et l'effet de son application ».

La description que lord chancelier Selborne a donnée de la faillite dans le contexte de la loi anglaise dans l'arrêt *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83, p. 86, est encore plus utile :

> [TRADUCTION] Ce qu'il y a à faire en cas de faillite, c'est l'administration de la faillite. Le débiteur et les créanciers, en qualité de parties à l'administration de la faillite, sont assujettis à cette juridiction. Les syndics ou les cessionnaires, en qualité de personnes chargées de l'administration, sont assujettis à cette juridiction. Les éléments d'actif qui leur sont remis et leur mode d'administration sont assujettis à cette juridiction; et il peut exister, comme je le crois, des catégories particulières

clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or if the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Re Ireland*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (Que. C.A.); *In re Martin* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246 (Ont. S.C.), and *Re Morris Lofsky*, *supra*, at p. 169.

The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in

d'opérations qui, en vertu de disposition législatives particulières, reçoivent un traitement particulier en ce qui a trait aux tiers. Mais la proposition générale selon laquelle c'est la Cour des faillites qui doit entendre les demandes que peuvent faire valoir en common law ou en equity, contre un étranger à la faillite, les cessionnaires ou syndics de faillite, ou les fiduciaires ainsi nommés par acte formaliste, me paraît dénuée de tout fondement légal et de toute trace de fondement jurisprudentiel. [Je souligne.]

36 Malgré le fait que l'Angleterre soit un État unitaire libre des restrictions constitutionnelles qu'impose notre partage des compétences, les tribunaux canadiens adhèrent généralement depuis 1874 à la division fondamentale entre les litiges liés à l'administration de l'actif du failli et les litiges impliquant des « étrangers à la faillite ». Le principe veut que si le litige a trait à une matière que même une interprétation généreuse de l'administration d'une faillite ne peut englober ou si la Loi ne prévoit pas la réparation visée, le syndic doit demander réparation aux tribunaux civils ordinaires. Ainsi, dans l'affaire québécoise *Re Ireland*, précitée, le syndic avait intenté une procédure pour faire décider qui avait droit au produit des polices d'assurance qu'il avait souscrites relativement à des biens faisant partie de l'actif du failli. Le juge Bernier a conclu que la Cour supérieure du Québec siégeant en matière de faillite n'avait pas compétence quant à l'objet du litige. Ce dernier soulevait purement des questions de droit civil et aucune disposition de la Loi ne conférait au tribunal de faillite une compétence spéciale lui permettant de trancher ces questions. Les tribunaux ont retenu des arguments similaires dans les décisions *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Qué.); *In re Martin* (1953), 33 C.B.R. 163 (C.S. Ont.), p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (C.S. Ont.), p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (C.S. Ont.); *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246 (C.S. Ont.), et *Re Morris Lofsky*, précitée, p. 169.

37 La Cour d'appel du Québec a peut-être pavé la voie à une interprétation plus large de ce qui constitue un litige relevant du droit de la faillite et ressortissant donc au tribunal de faillite : *Geof-*

the bankruptcy court: *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; and *Excavations Sanoduc inc. v. Morency*, [1991] R.D.J. 423. See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, *supra*, and *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (Que. Sup. Ct.); but the push is not confined to Quebec: *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (N.S.S.C.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (B.C.C.A.), at p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Re Reynolds*, *supra*, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Re Morris Lofsky*, *supra*, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Re Galaxy Interiors*, *supra*, and *Sigurdson*, *supra*), as can claims for relief specifically granted by the Act (*Re Ireland*, *supra*, and *Re Atlas Lumber*, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L. W. Houlden and G. B. Morawetz observe:

frion c. Barnett, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; et *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423. Voir aussi les motifs dissidents du juge LeBel, maintenant juge de notre Cour, dans l'arrêt *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, précité, et *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (C.S. Qué.), mais cette tendance ne se manifeste pas uniquement au Québec : *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (C.S.N.-É.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (C.A.C.-B.), p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (C.S. Ont.), p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (B.R. Man.).

La jurisprudence semble reconnaître que le mot « faillite » figurant au par. 91(21) de la *Loi constitutionnelle de 1867* doit être interprété de façon large pour réaliser son objet. Une interprétation moins libérale compliquerait et entraverait inutilement la liquidation économique et expéditive de l'actif du failli. L'établissement d'une compétence nationale en matière de faillite se révélerait inutile si une interprétation étroite et restrictive de cette compétence constitutionnelle en entravait continuellement l'exercice. Par l'adoption du par. 183(1) de la Loi, le législateur fédéral a transmis au tribunal de faillite une vaste compétence équivalente à celle qu'il a reçue.

Il y a évidemment des limites. Si la demande du syndic est dirigée contre un étranger à la faillite, c.-à-d. [TRADUCTION] « des personnes ou des questions ne relevant pas de [la] Loi » (*Re Reynolds*, précité, p. 129), ou si elle n'est pas de la [TRADUCTION] « nature d'une affaire de faillite » (*Re Morris Lofsky*, précité, p. 169), elle doit être présentée aux tribunaux civils ordinaires, et non au tribunal de faillite. En revanche, on peut manifestement saisir le tribunal de faillite d'une demande de recouvrement d'un bien particulier (*Re Galaxy Interiors*, précité, et *Sigurdson*, précité) tout comme d'une demande sollicitant une réparation prévue par la Loi (*Re Ireland*, précité, et *Re Atlas Lumber*, précité). Cela dit, il est parfois difficile de percevoir le « fil d'or » particulier qui lie les décisions. L. W. Houlden et G. B. Morawetz font remarquer que :

There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.

(*Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4)

The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. *Does This Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?*

In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns West African Gold & Exploration S.A., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly

[TRADUCTION] Il y a eu de nombreux litiges sur cette question et il n'est pas toujours facile de concilier les décisions. La difficulté découle du partage des compétences constitutionnelles au Canada, la faillite et l'insolvabilité étant de compétence fédérale et la propriété et les droits civils ainsi que l'administration de la justice étant de compétence provinciale.

(*Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), I§4)

40 En bref, toutefois, la réponse à l'argument fondé sur « la propriété et les droits civils » est que l'appelante pose la mauvaise question. La question est de savoir si le litige contractuel entre l'appelante et le syndic intimé se rapporte bel et bien à la faillite. Dans l'affirmative, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite.

4. *Cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?*

41 En l'espèce, le syndic intimé a intenté, avec la permission des inspecteurs, une « procédure judiciaire se rapportant aux biens du failli » devant le tribunal de faillite en vertu de l'al. 30(1)*d*). Le syndic prétend que, outre les actions de Azco et de Sanou, la définition de « biens » figurant à l'art. 2 inclut les « droits incorporels », ce qui, selon lui, englobe ses demandes pécuniaires.

42 Quant aux actions et aux bons de souscription, le syndic allègue au par. 108 de sa requête que Azco est [TRADUCTION] « reconnue comme la propriétaire nominale de 100 % de Sanou Mining Corporation », qui est propriétaire de West African Gold & Exploration S.A., laquelle exploite les concessions minières au Mali. En fait, le syndic prétend que Azco détient les actions et les bons de souscription de Sanou qui font partie à bon droit de l'actif du failli et que Azco est en mesure de les lui transférer si le tribunal de faillite l'exige.

43 Comme je l'ai mentionné, on ne peut pas sérieusement prétendre que le tribunal de faillite n'a pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. De façon plus étroite,

defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for US$3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

la question est de savoir si le tribunal de faillite n'a pas compétence (i) parce que l'appelante est à juste titre considérée comme une « étrangère à la faillite » ou (ii) parce que le tribunal de faillite ne peut pas accorder la réparation que le syndic sollicite.

(i) L'appelante est-elle une « étrangère à la faillite »?

Si un défendeur potentiel est un « étranger » à la faillite, il se peut que le tribunal de faillite n'ait pas compétence sur l'objet du litige (parce que celui-ci ne fait pas partie de la faillite) même si l'« étranger » réside dans le ressort du tribunal.

Au moment de la requête en recouvrement présentée par le syndic, l'appelante n'avait déposé aucune preuve de réclamation dans le cadre de la faillite. Elle semble avoir adopté une « attitude attentiste », c'est-à-dire qu'elle entendait déposer une réclamation seulement si le syndic déposait une demande contre elle. Le syndic *a* finalement *déposé* une demande contre elle, dans sa requête en recouvrement du 18 janvier 1999, et l'appelante lui *a donné avis* de sa demande reconventionnelle dans sa requête du 24 février 1999, et notamment du fait qu'elle détenait des billets à ordre d'une valeur de 3 844 858 $US signés par le failli et payables sur demande, lesquels constituaient des obligations éventuelles dont le syndic avait hérité.

Dans l'arrêt *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, rendu simultanément, nous avons confirmé la décision de la Cour fédérale du Canada de statuer sur les demandes des titulaires de privilèges maritimes grevant un navire dont le propriétaire avait été déclaré failli après la saisie du navire, mais avant qu'il soit statué sur l'action réelle. Nous avons conclu que la Cour fédérale n'avait pas perdu compétence sur l'objet du litige à la suite de la faillite du propriétaire du navire. Nous avons statué que la Cour fédérale *aurait pu* surseoir à l'instance par déférence envers le tribunal de faillite, mais qu'elle n'était pas obligée d'y surseoir dans les circonstances.

The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

47 La question en litige en l'espèce est quelque peu différente. L'appelante conteste une demande du syndic de faillite et menace de présenter contre l'actif du failli une demande reconventionnelle fondée sur la même série de contrats commerciaux. L'appelante a sollicité uniquement le renvoi de l'instance à une autre division du tribunal de faillite au Canada.

In *Re Morris Lofsky*, *supra*, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

48 Dans l'arrêt *Re Morris Lofsky*, précité, la Cour d'appel de l'Ontario s'est penchée sur une affaire dans laquelle le syndic avait sollicité un jugement déclaratoire portant que la cession d'une automobile du failli à son épouse était frauduleuse et inopposable au syndic et que cette automobile faisait partie des biens du failli. L'épouse a contesté la demande en faisant valoir que l'automobile n'avait jamais appartenu au failli (même si elle était immatriculée au nom de ce dernier). À la page 169, le juge Roach a conclu que l'épouse était une étrangère à la faillite :

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

> [TRADUCTION] J'estime qu'on doit conclure que la question en litige entre le syndic et l'appelante n'est pas une affaire de faillite, mais bien une pure affaire de propriété et de droits civils. Elle ne comporte aucun élément susceptible d'en faire une affaire de faillite. Elle ne soulève aucune question opposant débiteur et créancier dans la répartition de l'actif du failli. L'appelante ne revendique pas le titre de l'automobile par l'entremise du failli. En effet, elle affirme que le failli n'a jamais détenu le titre et qu'elle en a toujours été la propriétaire. Je ne peux voir aucun aspect de la question qui lui conférerait la nature d'une affaire de faillite sauf, peut-être, le fait que le failli a fait immatriculer le véhicule au nom de l'appelante au cours de la faillite. Cette immatriculation ne transforme pas la question en affaire de faillite, la seule question se posant étant de savoir qui, du failli ou de l'appelante, a toujours été le véritable propriétaire.

See also *Re Reynolds*, *supra*, at p. 131.

Voir également l'arrêt *Re Reynolds*, précité, p. 131.

On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the

49 Dans le dossier qui nous est soumis, toutefois, l'appelante plaide qu'elle est la créancière la plus importante de l'actif du failli et qu'elle déposera « assurément » une demande reconventionnelle en réponse à la requête du syndic. Pour sa part, le syndic considère l'appelante comme la débitrice la plus importante de l'actif du failli. Loin d'être une

most significant player in the role of either creditor or debtor, as the case may be.

(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?

50 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. In *Sigurdson*, *supra*, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Re Ireland*, *supra*.

51 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

« étrangère » à la faillite, Azco en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice.

(ii) Le tribunal de faillite a-t-il compétence pour accorder la réparation sollicitée par le syndic?

Il est bien établi que le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat. Sa compétence et son pouvoir de réparation se limitent à ce que prévoit la Loi. Dans *Sigurdson*, précité, le syndic de faillite avait poursuivi deux anciens administrateurs du failli pour fraude devant la Cour suprême de la Colombie-Britannique. Dans une partie de ses motifs portant sur un autre point, la Cour d'appel a fait remarquer que si le syndic avait intenté sa poursuite devant le tribunal de faillite, [TRADUCTION] « il se serait trouvé devant le mauvais tribunal » car « [i]l doit s'adresser aux tribunaux civils ordinaires pour engager une poursuite en dommages-intérêts » (p. 102). Voir également *Re Ireland*, précité.

Je suis toutefois d'avis qu'on ne peut pas, en l'espèce, qualifier la demande du syndic de simple demande en dommages-intérêts, même s'il a tenté de déterminer la valeur pécuniaire des actions qui, selon lui, reviennent à l'actif du failli et que l'appelante retient sans droit. Je ne pense pas qu'il soit interdit au tribunal de faillite d'envisager une ordonnance dans laquelle de l'argent serait substitué au bien revendiqué, lorsque celui-ci ne peut être remis. Il faut rappeler que le syndic réclame essentiellement 125 000 actions de Azco même, plus 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il prétend contrôlée entièrement par l'appelante. La requête du syndic dit ce qui suit, au par. 65 :

[TRADUCTION] La société débitrice a également droit aux 3 500 000 actions et aux 4 000 000 bons de souscription de Sanou, conformément au contrat, comme l'a reconnu l'intimée elle-même dans son rapport annuel destiné à la *Securities and Exchange Commission* des États-Unis pour l'exercice financier se terminant le 30 juin 1997, déposé comme pièce R-24;

As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

[TRANSLATION] It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Re Galaxy Interiors*, *supra*, *per* Houlden J., at p. 144; *Mancini*, *supra*, *per* Catzman J., at pp. 250-51; *Re Atlas Lumber*, *supra*, *per* Rinfret J., at p. 234.

It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

Quant aux actions de Azco, le syndic déclare au par. 101 de sa requête qu'il réclame [TRADUCTION] « 125 000 actions de Azco Mining Corporation qui avaient une valeur de 2,70 $CAN l'action ». 52

Il est tout aussi important de noter que l'appelante reconnaît que l'action intentée contre elle vise essentiellement la remise des actions et déclare ce qui suit au par. 25 de son mémoire : 53

Il semble que le recours du syndic est une action réelle plutôt qu'une action personnelle puisque le syndic cherche principalement à se faire reconnaître des droits sur 125 000 actions d'Azco et 3 500 000 actions et 4 000 000 bons de souscription de la compagnie Sanou (voir notamment les paragraphes 95, 98, 99 et 102 de la requête du syndic).

Malgré l'emploi de termes qui laissent perplexe dans la requête du syndic, les parties semblent donc s'entendre pour dire que la demande du syndic doit essentiellement être qualifiée de demande de recouvrement de biens précis du failli que l'appelante retient sans droit. Par conséquent, le syndic a le droit de réclamer les actions et les bons de souscription (par. 17(1)) et, avec la permission des inspecteurs (qu'il a obtenue), d'intenter une procédure judiciaire se rapportant à ces biens devant le tribunal de faillite (al. 30(1)*d*)). En invoquant ces dispositions législatives et les réparations qu'elles prévoient, le syndic situe manifestement sa réclamation dans le cadre de la Loi. Voir *Re Galaxy Interiors*, précité, le juge Houlden, p. 144; *Mancini*, précité, le juge Catzman, p. 250-251; *Re Atlas Lumber*, précité, le juge Rinfret, p. 234. 54

Lorsque les faits seront connus et que la position des parties sur les questions en litige seront précisées, il incombera au tribunal de faillite de Hull d'examiner la requête en recouvrement de biens pour déterminer si un élément particulier des diverses demandes du syndic échappe à sa compétence. Pour le moment, il suffit de conclure que la demande du syndic se rapporte essentiellement à la faillite, pour les motifs que j'ai déjà exposés. Dans l'état actuel du dossier (il s'agit d'une requête préliminaire), nous ne pouvons aller plus loin. 55

5. *Even if Fully Clothed with Jurisdiction to Hear This Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?*

56 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district or division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

57 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, *supra*, released concurrently.

58 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (Que. Sup. Ct.), and *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (Que. Sup. Ct.).

59 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Civil Code of Québec* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040 (Sup. Ct.), and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

5. *Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?*

Le tribunal peut, (i) s'il est convaincu que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division des faillites ou (ii) pour « un autre motif suffisant », renvoyer « des procédures » en cours devant lui à l'autre district ou division de faillite (par. 187(7)).

Le paragraphe 187(7) établit une méthode pour renvoyer des procédures entre différents tribunaux de faillite au Canada. On verra plus loin que ce paragraphe soulève des questions différentes de la situation internationale particulière en cause dans *Holt Cargo Systems*, précité, rendu simultanément.

Le juge des requêtes a exercé son pouvoir discrétionnaire en refusant d'ordonner le renvoi en l'espèce. L'appelante doit donc démontrer que cette décision est entachée d'une erreur de droit ou de principe ou de l'omission de prendre en considération un élément prépondérant : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 588. Les décisions *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (C.S. Qué.), et *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (C.S. Qué.), ont reconnu la portée de ce pouvoir discrétionnaire en matière de faillite.

L'appelante affirme que les cours d'instance inférieure ont commis une erreur, tant sur le plan du droit que sur celui des principes. Selon l'appelante, elles ont commis une erreur de droit parce que l'art. 3148 du *Code civil du Québec* obligeait le tribunal de faillite à se déclarer incompétent vu les clauses « d'élection de for ». Par ailleurs, elles ont commis une erreur de principe parce qu'il n'existe aucun lien important entre le litige et la province de Québec. À cet égard, l'appelante invoque les décisions *Bourque Consumer Electronics (Syndic de)*, J.E. 91-1040 (C.S.), et *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897.

(i) Choice of Forum Clause

The appellant's point is that the applicable rules are found in the *Civil Code of Québec*, and in particular art. 3148 which provides in part that:

. . . a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management services agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold & Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

As to the legal issue, the question is whether arts. 3148 or 3135 of the *Civil Code of Québec* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "[i]n cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Civil Code of Québec*. But this is incorrect. Resort is to be had to the provincial rules only "[i]n cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Civil Code of Québec*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Civil Code of Québec*

(i) La clause d'élection de for

60 L'appelante tente de démontrer que les règles applicables se trouvent dans le *Code civil du Québec*, notamment à l'art. 3148, qui prévoit en partie que :

. . . les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

61 L'argument fondé sur l'élection de for est malheureusement mal fondé, tant en fait qu'en droit. Pour ce qui est des faits, les seuls contrats pertinents sont ceux auxquels Eagle était partie. La clause 28 figurant au contrat de financement du 7 juin 1996 et la clause 20 du contrat de services de gestion ne constituent rien de plus que l'expression du choix des lois applicables. Les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Le sens de la clause 17 du contrat d'emprunt sous forme de débenture de la West African Gold & Exploration S.A. conclu le 9 août 1996 est moins clair, mais, comme Azco n'y était pas partie et ne peut donc pas être poursuivie en vertu de ce contrat, ses stipulations ne sont pas pertinentes.

62 Pour ce qui est du droit, il s'agit de savoir si les art. 3148 ou 3135 du *Code civil du Québec* s'appliquent de quelque manière à la présente instance. Ces dispositions ne trouvent application dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les présentes règles » (*Règles générales sur la faillite et l'insolvabilité*, art. 3). Le paragraphe 187(7) prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district, ce que l'appelante n'a pas soutenu, ou pour « un autre motif suffisant ». L'appelante prétend qu'il faut « préciser » ces mots de portée générale au moyen des dispositions plus particulières du *Code civil du Québec*. Mais, cela est inexact. Il faut recourir aux règles provinciales seulement « [d]ans les cas non prévus ». En l'espèce, le cas est prévu. On ne peut donc pas faire appel aux dispositions particulières

applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

63 Leaving aside, then, the inapplicable directives of the *Civil Code of Québec*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), *per* Huddart J.A., at p. 153 (leave to appeal refused, [1997] 2 S.C.R. xiv); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Gen. Div.), aff'd (1992), 9 O.R. (3d) 755 (C.A.) (leave to appeal refused, [1992] 3 S.C.R. v); *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S.C.A.).

(ii) Public Policy Considerations

64 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), aff'd 240 F.3d 148 (2d Cir. 2001).

65 In *Re Moratorium Act*, *supra*, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may

du *Code civil du Québec*. Cette interprétation de l'art. 3 est non seulement inévitable, mais souhaitable. Le *Code civil du Québec* s'applique à un vaste éventail de matières. Lorsque le par. 187(7) parle de « motif suffisant », il le fait dans le contexte particulier de la faillite.

Il faut donc laisser de côté la prescription inapplicable du *Code civil du Québec* et se poser la question de savoir si une clause d'élection de for constituerait un « motif suffisant » au sens du par. 187(7), de sorte que le juge des requêtes aurait commis une erreur de droit en ne lui donnant pas effet dans les circonstances. D'après moi, un juge des requêtes devrait examiner avec soin une clause d'élection de for (lorsqu'il en existe réellement une), mais il n'est pas lié par une telle clause : J.-G. Castel, *Canadian Conflict of Laws* (4e éd. 1997), p. 262-263. Voir *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), le juge Huddart, p. 153, autorisation de pourvoi refusée, [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (C.A. Alb.), le juge Kerans, p. 381; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Div. gén.), conf. par (1992), 9 O.R. (3d) 755 (C.A.), autorisation de pourvoi refusée, [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (C.A.N.-É.).

(ii) Considérations d'intérêt public

Il serait possible de prétendre que le principe d'intérêt public favorisant le « contrôle unique » des instances en matière de faillite et s'opposant à leur fragmentation commande qu'on attribue moins de poids à une clause d'élection de for en matière de faillite que dans le contexte des litiges commerciaux ordinaires : *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), conf. par 240 F.3d 148 (2d Cir. 2001).

Dans l'arrêt *Re Moratorium Act*, précité, le juge Rand a parlé des objectifs d'« ordre public » importants des dispositions législatives en matière de faillite, à la p. 46 :

[TRADUCTION] À cette procédure peuvent se rattacher non seulement la stigmatisation de la personne mais des

result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at p. 120.

In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

[TRANSLATION] The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.

(*Faillite et insolvabilité* (1992), vol. 1, at p. 48)

The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in I. F. Fletcher, *Insolvency in Private International Law* (1999), at p. 47, fn. 73:

[P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), and *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

contraintes restreignant sa liberté dans ses activités commerciales futures. La réparation pour le débiteur consiste à annuler ses dettes, qui pourraient autrement faire obstacle à sa réadaptation économique et sociale.

Voir aussi *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109, p. 120.

66 Dans son traité sur la faillite, le professeur Albert Bohémier dit ce qui suit au sujet de l'objectif de la Loi :

La *Loi sur la faillite* a pour but de protéger le débiteur, ses créanciers et l'intérêt public. Ces objectifs ont toujours été présents, mais avec une intensité variable. On peut affirmer sans craindre de se tromper que plus une société favorise le crédit et donc l'endettement, plus la législation aura tendance à faire primer le souci d'atténuer le sort des débiteurs honnêtes et infortunés. Un régime qui repose sur l'endettement doit comporter un système auto-régulateur de sorte que les débiteurs défaillants puissent éventuellement être réintégrés dans le système et redevenir des éléments productifs.

(*Faillite et insolvabilité* (1992), vol. 1, p. 48)

67 En cas de conflit, on pourrait s'attendre à ce que la mise en œuvre de ces principes d'intérêt public ait priorité sur les conventions privées d'élection de for, comme l'a effectivement conclu le juge Robert de la Cour d'appel du Québec. Une opinion semblable est exprimée dans I. F. Fletcher, *Insolvency in Private International Law* (1999), p. 47, note 73 :

[TRADUCTION] [L]es arrangements contractuels privés entre les parties ne peuvent avoir préséance sur l'exercice de la compétence en matière de faillite, qui est du domaine de l'ordre public et sert une plus vaste gamme d'intérêts y compris, en bout de ligne, ceux de la société dans son ensemble.

Il existe toutefois aux États-Unis un courant jurisprudentiel contraire portant que, règle générale, un syndic de faillite qui engage un recours fondé sur une convention comportant une clause d'élection de for devrait être lié par cette clause dans la même mesure que les parties qui l'ont stipulée : voir *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), et *Hays and Co. c. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

68 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

69 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against *Amchem*, *supra*, and public interest factors within the framework of s. 187(7) of the Act.

70 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) Error of Principle

71 The appellant, relying on *Amchem*, *supra*, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

72 Again, with respect, I do not think this position is sustainable on the law or the facts.

73 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, *supra*, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

Selon moi, pour les motifs déjà exposés, la clause d'élection de for constituerait un facteur important pour l'application du par. 187(7), mais il ne serait pas déterminant dans le contexte des principes d'intérêt public exprimés dans la Loi.

Vu ma conclusion que l'appelante ne bénéficie pas d'une clause d'élection de for en l'espèce, il n'y a pas lieu que j'entreprenne l'examen de la question de savoir s'il y a ici conflit entre le choix privé et l'intérêt public et, le cas échéant, quel poids doit être accordé à l'élection de for en regard des facteurs d'intérêt public énoncés dans *Amchem*, précité, dans le cadre du par. 187(7) de la Loi.

En bout de ligne, l'appelante est incapable de démontrer que le juge des requêtes a commis une erreur de droit en refusant de renvoyer l'instance à Vancouver.

(iii) L'erreur de principe

Se fondant sur l'arrêt *Amchem*, précité, l'appelante prétend que le litige actuel a son lien le plus réel et le plus important avec la Colombie-Britannique et que le juge des requêtes a commis une erreur de principe en ne prenant pas en considération certains facteurs pertinents pour tirer la conclusion inverse.

Encore une fois, j'estime que cette position est indéfendable en fait et en droit.

En premier lieu, comme je l'ai déjà dit, il faut appliquer en l'espèce la méthode suivie dans l'arrêt *Amchem* en tenant pleinement compte du contexte de la législation canadienne en matière de faillite. Le présent pourvoi porte sur l'attribution d'une affaire de faillite particulière à un tribunal à l'intérieur d'un seul régime national de faillite créé par la Loi. Comme le démontre l'arrêt *Holt Cargo Systems*, précité, l'examen de l'attribution d'une affaire comportant différents aspects (p. ex., un aspect de droit maritime et un aspect de droit de la faillite) entre les tribunaux canadiens et les tribunaux étrangers, assujettis à des régimes fort différents, notamment sur le plan législatif, peut soulever divers problèmes.

Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, *supra*, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

74 En deuxième lieu, l'arrêt *Amchem* et les arrêts qui l'ont suivi portaient sur des litiges privés. Le présent pourvoi, tout comme cela a été expliqué dans l'arrêt *Holt Cargo Systems*, précité, comporte l'aspect important de l'intérêt public mentionné précédemment. Notre Cour ne peut s'en tenir seulement aux facteurs énoncés dans *Amchem*; elle doit s'efforcer de donner effet à l'intention manifeste du législateur, exprimée dans la Loi, de créer un système national économique et efficace d'administration de l'actif des faillis.

It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

75 Il est dans l'intérêt public de faciliter la résolution rapide des retombées d'un effondrement financier. Comme nous l'avons souligné dans l'arrêt *Holt Cargo Systems*, on ne retrouvait pas ce facteur dans la situation factuelle en cause dans *Amchem*. En fait, il existe des considérations de principe plus fortes en l'espèce que dans l'affaire *Holt Cargo Systems*. Dans cette affaire, il fallait choisir entre, d'une part, une action de droit maritime intentée à Halifax portant sur les réclamations de créanciers *garantis* qui avaient déjà obtenu un jugement par défaut et, d'autre part, l'exercice de sa compétence par la Cour supérieure du Québec siégeant en matière de faillite à la demande du tribunal de faillite de la Belgique, dans une affaire qui en était encore à ses étapes préliminaires. Dans ces circonstances, la Cour fédérale du Canada a refusé d'ordonner la suspension de la procédure de droit maritime et la Cour d'appel fédérale ainsi que notre Cour ont confirmé sa décision discrétionnaire.

In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within

76 En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (*Stewart*, précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts. Le législateur a jugé que la preuve des faits visés par la définition de l'expression « localité d'un

the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

77 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

78 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual

débiteur » figurant au par. 2(1) établit un lien suffisamment important pour rattacher une instance de faillite à un district ou à une division en particulier. Le syndic de cette localité est chargé de « recouvrer » les biens, et c'est le tribunal de faillite de ce ressort qui contrôle les procédures connexes. La Loi vise l'économie de la liquidation des biens du failli, même au prix de frais additionnels pour les créanciers et les débiteurs.

Le « critère de la pondération » que l'appelante préconise en s'appuyant sur les facteurs énoncés dans *Amchem* et sur les principes généraux du droit international privé ne tient pas compte de ces importants principes d'intérêt public. La Cour supérieure du Québec siégeant en matière de faillite constitue un véritable tribunal national.

Enfin, sur le plan des faits, même si les principes du droit international privé s'appliquaient sans qu'il soit nécessaire de les adapter au contexte de la faillite, il est difficile de discerner quelque lien que ce soit entre le litige et Vancouver, sauf le fait que Eagle a signé certains contrats comportant une clause selon laquelle les lois applicables étaient celles de ce ressort. Les liens entre l'appelante et Vancouver ne sont pas particulièrement étroits. L'appelante a, parmi ses bureaux, une adresse à Vancouver, mais la plupart des activités en cause en l'espèce ont eu lieu à l'extérieur de la Colombie-Britannique. Son employé clé, M. Ryan Modesto, réside aux États-Unis. Le contrat de services de gestion du 12 juin 1996 précise que le siège social de Azco est situé en Arizona. Le communiqué de presse du 17 septembre 1996 par lequel Azco a annoncé ce projet à l'échelle mondiale émanait de l'Arizona. De plus, l'appelante n'a aucun avantage sur le plan juridique à exercer ses recours en vertu du même régime de faillite à Vancouver plutôt qu'à Hull. Dans un cas comme dans l'autre, les lois de la Colombie-Britannique peuvent être appliquées. Il serait peut-être légèrement plus commode pour l'appelante et pour certains de ses témoins que l'affaire soit entendue à Vancouver, mais c'est tout ce qu'on peut dire en faveur de ce lieu. De son côté, le syndic se plaint du fait que si le pourvoi est accueilli, il sera obligé, suivant le même raisonnement, d'intenter d'autres actions (sans lien avec Azco) à Chicoutimi,

support for his decision to retain the case in Hull.

I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart*, *supra*, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

I would dismiss the appeal with costs.

Toronto, Halifax, Winnipeg, Charlottetown et Calgary. De nombreux faits étayent la décision du juge de première instance de poursuivre l'instance à Hull.

79 Je ne veux toutefois pas que mes motifs soient interprétés comme rendant impossible toute application du par. 187(7). Les faits de l'espèce ne font pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique, mais il peut évidemment surgir d'autres affaires dans lesquelles le renvoi sera justifiable. Même dans l'arrêt *Stewart*, précité, qui a établi le paradigme du « contrôle unique », le juge Anglin a pris la peine de dire que l'affaire aurait probablement dû être entendue à l'Île-du-Prince-Édouard. Le problème des parties demanderesses dans cette affaire tenait au fait qu'elles n'avaient pas demandé l'autorisation du tribunal de la Colombie-Britannique avant d'introduire l'instance à l'Île-du-Prince-Édouard. Juste avant le passage sur le « contrôle unique » déjà cité, le juge Anglin a affirmé ceci (à la p. 349) :

> [TRADUCTION] Je refuse de tenir pour acquis que la Cour suprême de la Colombie-Britannique ne rendra pas d'ordonnance de renvoi, précédée ou accompagnée de l'autorisation requise par l'art. 22, s'il lui est démontré — comme cela semblerait être le cas d'après les éléments qui nous ont été soumis — qu'il est possible d'instruire plus efficacement à l'Île-du-Prince-Édouard les questions portant sur l'existence de la fiducie alléguée par la partie demanderesse et sur l'affectation de certains biens détenus par le liquidateur à titre de biens de la fiducie.

Pour sa part, le juge Brodeur a dit ce qui suit (à la p. 352) :

> [TRADUCTION] Il me semble que l'intérêt de la justice serait mieux servi en l'espèce si les tribunaux de l'Île-du-Prince-Édouard statuaient sur la question soulevée en l'instance. Toutefois, il incombait aux parties intimées d'obtenir l'autorisation de la cour de la Colombie-Britannique, et elles ne l'ont pas obtenue.

80 Le fait est que Azco devait démontrer l'existence d'un « motif suffisant » à la lumière des faits de la *présente* affaire et elle n'y est pas parvenue.

V. Conclusion

81 Je suis d'avis de rejeter le pourvoi avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman Elliott, Montréal.

Solicitors for the respondent: Gervais & Gervais, Montréal.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Stikeman Elliott, Montréal.

Procureurs de l'intimée : Gervais & Gervais, Montréal.

Tab 10

ANDREW STEWART, LIQUIDATOR OF THE DOMINION TRUST COMPANY (DEFENDANT) ..... APPELLANT;

AND

BRADFORD W. LEPAGE AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

1916
*Feb. 2, 3.
*May 2.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND.

Procedure—"Winding-up Act"—Suit in P. E. I.—Winding-up in B.C. —Leave of court of B. C.—R.S.C. c. 144, ss. 22 and 23.

Where a trust company incorporated by the Parliament of Canada with headquarters in Vancouver is being wound up in British Columbia, leave of the Supreme Court of that province is necessary before suit can be brought in Prince Edward Island against the liquidator and the company to have the latter declared a trustee of moneys deposited with it for investment, for its removal from office and appointment of a new trustee and for the vesting in such new trustee of the securities representing said moneys. Davies J. dissenting.

Judgment appealed against (24 D.L.R. 554) reversed.

APPEAL from a decision of the Court of Appeal in Equity of Prince Edward Island(1) affirming the judgment of the Vice-Chancellor who refused to set aside the bill of complaint on the ground that the plaintiffs had not obtained leave to bring the suit from the Supreme Court of British Columbia.

The only question raised on this appeal was whether or not a suit of the nature stated in the above headnote could be brought in the courts of Prince Edward Island without the leave of the Supreme Court of British Columbia. In other words, whether or not

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 24 D.L.R. 554.

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section 22 of the "Winding-up Act" applies to such a case. The courts below held that it does not.

Lafleur K.C. and *A. E. MacDonald K.C.* for the appellant.

Gaudet K.C. for the respondents.

DAVIES J. (dissenting)—This is an appeal from the Court of Appeal in Equity in Prince Edward Island dismissing an appeal from a judgment of Vice-Chancellor Fitzgerald dismissing in turn an application made to him by the appellant, as liquidator of the Dominion Trust Company, to have a bill of complaint filed in his court against the said Trust Company and the liquidator thereof dismissed on the ground that the action was commenced without the leave of the Supreme Court of British Columbia as required by the 22nd and 23rd sections of the "Winding-up Act."

The question for our determination is whether those 22nd and 23rd sections are applicable to proceedings such as these or whether they come within section 133 of the Act.

To determine that question it is necessary to see in what relation the complainants stand to the company and its estate and effects.

To do this, we have only before us the statements in the complainant's bill of complaint. The liquidator has not put in any answer to that bill and it seems to me that on this application we are bound to assume the truth of the statements in the bill.

There is no charge of any breach of trust or any claim that the complainants are creditors of the company. The bill seeks a declaration that certain moneys paid by the complainants to the Trust Company and received by it are trust moneys held by it

for the use and benefit of the complainants and that certain mortgages set out in the schedule to the Act were obtained as securities by the defendant company for loans made with complainants' money, and that the company may be declared to be a trustee of such mortgages for the complainants and that as such company is now insolvent it may be removed from the office of trustee and some other person or company substituted for it.

The certificate or declaration of trust which complainants received from the company when they paid over their moneys to it is set out in the bill.

Assuming therefore the truth of the statements in the bill of complaint the question arises whether section 22 of the Act applies at all.

This section is one taken from the Imperial "Winding-up Act" and has been the subject of numerous decisions in the English courts. In construing it and its application the Appeal Court has held in several cases that it did not extend to the case of a landlord distraining upon the goods of the insolvent company which were found upon the land leased and that the landlord's common law right of distraint was not interfered with by the section which "dealt only with *the company*, its *creditors* and its *contributories*.

In the case of *In re Lundy Granite Co.; ex parte Heavan*(1), the Lords Justices, reversing a decision of Lord Romilly, M.R., held that the sections 163 and 87 of the English Act (corresponding to sections 22 and 23 of our Act), did not prevent a landlord from distraining upon the goods of the company for rent accrued since the winding-up. Sir W. M. James, at p. 467, said:

(1) 6 Ch. App. 462.

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It must be the true meaning of the Act to consider these provisions as confined to proceedings by a creditor of the company against the goods of the company; and the Act must be read according to the manifest intention, which could not have been that during the many years over which the winding-up may extend the court should have power to interfere with the rights of every one who happened to have goods of the company in his possession. The landlord has a right to proceed against his tenant, and against the goods of every stranger which happen to be upon the land, and subject to distress.

In a later case of *In re Regent United Service Stores*(1), the Appeal Court, reversing a judgment of Malins Vice-Chancellor, held that the landlord was not a creditor of the company and that his legal right as landlord could not be interfered with under these sections.

Jessel M.R. at page 618, says:

The first question that arises is, whether the statutory provision applies where the landlord is not a creditor of the company. On this point, I need not say more than that it was decided by the Lord Justices in the case of *In re Lundy Granite Company*(2) that it does not apply. That decision is binding upon us, and we need go no further to find a reason for reversing the decision of the Vice-Chancellor.

The other justices concurred with him and Thesiger L.J., referring to *In re Lundy Granite Company*,(2) said, at page 620:

The *ratio decidendi* was not the difference between claims existing at the time of the winding-up order and claims subsequently arising, but that, where a person has no right to claim as a creditor against the company, the court has no jurisdiction to interfere with his legal right against the company's property.

In the case of *In re Longdendale Cotton Spinning Co.*(3), it was held that the mere fact that an order has been made for winding-up a company does not prevent a debenture holder or mortgagee of the company from bringing an action to realize his security

(1) 8 Ch. D. 616. (2) 6 Ch. App. 462.

(3) 8 Ch. D. 150.

and for that proposition the authority of the Court of Appeal in *In re David Lloyd & Co.*(1) was cited as emphatically negativing the existence of any such right.

In *The Longdendale Cotton Case*,(2) Jessel M.R. says (p. 153):

> Then the third objection is that the mortgagors are themselves desirous of selling the property, and that, if the mortgagee sells the property in the action, the probability is that nothing will be left for the general creditors; whereas if the mortgagors sell it, the result may be better for all parties. The answer to that is, the mortgagors had better redeem. If the mortgagee wants to sell he has the right to sell, and to prevent him from selling would be an interference with his rights, and I see no equity in the mortgagors which should deprive him of those rights.
>
> Then the only other point is whether the winding-up makes any difference or confers any new rights. The mere fact that a winding-up order has been made makes no difference, and does not confer upon the company the right of preventing a mortgagee from realizing his security; and for that proposition I have the authority of the Court of Appeal in *In re David Lloyd & Co.*(1), an authority which emphatically negatives the existence of any such right.

It has been suggested that this case is not a binding authority because it was a *voluntary* winding-up. But the judgment of the Master of the Rolls is not based upon that, but broadly upon the construction of the statute and the authority of *In re David Lloyd & Co.*(1) above cited which was a company being wound up under a *compulsory* winding-up order.

I think we are bound by the decisions of the courts of appeal and should not grant the order dismissing the action under sections 22 and 23.

Then section 133 is relied upon, but it seems to me that the same reasoning which confined the operation of sections 163 and 87 of the English Act to claims of creditors only, must apply to this section also. That section reads as follows:—

(1) 6 Ch. D. 339.

(2) 8 Ch. D. 150.

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All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever.

To give the section 133 the broad construction claimed for it and to extend it to all persons creditors and non-creditors would have the effect not only of practically reversing several English decisions of the Court of Appeal, but would result in transferring the exclusive jurisdiction over trusts and the property trustees hold as such, which is now vested in the Court of Chancery of the Province of Prince Edward Island with regard to trust property held in that province, to the court winding-up an insolvent company in another province.

The result would be that the winding-up court in British Columbia could determine on "summary petition" the legal rights of trustees and *cestuis qui trustent* in Prince Edward Island whether these *cestuis qui trustent* were creditors of the insolvent company or not.

Now I can well understand that such an enactment, however far reaching it might be and however much it might interfere with civil rights in the province in so far as it dealt with the creditors or contributories or assets of the company and so was reasonably necessary for the purpose Parliament was legislating upon, would be *intra vires* of the Dominion Parliament, but I should more than doubt the power of Parliament when legislating upon the subject matter of bankruptcy and insolvency to deal with and take away the rights of third parties not creditors or conributories of the company and not claiming any right to share in the distribution of the assets of the insolvent company.

Surely the negative words of section 133 prohibiting

> an action, suit, attachment, seizure or other proceeding of any kind whatsoever

being brought

> to enforce any claim for debt, privilege, mortgage, lien or right of property

have reference only to actions of creditors or contributories and do not extend to third parties who are not creditors and are not concerned in the distribution of the assets but seek to assert a legal or equitable right to property they claim as theirs and which the company holds in trust for them.

Of course, I can appreciate the fact that in a case such as the one before us there ought not to be and there would not be any difficulty in obtaining leave from the judge of the British Columbia court having charge of the winding-up proceedings to bring and prosecute this action under section 22, but if the construction of section 133 is as broad and comprehensive as contended for, the only way complainants could enforce their claim as set forth in this action would be a summary petition before the court in British Columbia.

I am strongly inclined to adopt the view of Mr. Justice Haszard that at any rate the application to dismiss the action is premature. It is possible that at the trial if a defence is put in and the crucial statements of fact made in the complainants' bill are controverted and found against the complainants, or if at the hearing they should be found to be creditors or their claim one which affected the distribution of the assets of the company, in other words, if the court found that these moneys and mortgages in

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controversy were really assets of the company and not trust property held for the claimants, a condition would then be found to exist which would make sections 22 and 133 applicable.

In my opinion and as the suit stands at present, they are not so applicable and the courts below were right in so holding.

I would therefore dismiss the appeal.

IDINGTON J.—The appellant is the liquidator of the Dominion Trust Company which was incorporated by an Act of the Dominion Parliament and ordered by the Supreme Court of British Columbia, acting by virtue of the powers conferred upon it by the "Winding-up Act" and amendments thereto, to be wound up.

The respondents instituted thereafter proceedings by way of a bill filed in the Court of Chancery in Prince Edward Island against the said company to have it removed as trustee of certain parties for purposes within the scope of its Act of incorporation and another substituted.

The appellant as liquidator moved the said court to have the said bill dismissed on the ground that leave to bring the suit had not been obtained from the Supreme Court of British Columbia as required by section 22 of the "Winding-up Act" which is as follows:—

> 22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

The language of this section seems so clear and comprehensive that I can see no room for doubt as to its meaning.

The Dominion Trust Company is a corporate creature of Parliament and everything relative to its

existence or extinction in any way its creator chooses to direct and the relation of those contracting with it pursuant to its corporate powers must be governed by what it chooses to enact.

The "Winding-up Act" seems to apply to any such corporations as the one in question. Indeed there are only a few classes of the Dominion corporations which are excluded from its operation. This is not one. I am, therefore, unable to follow the reasoning upon which the court below has proceeded.

The term assets therein relied upon so much is not defined by the Act and is of somewhat variable meaning according to the context in which it is used. Indeed the Act uses the word in one or two places, as for example, in referring in section 47 to "money and assets" and section 93 "any property or assets," in a way that is illustrative of this.

The ascertainment of the assets distributable amongst the creditors, so far as unsecured, is part of the duty of the liquidator under the direction of the court. He cannot do that efficiently if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation.

Section 133, for example, furnishes a summary remedy which might be made applicable to respondent's claims, if of the clear and undoubted character their counsel suggests.

If not of that character it is quite competent for the court, in charge of the proceedings, to permit some more suitable remedy either in that court or in such court as it may direct.

The scheme of the Act does not in any way imply that any one is to be deprived of his right in law or equity.

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To say that some of the trust funds are traceable in such a way that in law they must be appropriated to meet the demands of particular *cestuis que trustent* creditors, possibly in priority to others not so fortunate, means nothing in this connection.

All such rights as any man or class of men may have in that regard or any way, must be followed and enforced in a due and orderly manner such as the "Winding-up Act" contemplates and in part prescribes, and evidently intends should be pursued.

The Act in many of its provisions may fall short of meeting what might well have been provided and prescribed for the emergencies of such a case as the respondents present.

The evident scope of the Act, however, clearly is that the courts should be resorted to in order to determine the rights of any creditor or claimant, whatever they may be, according to the settled principles of law applicable thereto.

I see no difficulty in the claims of the respondents, if what they assert be correct, being established just as much as a mortgagee may be permitted to assert his claim.

It is not to be presumed that the court will refuse, in a proper case properly presented, the right to establish any such claim.

It is therefore incumbent upon the court having the matter in charge to give every person the liberty to prosecute his rights, whatever they may be in law, to enforce same.

All that the Act by section 22, as I understand it, means is that reckless and undesirable litigation should be avoided and the consequent waste or ruin thereby of the estate averted.

But whenever there is a fair claim of right in the

way of lien or otherwise presented, he having it or the class he belongs to having it, should be given the right to prosecute and establish same.

Trust funds may thus be traceable as in bankruptcy cases, and a prior claim thereto be established.

I observe that the learned Vice-Chancellor has pointed out the re-incorporation of the company by Prince Edward Island legislation. But that is not what the bill of complaint presents and we must be limited in our view to what it does shew as respondents' ground of complaint.

It is to be observed, moreover, that the effect of re-incorporation by a provincial legislature of a Dominion company, in light of the decision of the Judicial Committee of the Privy Council in the case of *City of Toronto* v. *The Bell Telephone Co.*(1), does not seem to hold out much encouragement to the founding an action or suit on the re-incorporation.

Incidentally it may well be that such legislation, treated as of a contractual nature, may help respondents in asserting their rights.

I think the appeal must be allowed with costs but without prejudice to the parties respondent, or any of them, asserting their right to apply for leave and prosecuting their rights under the direction of the court seized of the proceedings under the "Winding-up Act."

DUFF J.—I would allow the appeal.

ANGLIN J.—Section 133 of the "Winding-up Act" provides a method whereby the complainants may obtain in a summary and inexpensive way the declara-

(1) [1905] A.C. 52.

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tion of trust which they seek. The English statute does not contain a similar provision. I am, therefore, with respect, of the opinion that the reason for which the prohibitive clause of the English "Companies' Act" of 1862 (sec. 87), corresponding to section 22 of our statute, was held inapplicable in some of the cases referred to in Halsbury at p. 538, cited by the learned Chief Justice of Prince Edward Island, not to actions or suits against the company, but to proceedings by way of distress—most of them cases where there was no liability of the company itself, *In re Lundy Granite Co.*(1); *In re Trimsaran Coal, Iron and Steel Co.* (2); *In re Regent United Service Stores* (3), —does not exist here. The complainants' interests are provided for and may be asserted by proceedings in the winding-up. No ground has been shewn, in my opinion, for excluding this suit from the operation of section 22, and a remedy in the winding-up being available, leave to maintain it would not improbably be refused, *In re David Lloyd Co.*(4), although it would otherwise be readily granted, *In re Longdendale Cotton Spinning Co.*(5).

I incline to think, however, that section 133 is prohibitive of any action or suit, such as that brought by the complainants in so far as they seek a declaration of trust and an allocation to the trust of certain "effects or property in the hands, possession or custody of a liquidator," and prescribes an application by summary petition as the exclusive means of obtaining this part of the relief sought. Once the trust has been established the appointment of a new trustee would seem almost a matter of course.

(1) 6 Ch. App. 462.
(2) 24 W. R. 900.
(3) 8 Ch.D. 616.
(4) 6 Ch. D. 339, at p. 3
(5) 8 Ch. D. 150.

Counsel for the respondents urges the grave inconvenience to his clients in Prince Edward Island involved in their being obliged to proceed in the courts of British Columbia. But by section 125 of the Act provision is made for the transfer of any matter relating to the winding-up to any of the several provincial courts. That section contemplates the application for transfer being made in the first instance to the court charged with the liquidation, with the concurrence of the court to which removal is sought —orders of both courts being obtained if thought advisable. I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island—as from what is now before us would seem to be the case—an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

For these reasons I would allow this appeal.

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BRODEUR J.—The appellant is the liquidator of the Dominion Trust Company and the respondents, on behalf of themselves and other *cestuis qui trustent* began proceedings in the Court of Chancery of Prince Edward Island and prayed that the Dominion Trust Company be removed from the office of trustee for the respondents and the other *cestuis qui trustent* and that a new trustee be appointed in its place. They asked also that certain mortgages in the Island taken as security for loans made by the company with moneys received from the respondent and other inhabitants of the Island be vested in the new trustee.

The insolvent company, through its liquidator, has asked that the complaint of the respondents be dismissed on the ground that leave to the Supreme Court of British Columbia to bring the suit was not first obtained as required by section 22 of the "Winding-up Act."

The courts below decided against the appellant and the company on the ground that the trust funds were not affected by the "Winding-up Act" and that the courts of Prince Edward Island alone have jurisdiction over trusts and trustees in that province and must determine whether or not the moneys received by the Dominion Trust Company from the respondents are trust funds.

I am unable to agree with the proposition that the proceedings could be instituted against the insolvent company without leave of the court in whose jurisdiction the liquidation takes place.

Section 22 of the "Winding-up Act" is very wide and reads as follows:

> After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The object of this legislation is to prevent litigation being carried on by any one prejudicial to the estate, to prevent the assets being dissipated by law suits, and to have all such matters decided promptly by a summary petition (sec. 133).

The Dominion Trust Company was incorporated by the Federal Parliament and its chief place of business was declared by its Act of incorporation to be in the Province of British Columbia. The proceedings to wind up that company were naturally instituted in the Supreme Court of British Columbia.

It may be that by some provision of the Act suits against the company could be brought in some other province (sec. 125); but the courts of the various provinces are declared auxiliary to one another for the purpose of the "Winding-up Act" and the proceedings may be transferred from one court to another with the concurrence, or by the order, of the two courts or by an order of the Supreme Court of Canada.

That provision of the law, however, would not prevent the court in which the liquidation takes place from granting its leave for the continuance or the instituting of suits or proceedings against the company. The distinction which is sought to be made between actions instituted by ordinary creditors and those instituted by or against trustees could not apply because the law is general and declares formally that no suit or proceeding can be commenced or proceeded with without the leave of the court. The courts have in different cases granted leave to proceed against the company, *In re David Lloyd & Co.*(1), but so far as I have been able to see they have not decided that

(1) 6 Ch. D. 339.

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proceedings even by mortgagees or *cestuis qui trustent* could be instituted without leave.

In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

This is a suit in which all the creditors of the company might be interested, because its purpose is to have a declaration that some funds should belong exclusively to the plaintiffs and should not be disposed of for the benefit of the creditors. Besides, the company, by the agreement with the plaintiff creditors, has an interest in those funds; because the interest and profits resulting from the investment of the principal sum over the rate of interest payable to the investor is the property of the company.

For those reasons, I would allow the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Aeneas A. MacDonald.*
Solicitor for the respondents: *Gilbert Gaudet.*

Tab 11

Court of Queen's Bench of Alberta

Citation: Transglobal Communications Group Inc. (Re), 2009 ABQB 195

Date: 20090330
Docket: BE03-1071018
Registry: Edmonton

In the Matter of the Proposal of Transglobal Communications Group Inc.

Corrected judgment: A corrigendum was issued on April 2, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi

I. Nature of the Application

[1] This case relates to appeals of two decisions that a proposal trustee made under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). One involves the proposal trustee's valuation of a creditor's claim. The other involves the proposal trustee's disallowance of a creditor's claim for voting purposes.

II. Facts

A. Stone Sapphire Appeal

[2] Transglobal Communications Group Inc. ("Transglobal") was in the business of selling imported goods to North American retailers. It became embroiled in litigation with an overseas supplier, Stone Sapphire Ltd. ("Stone Sapphire"). Stone Sapphire claimed that Transglobal had failed to pay invoices totalling USD $2,280,828.57. Transglobal defended and counterclaimed for an amount exceeding Stone Sapphire's claim.

[3] On April 12, 2007, Justice Lee granted Stone Sapphire a partial summary judgment, reported at 2007 ABQB 236 ("Summary Judgment"), in the amount of USD $1,533,352.62 in relation to what Justice Lee defined as "undisputed invoices." The undisputed invoices related to items that Transglobal had "ordered, inspected, delivered and sold ... at a profit to its retail customers," Summary Judgment at para. 10. Justice Lee concluded that Transglobal was not entitled legally or equitably to set-off its counterclaim amounts against the amounts that Stone Sapphire claimed in its summary judgment application, Summary Judgment at paras. 62-80. Finally, he stayed Stone Sapphire's enforcement on the Summary Judgment, provided

Transglobal paid into court the full amount of the Summary Judgment to permit litigation on the counterclaim (the "Stay"). Transglobal filed a notice of appeal with respect to the Summary Judgment. The Alberta Court of Appeal has not yet heard that appeal.

[4] Transglobal subsequently applied, unsuccessfully, for other relief, including:

(a) to have the Summary Judgment reopened on fresh evidence ("Rehearing Application"). The fresh evidence included allegations that the plaintiff in this case was not the entity with which Transglobal had contracted and that Stone Sapphire was overcharging Transglobal; and

(b) to amend its counterclaim to include the fresh evidence.

[5] Justice Lee denied Transglobal's application to amend its counterclaim on April 3, 2007. Transglobal did not appeal this decision. It later filed, but did not pursue, another motion seeking the same relief.

[6] On June 27, 2008, Justice Lee rendered his decision in which he dismissed the Rehearing Application, reported at 2008 ABQB 397 (the "Fresh Evidence Judgment"). Transglobal has appealed the Fresh Evidence Judgment, as well.

[7] Before the Court released the Fresh Evidence Judgment, Transglobal's primary lender called in its loans. Transglobal responded on May 20, 2008, by filing a notice of intention to make a proposal pursuant to *BIA* s. 50.4(1). Transglobal named Meyers Norris Penny Limited ("MNP") as the proposal trustee.

[8] Stone Sapphire applied for an order declaring that it was the owner of the monies Transglobal paid into court to obtain the stay. HSBC Bank Canada opposed that application on the basis that it held a security interest in those funds. Justice Topolniski rendered a judgment on September 19, 2008, reported at 2008 ABQB 575, dismissing Stone Sapphire's application (the "Property Order").

[9] Transglobal filed its *BIA* proposal. MNP held an initial meeting of Transglobal's creditors. That meeting was adjourned at the creditors' request to permit them to make inquiries into the value to be assigned to Stone Sapphire's claim for voting purposes.

[10] On October 27, 2008, Stone Sapphire submitted a proof of claim in the amount of $2,005,722.30, $1,710,345.58 of which represented the amount of the Summary Judgment, accrued interest and costs arising from the Summary Judgment.

[11] Apparently, satisfied that it was not bound by the Summary Judgment, the court's dismissal of the Rehearing Application or its dismissal of the application to amend Transglobal's counterclaim, MNP undertook an independent valuation and determined that Stone Sapphire's

claim was worth $1 for voting purposes. It noted that the following issues were relevant to its determination of Stone Sapphire's voting status:

1. With respect to Stone Sapphire's claim to be a secured creditor in the amount of $200,000, the Property Order expressly decided against Stone Sapphire, which arose from Justice Lee's decisions. However, Stone Sapphire appealed the Property Order and, accordingly, the matter is not yet finally resolved.

2. With respect to the unsecured portion of its claim, Stone Sapphire's right to enforce the Summary Judgment was stayed as a result of its payment into court of the Summary Judgment amount. Stone Sapphire's efforts to lift the Stay were unsuccessful. Accordingly, while Stone Sapphire has established a claim (subject to Transglobal's "plausible" counterclaim and Transglobal's appeal), its claim is not presently enforceable.

[12] The adjourned creditors' meeting was reconvened on December 15, 2008. Grant Bazian, a licensed bankruptcy trustee, acted as chair of that meeting. He advised those attending the meeting that MNP had assigned a $1 value to Stone Sapphire's claim, for voting purposes. Supported by MNP's recommendation, the unsecured creditors voted in favour of the proposal.

[13] Stone Sapphire appealed MNP's valuation pursuant to *BIA* s. 135(4), observing that the valuation of its claim at the amount of Summary Judgment award would have allowed it to successfully defeat the proposal. That is because *BIA* s. 115 provides that the votes of creditors are to be calculated by counting one vote for every dollar of every claim of the creditor that is not disallowed.

[14] Transglobal made an application on January 29, 2009, to sanction the proposal. That application was adjourned to allow the hearing of Stone Sapphire's appeal of the Property Order. On March 5, 2009, the Court of Appeal upheld the Property Order.

B. The Kulbabas' Appeal

[15] The second appeal is by Joshua and Julia Kulbaba. Joshua Kulbaba was Transglobal's controller. On April 29, 2008, Transglobal commenced an action against the Kulbabas, claiming that they had stolen approximately $300,000 from it. Transglobal obtained an *ex parte* attachment order from Justice Clark, freezing all of the Kulbabas' worldwide assets.

[16] The Kulbabas filed a defence to the action and a counterclaim against Transglobal and its president, Steven Prescott, for defamation. They also applied to set aside the attachment order. Their motion was heard on July 10, 2008, by Justice Clark, who set aside his attachment order and ordered Mr. Prescott personally to pay the Kulbabas' costs of the application on a solicitor-client basis, which amounted to $95,000. He directed Transglobal to post $75,000 as security for costs and granted the Kulbabas an injunction forbidding Transglobal or anyone associated with it

from further defaming them by suggesting that they were responsible for Transglobal's insolvency.

[17] The Kulbabas submitted a proof of claim to MNP on October 23, 2008. The proof of claim outlined the history of their litigation with Transglobal.

[18] The chair of the creditors' meeting advised the Kulbabas that MNP had disallowed their claim for voting purposes as it was "an unliquidated contingent claim." They now appeal that decision pursuant to *BIA* s. 108(1) and s. 135(4).

C. Schedule of Proceedings

[19] Stone Sapphire appeals MNP's valuation of its claim. Because the result of Stone Sapphire's appeal could determine the fate of Transglobal's proposal, Justice Topolniski ruled on January 29, 2009, that Stone Sapphire's appeal would be heard before the court would consider the MNP's application for court sanction of Transglobal's proposal.

[20] Justice Topolniski further set the following schedule for resolution of the various issues which have arisen:

1. March 20, 2009 - MNP's application for advice and directions as to the process and/or standard of review for MNP's valuations.

2. April 17, 2009 - If the appeals are on the record, review of the materials considered by MNP in making the valuations and determination of the matter on the basis of the ascertained standard of review.

3. April 14-17, 2009 - If the appeals are *de novo*, trial of the issues on the valuations and Transglobal's counterclaim, as filed.

III. Issues

[21] These reasons address the following issues:

(a) Whether the appeals are on the record or *de novo*.

(b) What is the appropriate standard of review?

(c) Whether MNP erred in determining that it was not bound by the court's various judgments in valuing Stone Sapphire's claim.

IV. Preliminary Matter

[22] The wording of the *BIA* as to the respective roles of the trustee and chair of the first meeting of creditors is unclear. *BIA* s. 51(3) says that the official receiver or the official receiver's nominee acts as chair of the first meeting of creditors. As well, that section says that the chair decides any questions or disputes arising at the meeting and any creditor may appeal any such decision to the court.

[23] *BIA* s. 66(1) then says that, "All provisions of this Act ... in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division." *BIA* s. 135 is the section that deals with the allowance or disallowance of proofs of claim. It requires the trustee to examine the proofs of claim, to determine whether a contingent or unliquidated claim is provable and, with respect to any provable claim, to value that claim. *BIA* s. 135(2) permits the trustee to disallow any claim.

[24] *BIA* s. 108(1) says that the chair of any meeting of creditors "has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court."

[25] From the foregoing, one can see that the official receiver (or its nominee) or the trustee has the power to question and, ultimately disallow the creditor's claim, its right to vote or both. These rulings are subject to appeal. In this case, it was MNP who concluded that Stone Sapphire's claim for voting purposes is $1. In the case of the Kulbabas, it was MNP who rejected their claim for voting purposes. The chair at the creditors' meeting was the official receiver's nominee, one of MNP's bankruptcy trustees, and he advised the meeting of MNP's ruling.

[26] Why is this important for the purposes of the following discussion? The *BIA* provides that decisions of the chair of the meeting are subject to appeal to a court, *BIA* ss. 51(3) and 108(1). *BIA* s. 135(3) says that the trustee's decision is "final and conclusive" unless the aggrieved person appeals. Thus, in the case of the chair's ruling, this Court need not provide any deference, whereas in the case of a trustee, this Court should accord some deference, based on this partial privative clause, see ***Stubicar v. Alberta (Office of the Information and Privacy Commissioner)***, 2008 ABCA 357 at para. 22. This Court will address this issue in more detail later in these reasons. For now, it is worthwhile noting that MNP fulfilled its duties under *BIA* s. 135 and the chair of the meeting appeared to accept the trustee's findings when he made his rulings at the first meeting of creditors, rather than undertaking an independent valuation or finding. Thus, for the purposes of this decision, this Court will deal only with the decisions of the trustee pursuant to *BIA* s. 135.

V. Positions of the Parties

A. Stone Sapphire Appeal

[27] MNP argued that the powers of the trustee are administrative or quasi-judicial in nature and, therefore, a "standard of review" analysis under ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 must be performed in connection with any appeal from a trustee's decision under *BIA* s. 135, citing ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 21, [2003] 1 S.C.R. 226; ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20 at para. 21, [2003] 1 S.C.R. 247; ***Imperial Oil Resources Ltd. v. 826167 Alberta Inc.***, 2007 ABCA 131 at paras. 8-9. MNP submits that while there is judicial authority that an appeal from a trustee's decision on the valuation of a claim should attract the reasonableness standard of review, which suggests the appeal should be on the record, the circumstances of this case merit a *de novo* hearing based on ***Re San Juan Resources Inc.***, 2009 ABQB 55.

[28] MNP maintains that it was not bound by the finality of the Summary Judgment decision in assessing Stone Sapphire's proof of claim. It cites ***Re Van Laun, ex parte Chatterton***, [1907] All E.R. 159 at 160 (C.A.); ***Re Lupkovics, ex parte, The Trustee v. Freville***, [1954] 2 All E.R. 125 at 130 (C.A.); ***Canadian Imperial Bank of Commerce v. 433616 Ontario Inc.***, 1993 CarswellOnt 193 at paras. 12 and 16 in support of that proposition. It acknowledged that ***Re Canadian Asian Centre Developments Inc.***, 2003 BCSC 41 at paras. 29-31, 39 C.B.R. (4th) 35 indicates that a proposal trustee should not go behind a judgment unless there is an allegation of fraud, collusion or miscarriage of justice. As well, it acknowledged that the Fresh Evidence Judgment ruled against the admissibility of the fresh evidence on which, presumably, MNP based its ruling.

[29] MNP takes the position that it was justified in looking behind the Summary Judgment given the extant appeals and the significant amount of evidence that was available for it to consider that was not before Justice Lee when he made the Fresh Evidence Judgment. It argued that if this Court determines that a hearing *de novo* is appropriate, it should allow evidence to be led and argument presented on the merits of Stone Sapphire's claim, rather than restricting the hearing to Transglobal's counterclaim.

[30] Stone Sapphire argued that the ***Dunsmuir*** standard of review analysis does not apply to this case. It argued that, in the absence of exceptional circumstances, an appeal from a trustee's decision is not a hearing *de novo* with new evidence, but a review "on the record" without deference to the trustee. Stone Sapphire contends that no injustice will result if the MNP's decision is restricted to a review of the record that Stone Sapphire placed before MNP. Even if one were to undertake a ***Dunsmuir***-type analysis, the standard of review would be reasonableness and also a pragmatic approach requires this Court to recognize that bankruptcy proceedings call for an expedited process. It does not dismiss the possibility that in extreme or exceptional circumstances, a court could conduct a *de novo* hearing, but argues that this is not one of those cases.

[31] Stone Sapphire notes as well that the new evidence that MNP seeks to introduce formed the basis for Rehearing Judgment and that Justice Lee concluded at para. 77, that even if the evidence were admitted, "it would have little or no impact on the outcome in any event."

[32] Stone Sapphire maintains that the record should consist of:

(a) its proof of claim;

(b) MNP's "Review of Claim by Stone Sapphire Ltd. in the Proposal Proceedings of Transglobal Communications Group Inc." (the "Trustee's Reasons"); and

(c) the judgments referred to in the Trustee's Reasons.

[33] Stone Sapphire argued that MNP, in valuing its claim, improperly considered information which was found inadmissible by Justice Lee. It further argued that MNP had no basis for going behind the Summary Judgment as there were no allegations of fraud or collusion and the identity issue had been expressly considered and rejected, as reflected in the Rehearing Judgment. It argued that, in essence, MNP usurped the role of the Court of Appeal.

B. The Kulbabas' Appeal

[34] The Kulbabas argued that a proposal trustee's decision is not subject to judicial review, as a proposal trustee acts as an officer of the court in a court proceeding, *viz.*, Bankruptcy No. 24-1071018. They maintain that appeals from a proposal trustee's decisions are heard on a *de novo* basis, citing ***Re Eskasoni Fisheries Ltd.*** (2000), 187 N.S.R. (2d) 363; 16 C.B.R. (4th) 173 at para. 16 (S.C.); ***Re Dunham***, 2005 NSSC 57, 231 N.S.R. (2d) 235; ***Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.***, 2008 NLTD 9; and ***Johnson v. Erdman***, 2005 SKQB 515.

[35] If this Court determines that a standard of review analysis is required, the Kulbabas argued that the appropriate standard of review is correctness. While they conceded that one could establish that the starting point for reviewing proposal trustees' decisions would be a standard of reasonableness, they argued that a fulsome review of the factors outlined in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1988] 1 S.C.R. 982, would lead one to the conclusion that the correctness standard applies in this case, citing ***Re Galaxy Sports Inc.***, 2004 BCCA 284 at para. 39; ***Lloyd's Non-Marine*** at paras. 13-18. They argued that the findings required to assess their claim involve questions of law or mixed fact and law and argue that MNP has no experience in assessing such claims

VI. Analysis

A. Whether the Appeals are on the Record or *De Novo*.

[36] Other than the fact that a disgruntled creditor may appeal a proposal trustee's decisions of disallowances or valuations for voting purposes, the *BIA* is silent as to the process to be followed for appeals. *BIA* s. 135(4) says that the appeal must be in accordance with the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368. Rule 11 states that: "Subject to these Rules,

every application to the court must be made by motion unless the court orders otherwise. Rule 3 provides that:

> 3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Ordinarily, an appeal is on the record, see *e.g.* ***Reform Party of Canada v. Canada (Attorney General)*** (1995), Alta. L.R. (3d) 153 at 185-86 (C.A.).

[37] It is important, at the outset, for this Court to provide a guidepost in its use of the phrase appeal "*de novo*." Courts have described appeals *de novo* in many different ways, including:

(a) new evidence or cross-examination is possible, ***Ross v. McRoberts*** (1999), 237 A.R. 244 (C.A.); ***Taylor v. Alberta (Workers' Compensation Board)***, [2005] A.J. No. 968 (Q.B.); ***Dickey v. Pep Homes Ltd.***, 2006 ABCA 402

(b) new grounds may be raised, ***678667 Alta. Ltd. v. Allendale Bingo Corporation***, [2001] A.J. No. 1303 (Q.B.)

(c) consideration by the reviewing judge afresh in which the court may substitute its opinion, judicially reasoned, for that of the lower court, ***Primrose Drilling Ventures Ltd. v. Carter***, 2008 ABQB 605 at para. 14

(d) an entirely new case is presented, independent of the original case, ***Minister of Human Resources Development v. Landry*** (2005), 31 Admin. L.R. (4th) 13 at para. 10 (F.C.A.)

(e) an appeal heard on the basis of the case originally presented to the tribunal, with the addition of new facts that the tribunal accepted when it revised its decision, ***Landry*** at para. 10

[38] In ***Newterm Ltd. v. St. John's (City)*** (1991), 93 Nfld. & P.E.I.R. 49 at para. 13 (Nfld. S.C.T.D.), the court made the very important statement that:

> The appeal before this Court is a civil proceeding and one must look to the particular statute giving the appeal (de novo) to determine the procedure, powers and jurisdiction to be exercised by the appellate court.

In other words, one cannot ignore the foundational statute on which the appeal is based to determine the type of appeal *de novo* with which one is dealing.

[39] In ***Alberta (Superintendent of Real Estate) v. Harder*** (1980), 28 A.R. 210, Justice Miller heard an appeal by the Superintendent of Real Estate from a decision of an Appeal Board

appointed under the *Real Estate Agents Licensing Act*. The Act provided that such an appeal was to be brought by filing an originating notice but did not specify whether the appeal was *de novo* or on the record. An application for advice and directions previously had been made to Justice Dea, who ordered that the appeal be on the record and that on default of agreement between the parties as to what would constitute the record, *viva voce* evidence would be heard to determine whether the disputed items should properly form part of the record.

[40] When the matter came before Justice Miller, the Superintendent questioned the procedure that had been ordered. Justice Miller noted that the appeal procedure provided for in the Act was by way of originating notice, a process frequently employed when it is unlikely there will be serious factual disputes. He observed that the Act did not use terms such as "on the merits", "rehearing" or "*de novo*." Justice Miller also commented that it would be illogical and unnecessarily expensive to conclude that the parties should be entitled under the Act to two separate and new appeal hearings. He cited the following statement by Clement J.A. from ***Haugen v. Camrose (County)*** (1979), 15 A.R. 451 at 453 (S.C.A.D.):

> ... An appeal court, whether this Division or another tribunal appointed for the purpose, does not conduct a new trial in order to exercise its appellate jurisdiction unless such is prescribed or permitted by the statute granting the right of appeal. An instance of such is found in the provisions of the *Criminal Code* relating to appeals from summary convictions, where formerly the appeal was specifically a trial *de novo* and now may be on the record in the summary conviction court or by a trial *de novo*. Further examples may be found in provincial statutes: *The Right of Entry Act*, R.S.A. 1970, c. 322, provides by s. 21 that an appeal to the district court shall be in the form a new hearing; s. 38 of *The Surface Reclamation Act*, R.S.A. 1970. c. 356, directs that an appeal to the district court shall be heard and determined as a trial *de novo* s. 53 of *The Expropriation Act*, R.S.A. 1970, c. 130, directs that an appeal to the district court shall be in the form of a new hearing. In such cases the scope of appeal is limited to prescribed issues. There are no such provisions here. The right of appeal given by s. 19.2(1) is in stark terms and evidence may well have had to be adduced to show what was in fact before Council when it held the prescribed hearing and then enacted its bylaws; but this would be in order to constitute the record for the purposes of appeal. Such a necessity gives no warrant for the exercise of a trial jurisdiction which would result, presumably, in the trial judge determining on such evidence as might be adduced before him, whether or not the bylaw should be enacted, instead of the body to whose consideration the Legislature left it.

[41] Justice Miller agreed with Justice Dea that the appeal should be on the record. He stated that because the Appeal Board was not bound to make a record of its hearing, the judge hearing the appeal should have the discretion to hear evidence to clarify any issues of fact, ***Harder*** at para. 42, see also ***SKK Investments Ltd. v. Alberta (Social Care Facilities Licensing, Director)*** (1994), 150 A.R. 351 (Q.B.), which followed ***Harder*** in reaching a similar conclusion.

[42] In ***Eskasoni Fisheries*** at paras 17-20, Registrar Hill observed that appellate deference is largely based on the trier having heard the evidence and arguments firsthand. As a trustee's valuation under the *BIA* does not involve preparation of a record and there is no hearing, he concluded that an appeal must be *de novo* for justice to be done.

[43] Other courts have followed ***Eskasoni Fisheries***, see *e.g.* ***Re MacDonald***, [2002] O.J. No. 2744 at para. 19 (Ont. Sup. Ct. Just.); ***Re Port Chevrolet Oldsmobile Ltd.*** (2002), 49 C.B.R. (4th) 127 (B.C.S.C.), aff'd (2004), 49 C.B.R. (4th) 146 (B.C.C.A.); ***Re Exner***, 2003 BCSC 260, 41 C.B.R. (4th) 49; ***Re Beetown Honey Products Inc.*** (2003), 46 C.B.R. (4th) 195 (Ont. Sup. Ct. Just.); ***Dunham***.

[44] The British Columbia Court of Appeal in ***Galaxy Sports***, declined to follow ***Eskasoni Fisheries***. The ***Galaxy Sports*** court noted at para. 36, that in ***Port Chevrolet Oldsmobile***, "counsel did not challenge the 'trial *de novo*' approach taken in ***Eskasoni***." It ruled at para. 42, that fresh evidence should not be admitted as a matter of course on an appeal and that exceptions must be established by showing that it is in the interests of justice or on some other principled basis. If courts were to permit the parties routinely to adduce fresh evidence on appeal, efficiencies would be lost, creditors who had neglected to file proofs of claim would suffer no practical consequences, and the business conducted at creditors meetings would be co-opted by the courts with attendant expense, delay and formality, ***Galaxy Sports*** at para. 41.

[45] As well, the ***Galaxy Sports*** court at para. 30, observed that Parliament had assigned trustees the authority to value a contingent or unliquidated claim, a function previously undertaken by the court on application by a trustee. It also noted at para. 33, the (partial) privative clause protecting the trustee's decision in that regard and commented that presumably Parliament was of the view that trustees are suited to make the determination "because they possess specialized expertise in the areas of business financing, restructurings and insolvency, and are decision-makers to whom some deference is owed by a reviewing court," see also ***Johnson*** at para. 10.

[46] In ***Lloyd's Non-Marine***, a creditor alleged that the trustee did not duly investigate a particular claim. The creditor made serious allegations of criminality and unfairness with respect to that claim. Justice Hall referred to ***Eskasoni Fisheries*** and ***Galaxy Sports***, and said at para. 18:

> ...efficacy, expedition, concerns over extra expense and delay or increased formality should not be permitted to trump fairness and should certainly not allow the claims determination process to constitute a de facto "good housekeeping seal of approval" upon activities surrounding which there is a serious allegation of criminality. Whether such criminality or unfairness in fact exists is a question to be determined upon the hearing of appropriate evidence. In my view however the Court should not be denied the opportunity to hear such evidence simply because doing so would be disruptive to the efficacy of the claims determination process.

[47] After reviewing the two lines of authority on the issue represented by ***Eskasoni Fisheries*** and ***Galaxy Sports***, Registrar Prowse in ***Re San Juan Resources Inc.***, 2009 ABQB 55, ruled that an appeal from a trustee's disallowance of a claim should not be heard *de novo* as a matter of right, but may be heard *de novo* where the circumstances of the case are such that a hearing restricted to the record might result in an injustice. On the specific facts before him, in particular the trustee's preference for the opinion of the debtor's oil and gas expert given in pre-proposal litigation as opposed to the opinion of the claimant's expert, he ruled that the case warranted a *de novo* hearing. He said at para. 30:

> The *BIA* needs to be interpreted in a commercially reasonable manner and having regard to the need to proceed in an expedited fashion. The rights which are afforded to litigants in non-insolvency situations are not automatically available to claimants under the *BIA*. This was recognized in the ***Galaxy*** decision, where claimants were precluded from appealing a disallowance *de novo* as of right. However, the ***Galaxy*** and ***Lloyd's Non-Marine*** cases both recognize that there are situations where an appeal *de novo* would be appropriate. For the reasons given above, this is such a situation.

He ordered that the appeals from the disallowances before him should be determined by a summary hearing following the process used for summary trials in Alberta and that the evidence of any expert or other witness could be provided by way of affidavit.

[48] Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, have come to be known as "real-time litigation" because, as the Ontario Court of Appeal noted in ***Re Androscoggin Energy LLC***, 2005 CarswellOnt 589; 8 C.B.R. (5th) 11 at para. 1, "Parties depend on the court system to be able to respond, as it has here, despite the inevitable time pressures." Bankruptcy liquidation proceedings have come to be known as "autopsy litigation." Proposal proceedings under the *BIA* are no less real-time litigation than proceedings under the *CCAA*. As Justice Farley, who was the individual who coined the phrase in the first instance, said in ***Re Royal Oak Mines Inc.***, 1999 CarswellOnt 792; 7 C.B.R. (4th) 293 at para. 5 (Ont. Ct. Just. Gen. Div.):

> Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests.

[49] Like ***Harder*** and ***Haugen***, the *BIA*, which is the foundational statute with which we are dealing, contains no reference to appeals on the merits, rehearing or *de novo*. The proposal provisions of the *BIA* were foundational provisions on which the ***San Juan*** court grounded its reasons. The ***San Juan*** court's reasoning is compelling, as it recognized the concern raised by ***Lloyd's Non-Marine*** court in the case with which it was dealing.

[50] In this case, however, as the ***Galaxy Court*** stated, no one has shown that it is in the interests of justice or some other principled basis on which this Court should direct an appeal *de novo*. Accordingly, the appeals from MNP's decisions will be on the record.

B. What is the Appropriate Standard of Review?

[51] The Supreme Court of Canada has indicated that on a statutory appeal from a decision of an administrative tribunal, courts must follow the same process as on a judicial review, ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557 at para. 1; ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 28; ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 21, [2003] 1 S.C.R. 226; ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20 at para. 21, [2003] 1 S.C.R. 247.

[52] ***Dunsmuir v. New Brunswick***, 2008 SCC 9; [2008] 1 S.C.R. 190 is the court's most recent pronouncement on that process. There is a more recent decision emanating from the Supreme Court of Canada which deals with standards of review, but it dealt with a specific tribunal which was addressing a specific issue not applicable to this case, ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12. However, ***Khosa*** provides further refinement of the ***Dunsmuir*** reasoning, so it deserves some comment in these reasons.

[53] ***Dunsmuir*** reduced the former three standards of review to two standards of review, comprised of the correctness standard and a reasonableness standard. The aim of this revision was to make the system simpler and more workable, ***Dunsmuir*** at para. 45.

[54] The ***Dunsmuir*** court at para. 62, stated that reviewing courts must undertake a two-step analysis to determine the appropriate standard of review. First, the reviewing court must ascertain whether there is satisfactory judicial authority that addresses the degree of deference that reviewing courts will accord the tribunal concerning a particular category of question. If that inquiry proves unsuccessful, the court must proceed to an analysis of the factors that will help it identify the proper standard of review. ***Dunsmuir*** at para. 64, provides reviewing courts with those factors when it said:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[55] Before going any further in this discussion, this Court must first ascertain whether ***Dunsmuir*** applies to the decisions of bankruptcy or proposal trustee's decisions at all. The

Galaxy Sports court placed an administrative law gloss on its decision without discussing this aspect.

[56] The *Constitution Act, 1867*, s. 91(21) allows the Parliament of Canada to enact laws in relation to "bankruptcy and insolvency." Thus, it enacted the current *BIA*. The *BIA* sets out the structure of administrative officials in the bankruptcy regime. *BIA* s. 5 allows the Governor in Council to appoint a superintendent of bankruptcy who, among other things, supervises the administration of bankrupt (and insolvent, in certain cases) estates and issues bankruptcy trustee licenses, *BIA* s. 5(2) and 5(3). Each province constitutes a bankruptcy district and the Governor in Council is required to appoint one or more official receivers in each bankruptcy district, *BIA* s. 12. The official receivers are "deemed officers of the court," *BIA* s. 12(2). Trustees are, as well, officers of the court, see *e.g.* ***Re Beetown Honey Products Inc.*** (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.); ***Re Reed*** (1980), 34 C.B.R. (N.S.) 83 at 86 (Ont. C.A.); ***Re Confederation Treasury Services Ltd.*** (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.); ***Re Page*** (2002), 38 C.B.R. (4th) 241 (Ont. Sup. Ct. Jus.).

[57] What is an "officer of the court"? The court in ***N.A.P.E. v. Newfoundland & Labrador (Minister of Justice)***, 2004 NLSCTD 54 at paras. 114 and 115, provides us with a list of the basic characteristics of an officer of the court, when it said [emphasis original]:

> From the foregoing, it can be determined that an officer of the court has at least the following characteristics:
>
> 1. His duties and functions in the court process are *necessary* to enable the system to function properly;
>
> 2. In the performance of her duties, her role is to *facilitate the functioning of the court system* either directly or by assisting other officers of the court to perform their functions effectively;
>
> 3. In performing his functions he owes a *duty of loyalty and fidelity* to the court as an institution and to the rule of law, a duty which transcends other interests;
>
> 4. In acting as an officer of the court, she is the *personification of the court*; her acts are the acts of the court;
>
> 5. His duties, insofar as they impact on the effective functioning of the court, are subject to the *supervisory control* and *judicial direction* of the court;
>
> 6. Her role includes the duty to *carry out and comply with orders* of the court so as to ensure they are given practical effect;

> 7. His failure to comply with judicial directions or orders make him *subject to sanction*, including punishment for *contempt*.
>
> In essence, then, an officer of the court is a person whose function is so integral to the functioning of an aspect of the court system that the court could not function effectively in that regard without being able to exercise control, by way of court order if necessary, over what is done and how the officer does it.

[58] To this we may add other characteristics that the cases have added to the trustee's role in a bankruptcy situation, which are referred to in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2008 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell Thomson, 2007) at C§10:

> (a) the trustee must impartially represent the interests of creditors, ***Re Roy*** (1963), 4 C.B.R. (N.S.) 275 (Que. S.C.);
>
> (b) the trustee should act equitably and, as far as possible, hold an even hand between competing interests of various classes of creditors. In bringing proceedings the trustee should not adopt an adversarial or hostile role, ***Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.*** (1983), 48 C.B.R. (N.S.) 83 (Ont. S.C.);
>
> (c) the trustee should present the relevant facts to the court in a dispassionate, non-adversarial manner, and leave the matter to the court for decision;
>
> (d) the trustee's actions should be measured by the reasonableness of the business approach taken at the time of the action, and not necessarily by whether the actions attain satisfactory results, ***Re Brown*** (2003), 48 C.B.R. (4th) 38 (Alta. Q.B.);
>
> (e) the trustee must realize as much as possible from the estate for the benefit of creditors, ***Re Coffey*** (2004), 2 C.B.R. (5th) 121 (N.L.T.D.).

This Court notes that MNP's counsel, during argument in this case, reinforced the trustee's role and took the dispassionate approach that the cases have suggested.

[59] The fact that the trustee is an officer of the court does not mean that its decisions are not subject to review by the court. The *BIA* makes provision for appeals of trustees' decisions. As well, even official receivers are not immune from curial review, even though the *BIA* makes no provision for appeals of official receivers' decisions. In ***Re Webber*** (1931), 12 C.B.R. 274 at para. 25 (N.S.S.C.), the court said that it "has inherent power to superintend the conduct of officers of the Court and the learned Judge in Chambers therefore had power to inquire by what authority the Official Receiver acted, and to set aside an order made without authority."

[60] But is this "superintending power" a judicial review or an appeal? We will be able to answer this question through the limitations placed on the concept of judicial review. In David

Phillip Jones & Anne S. de Villars, "*Principles of Administrative Law*" 4th ed. (Scarborough: Thomson Carswell, 2004) at 6-8, the authors say:

> Judicial review ... is generally limited to the power of the superior courts to determine whether the administrator has acted strictly within the powers which have been statutorily delegated to it. Judicial review concentrates almost completely on jurisdictional questions, and on the application of the *ultra vires* doctrine to the particular fact pattern surrounding the impugned administrative action.
> ...
> Judicial review of administrative action can occur for the following jurisdictional defects:
>
> (a) substantive *ultra vires* ...;
>
> (b) exercising a discretion for an improper purpose, with malice, in bad faith, or by reference to irrelevant considerations ...;
>
> c) not considering relevant matters;
>
> (d) making serious procedural errors;
>
> (e) making an error in law, in certain circumstances.

Thus, it seems, we are not in the realm of judicial review in this case, as no one is impugning MNP's jurisdiction to make the decisions it did. Arguably, the only "error in law" that MNP made and which could go to its jurisdiction concerns its dealing with the substantive issues involved in both appeals. At this stage, this Court cannot comment on those issues.

[61] Earlier in the reasons, this Court said that ***Galaxy Sports*** added an "administrative law gloss" to its decision. The ***Galaxy Sports*** court did not say specifically that it was conducting a judicial review of the trustee's decision. There is good reason for this; it was not undertaking a judicial review. Rather, it seems that the ***Galaxy Sports*** court used the administrative law gloss to focus on and assist it in examining the issues before it. Registrar Herauf, as he then was, in ***Johnson***, agreed when he applied the ***Galaxy Sports*** approach even in the face of his comment at para. 11, that, "it is not particularly easy to fit a trustee's decision into the continuum of administrative law."

[62] Like the ***Johnson*** court, this Court finds the ***Galaxy Sports*** approach compelling and it "makes sense." This Court will take a similar approach, recognizing the concern that the ***Johnson*** court expressed. As well, we must remember that, even though the ***Galaxy Sports*** court's analysis had an administrative law gloss, it found that the appeal, as sanctioned by the *BIA*, was a true appeal and not a judicial review.

[63] The ***Galaxy Sports*** court held that the standard of review for compliance with a "mandatory" provision, which it equated to a question of law or statutory compliance, such as the decision to allow or disallow a proof of claim, was one of correctness and that a reasonableness standard applied to trustees' decisions of a factual nature, such as the valuation of a contingent or unliquidated claim.

[64] In determining the standard of review, the ***Galaxy Sports*** court considered Parliament's confidence in the expertise of the trustee as demonstrated by its amendment to the legislation to give the trustee authority to value and allow or disallow claims and the privative clause protecting the trustee's decisions in that regard.

[65] ***Dunsmuir*** at para. 52, found that a privative clause represents a strong indication that Parliament intended that the administrative decision maker should be given greater deference, interference by a reviewing court should be minimized, and that review should be based on the reasonableness standard. The privative clause in the *BIA* is only a partial one, i.e. it says that the trustee's determination is final and conclusive unless a person on whom the notice is served appeals that decision to a court, *BIA* s. 135(4). Nevertheless, this court agrees with the ***Galaxy Sports*** court when it suggests that trustees' decisions in relation to certain issues they face warrant some deference.

[66] Like labour arbitrators in ***Dunsmuir***, this Court recognizes the relative expertise of bankruptcy trustees when they deal with matters, such as the valuation of proofs of claim. Accordingly, like ***Dunsmuir*** at para. 68, this favours the standard of reasonableness when reviewing trustees' decisions in this realm. They are presumed to hold relative expertise in the interpretation of their home legislation as well as related legislation that they might often encounter in the course of their functions.

[67] The ***Dunsmuir*** court considered that the legislative purpose confirmed its view of the regime that the legislature established. The legislation established a time and cost-effective method of resolving disputes and provided an alternative to judicial determination. The provision for timely and binding settlements of disputes implied that a reasonableness review was appropriate.

[68] Similarly, the ***Galaxy Sports*** court commented that the approach it took aligned with the implicit objective of the *BIA* to enable debtors to have their proposals voted on expeditiously. As well, the *BIA* allows creditors to have their rights and claims determined in a business-like manner, "while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases."

[69] In ***Dunsmuir***, the majority advised at para. 53 that:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (***Canada (Attorney General) v. Mossop***, [1993] 1 S.C.R. 554, at pp.

599-600; ***Dr. Q***, at para. 29; ***Suresh***, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

And further at para. 55:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (***Toronto (City) v. C.U.P.E.***, [2003] 3 S.C.R. 77, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[70] The ***Galaxy Sports*** court at para. 38, expressed the view that the trustee's decisions in that case did not involve the balancing of polycentric interests. It characterized the trustee's power to allow or disallow a claim (for which the trustee must give written reasons) under *BIA* s. 135 as a decision more of law than fact and, therefore, a matter on which the court might be assumed to have equal expertise. The court noted that such questions "have important legal consequences, in that a person whose proof of claim is disallowed or rejected may not participate as a creditor in the bankruptcy generally or in the distribution of the bankrupt's estate." This would attract a correctness standard.

[71] When undertaking a review of these factors it becomes clear that Stone Sapphire's appeal raises an extricable legal question, *viz.*, whether the trustee is bound by the Summary Judgment and the Rehearing Judgment in valuing the Stone Sapphire's claim or at least that portion of the claim to which the judgment relates. Accordingly, this question is subject to appeal on a standard of correctness. Once that question has been answered, the trustee's actual valuation of the claim is a matter of fact and discretion and, therefore, subject to appeal on a standard of reasonableness.

[72] Where a court applies a standard of correctness, it shows no deference to the decision of the tribunal. Instead, it undertakes its own analysis and agrees with the tribunal's determination or substitutes its own view of the correct answer.

[73] On an appeal based on the standard of reasonableness, the court recognizes that certain questions may give rise to a number of possible, reasonable conclusions. As indicated the ***Dunsmuir*** court at para. 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[74] The Kulbabas appeal the disallowance of their claim. The reason given for the disallowance apparently was that it was "an unliquidated contingent claim." Presumably, what MNP meant by this was that the Kulbabas' claim was a contingent or unliquidated claim that was not provable, but it did not say so. *BIA* s. 121(2) states that, "The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135." This provision applies in a proposal as well as a bankruptcy, ***Re F.E.A. Griffiths Corp.*** (1971), 15 C.B.R. (N.S.) 231 (Ont. S.C.). *BIA* s. 135(1.1) requires that the trustee determine whether any contingent or unliquidated claim is provable and, if it is, the trustee is to value the claim. ***Galaxy Sports*** at para. 39, said that this Court should apply a reasonableness standard when considering the trustee's role "in valuing contingent or unliquidated claims." In the case of the Kulbabas, the trustee did not value their claim; it rejected it. Thus, this falls in the "mandatory" category and attracts a correctness standard.

C. Whether MNP was Bound by the Court's Judgment in Valuing the Claim

[75] As mentioned earlier in these reasons, this issue is reviewable on the standard of correctness.

[76] MNP argued that there is authority that a trustee is not bound by a court judgment when assessing a creditor's proof of claim based on that judgment. It cites ***Re Van Laun, ex parte Chatterton***, [1907] All E.R. 159 at 160 (C.A.) and ***Re Lupkovics, ex parte, The Trustee v. Freville***, [1954] 2 All E.R. 125 at 130 in support of that contention. In ***Van Laun***, the court stated:

> The Trustee's right and duty when examining a Proof for the purpose of admitting or rejecting it, is to require some satisfactory evidence that the debt on which the Proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the Trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.

[77] Justice Burnyeat in ***Canadian Asian Centre Developments Inc.***, 2003 BCSC 41 at paras. 29-31 characterized this statement as *obiter dictum*. Justice Burnyeat concluded that a trustee can look behind a judgment only if there is "some good reason to conclude that there should not have been a judgment." He offered fraud or collusion as examples of such a good reason. Justice Burnyeat observed that no appeal had been taken of the judgment involved in the ***Van Laun*** case.

He also remarked at para. 35 that, "a judgment of a Court of competent jurisdiction should almost invariably satisfy a Trustee regarding a debt, the security, or a judgment if it can be said that the Court considered the merits of the entitlement to a creditor to a judgment relating to security claimed."

[78] In this case, MNP's reasons for its valuation of Stone Sapphire's claim are sparse, but those reasons do not refer to any fraud or collusion. MNP's reasons also refer to the fact that it considered the reasons of Justice Lee and Justice Topolniski, but it chose to disregard those judgments. Was this correct? MNP's reasons give this Court no basis on which to determine the correctness or lack of correctness in this decision. It can only surmise that MNP came to this decision because of the extant appeals and the new evidence that Transglobal presented to Justice Lee.

[79] It should be noted that Justice Lee considered the new evidence that Transglobal sought to present and he concluded that "it would have little or no impact on the outcome in any event," Rehearing Judgment para. 77. As well, Justice Lee specifically found that any counterclaim that Transglobal claimed did not provide it with a right of legal or equitable set-off from Stone Sapphire's Summary Judgment.

[80] While this Court acknowledges that the appeals of Justice Lee's judgments are extant, there is "no principle which says that a decision of the trial court or a chambers judge has no effect or is presumed wrong until the Court of Appeal finally at the end of the appeal disposes of it," ***Alberta (Minister of Consumer and Corporate Affairs) v. Bennett*** (1992), 131 A.R. 184 (C.A.).

[81] McEwan J. in ***Re Exner***, 2003 BCSC 260, 41 C.B.R. (4th) 49 expressed the view that the trustee in that case had a duty to scrutinize a certificate of judgment obtained by a creditor. One should not, however, ignore the fact that the court in that case was considering a default judgment.

[82] Thus, MNP was incorrect when it did not give recognition to the judgments of Justice Lee and Justice Topolniski.

VI. Summary

[83] Stone Sapphire's appeal shall be on the record. There will be no *de novo* hearing. The record that this Court will review and that the parties will argue on appeal will be comprised of the proof of claim, the trustee's notice of valuation or disallowance and all of the material that the trustee considered in determining that the claim was not provable or in valuing the claim, including the judgments of Justices Lee and Topolniski. If the parties are unable to agree as to what precisely constitutes the record, they may apply to the court for a determination of that issue.

[84] With respect to the Kulbabas' claim, the parties will, in the first instance, argue whether the Kulbabas' claim is provable. Thereafter, if this Court finds that it is a provable claim, this Court may order MNP to value it, as MNP is required so to do by *BIA* s. 135(1.1).

Heard on the 20th day of March, 2009.
Dated at the City of Edmonton, Alberta this 30th day of March, 2009.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Cherisse Killick-Dzenick
Reynolds Mirth Richards & Farmer LLP
3200 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3W8
Telephone: 780-425-9510
Fax: 780-429-3044
for Transglobal Communications Group Inc.

Kenneth W. Fitz
McLennan Ross LLP
#600, 12220 Stony Plain Road
Edmonton, Alberta T5N 3Y4
Telephone: 780-482-9231
Fax: 780-482-9101
for Stone Sapphire Ltd.

Jeremy H. Hockin
Parlee McLaws LLP
1500, 10180 - 101 Street
Edmonton, Alberta T5J 4K1
Telephone: 780-423-8500
Fax: 780-423-2870
for Meyers Norris Penny Limited

Michael D. Mysak
Bennett Jones LLP
4500, 855 – 2nd Street SW
Calgary, Alberta T2P 4K7
Telephone: 403-298-3100
Fax: 403-265-7219
for Joshua and Julia Kulbaba

Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice K.D. Yamauchi

Cherisse Killick-Dzenick
Reynolds Mirth Richards & Farmer LLP
3200 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3W8
Telephone: 780-425-9510
Fax: 780-429-3044
for Transglobal Communications Group Inc.

has been added to the Appearances on Page 20.

Tab 12

1992 CarswellOnt 185, 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339

Campeau v. Olympia & York Developments Ltd.

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

Ontario Court of Justice (General Division)

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle* , for the plaintiffs.

Peter F. C. Howard , for National Bank of Canada.

Yoine Goldstein , for Olympia & York Development Limited and 857408 Ontario Inc.

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

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General

Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to

pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

Cases considered:

Arab Monetary Fund v. Hashim (June 25, 1992), Doc.34127/88, O'Connell J. (Ont. Gen. Div.), [1992] O.J. No. 1330 — *referred to*

Attorney General v. Arthur Anderson & Co. (1988), [1989] E.C.C. 244 (C.A.) — *referred to*

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) — *applied*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. (H.C.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) — *applied*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R.

(2d) 122 (Fed. T.D.) , appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 106

Personal Property Security Act, R.S.O. 1990, c. P.10 —

s. 17(1)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 6.01(1)

Motion to lift stay under Companies' Creditors Arrangement Act; Motion for stay under Courts of Justice Act.

***R.A. Blair J*:**

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,

b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act* , R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

13 The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

20 I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.) , appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) , where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

24 In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (1988), [1989] E.C.C. 224 (C.A.) , cited in *Arab Monetary Fund v. Hashim* , supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

END OF DOCUMENT

Tab 13

Court File No.: CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR. JUSTICE I. MCEWEN	)	THURSDAY, THE 9TH
JUSTICE MCEWEN	)	DAY OF JANUARY, 2014

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.

STAY EXTENSION ORDER

THIS MOTION, made by GrowthWorks Canadian Fund Ltd. (the "**Applicant**") for an order extending the stay period defined in paragraph 14 of the initial order of the Honourable Justice Newbould made October 1, 2013 in these proceedings, as amended and restated on October 29, 2013 (the "**Stay Period**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the affidavit of C. Ian Ross sworn on January 6, 2014, and the Fifth Report (the "**Fifth Report**") of FTI Consulting Canada Inc., in its capacity as monitor of the Applicant (the "**Monitor**"), and on hearing the submissions of counsel for the Applicant, the Monitor, Roseway Capital S.a.r.l. ("**Roseway**") and GrowthWorksWV Management Ltd. (the "**Manager**"), no one appearing for any other party although duly served as appears from the affidavit of service.

SERVICE

1. THIS COURT ORDERS that the time for service of this Motion and the Fifth Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

STAY EXTENSION

2. THIS COURT ORDERS that the Stay Period is hereby extended until and including March 7, 2014.

MONITOR'S ACTIVITIES AND REPORT

3. THIS COURT ORDERS that the Third Report of the Monitor dated November 15, 2013, the Fourth Report of the Monitor dated November 26, 2013, and the activities described therein are hereby approved.

JAN 0 9 2014

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.

Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding Commenced at Toronto

STAY EXTENSION ORDER

McCARTHY TÉTRAULT LLP
Barristers and Solicitors
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel.: (416) 601-7730
Fax: (416) 868-0673

Heather Meredith LSUC# 48354R
Tel.: (416) 601-8242
Fax: (416) 868-0673

Lawyers for GrowthWorks Canadian Fund Ltd.

#13083895

Tab 14

Luscar Ltd. v. Smoky River Coal Limited, 1999 ABCA 179

Date: 19990609
Docket: 99-18164

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE McINTYRE

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

AND IN THE MATTER OF SMOKY RIVER COAL LIMITED

ALLSTATE INSURANCE COMPANY, ALLSTATE LIFE INSURANCE COMPANY, SECURITY LIFE OF DENVER INSURANCE COMPANY, INDIANA INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, PACIFIC LIFE INSURANCE COMPANY, AH (MICHIGAN) LIFE INSURANCE COMPANY, NORTHERN LIFE INSURANCE COMPANY, RELIASTAR LIFE INSURANCE COMPANY, MODERN WOODMEN OF AMERICA, PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK, and PHOENIX AMERICAN LIFE INSURANCE COMPANY;

Petitioners/(not Parties to the Appeal)

BETWEEN:

LUSCAR LTD. and CONSOL OF CANADA INC.

Appellants

- and -

SMOKY RIVER COAL LIMITED

Respondent/(Debtor)

- and -

CANADIAN NATIONAL RAILWAY COMPANY

Respondent/(Creditor)

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE S. J. LOVECCHIO
GRANTED FEBRUARY 1, 1999

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PICARD
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE McINTYRE

COUNSEL:

R. B. Davison, Q.C.
J. H. Hockin
For the Appellants

D. R. Haigh, Q.C.
B. T. Beck
For the Respondent Smoky River Coal

W. E. Cascadden
For Neptune Bulk Terminals

T. M. Warner
For the Respondent Canadian National Railway

D. W. Mann
For the Petitioners

REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE HUNT

[1] This case raises a question about the scope of the powers of a judge pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*"), R.S.C. 1985, c. C-36. Specifically, does a judge have the discretion to establish a procedure for resolving a dispute between parties who have agreed to arbitrate their disputes under a contract? In my view, the judge is granted that power by the *CCAA,* in this case his discretion was exercised properly, and the appeal must be dismissed.

FACTS

[2] The Appellants Luscar Ltd. and Consol of Canada Inc. ("the Appellants") and the Respondent Smoky River Coal Limited ("Smoky") are owners and operators of coal mines in Western Canada. Neptune Bulk Terminals (Canada) Ltd. ("Neptune") owns and operates a port facility in Vancouver. Smoky and the Appellants are shareholders of Neptune and ship coal for export through the port facility.

[3] The relationship between Neptune and its shareholders is governed by a Shareholders' Agreement ("the Agreement"), key provisions of which are reproduced below. Briefly, the Agreement restricts the manner in which a shareholder may dispose of rights arising from the Agreement. Among the consequences of a breach specified in the Agreement are that shareholders are given a right of refusal to purchase, at book value, the Neptune shares belonging to an offending shareholder. The Agreement also provides that disputes among the parties will be arbitrated in British Columbia.

[4] In April 1998, a dispute arose between the Appellants and Smoky when the Appellants alleged that Smoky had breached its obligations under the Agreement. Neptune issued a Notice of Default as required by the Agreement. Over the next several months, information was exchanged among the parties concerning the facts giving rise to the alleged breach. The Appellants say it was not until September 1998 that they received information, on a "with prejudice" basis, that confirmed their view that Smoky had breached its contractual obligations. Because until September they had been unable to use the information obtained earlier, they had taken no further steps in the interim to trigger formally the default provisions of the Agreement.

[5] In the meantime, on July 30, 1998, a syndicate of Smoky's lenders had filed a petition to place Smoky under the protection of the *CCAA*. They, along with Canadian National Railway Company (a major unsecured creditor of Smoky) are also Respondents. On August 7, 1998, an order was made retroactive to July 31, 1998, staying all actions against Smoky and its assets. This order ("the Cairns order") made specific reference to rights arising under the Agreement, even though Neptune and the Appellants had been

unaware of the *CCAA* filing. The Cairns order, which was of limited duration, has since been extended several times. A Monitor has been appointed to oversee Smoky's affairs, although not empowered to take possession of Smoky's assets or manage Smoky's business.

[6] Upon learning of the Cairns order, the Appellants became involved in the *CCAA* proceedings, arguing that the stay should not be extended against them and asserting that their dispute with Smoky should be resolved by arbitration pursuant to the Agreement. The chambers judge suggested that the parties attempt to resolve this issue among themselves. When they were unable to do so, cross-motions resulted. In its motion, Smoky sought various declarations concerning the status of the "dispute" under the Agreement or, alternatively, an order prohibiting arbitration proceedings under the Agreement and giving directions for the determination of issues arising under the Agreement. The Appellants' motion sought a stay of Smoky's motion pursuant to s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "B.C. *Arbitration Act*").

DECISION APPEALED FROM

[7] The learned chambers judge dismissed the Appellants' motion, concluding that the Court of Queen's Bench (which is the "court" under s. 2 of the *CCAA*) has jurisdiction "to hear and determine ... whether Smoky has been or is in default under the ... Agreement and any and all related issues arising therefrom." He ordered the parties to appear before him for further directions concerning a trial of the issues arising from the Agreement.

[8] Among his undisputed findings were that:

- the law of British Columbia applies to the dispute under the Agreement
- the question of whether or not Smoky was in default under the Agreement was an issue that, pursuant to the Agreement, the parties had agreed would be decided by arbitration
- Smoky's motion was a commencement of "legal proceedings" within the meaning of s. 15 (1) of the B.C. *Arbitration Act*
- the Appellants had applied to stay Smoky's motion

[9] He framed the question this way at para. 1: "Should this Court establish a procedure to resolve a dispute between [the Appellants and Smoky] as part of its supervisory role of the reorganization of Smoky under the *CCAA*, or should this Court stay the pending Notice of Motion of Smoky dated January 6, 1999 while that dispute is resolved by an arbitrator in British Columbia in accordance with the *Commercial Arbitration Act*?"

[10] He concluded that s. 15 of the B.C. *Arbitration Act* obliged him to stay Smoky's motion and send the matter to British Columbia for arbitration unless, in the words of that section, the agreement to arbitrate was "void, inoperative or incapable of being

performed." He suggested at para. 31 that the latter condition applied because of Smoky's insolvency, the appointment of the Monitor, and the role of the Court under the *CCAA*. He said this incapacity was beyond the parties' control.

[11] He considered that the *CCAA* process would be compromised if the contractual dispute was not settled within its ambit. But he noted that, in so dealing with the matter, the resolution of the dispute would be neither precluded nor postponed. Rather, it had to be addressed expeditiously because of its likely impact on the viability of a plan of arrangement. Were it not resolved under the umbrella of the *CCAA*, moreover, the efforts of Smoky's officers could be drained through involvement in the B.C. arbitration, at a time when they should be attending to Smoky's reorganization. Additionally, other stakeholders (including the Monitor) would be excluded from an arbitration in B.C. He rejected the Appellants' argument that their rights as non-creditors could not be affected by *CCAA* orders. He concluded that the dispute should be resolved as expeditiously as possible in the Court of Queen's Bench under the *CCAA* proceedings, "so as to permit Smoky to move forward with certainty as to its status as a shareholder of Neptune" (para. 43).

[12] O'Leary J.A. subsequently granted leave to appeal pursuant to s. 13 of the *CCAA*. He suggested the following as the issues for the appeal:

> (1) Did the chambers judge err in finding that the arbitration agreement was "incapable of performance" because Smoky is subject to proceedings under the CCAA?
>
> (2) If [the chambers judge] erred in finding that the arbitration agreement was incapable of performance, did he nevertheless have jurisdiction under the CCAA to override the NSA arbitration agreement with respect to the forum and procedure for resolving disputes?
>
> (3) If the Order appealed adversely affected the substantive rights of Luscar and Consol under the *Commercial Arbitration Act* and the arbitration rules of the British Columbia International Commercial Arbitration Centre, did the chambers judge have jurisdiction under the CCAA to make the Order?

[13] Because of the approach I have taken to this case, I do not find it necessary to deal with the first issue in quite the way framed by O'Leary J.A. The second and third issues are considered in the reasons that follow.

CONTRACTUAL PROVISIONS

[14] A number of provisions of the Agreement are relevant to the issue under appeal.

[15] Paragraph 8.01 provides:

> Except as otherwise expressly permitted by this agreement or a Terminal Contract, no Shareholder or Affiliate shall sell, transfer or otherwise dispose of or offer to sell, transfer or otherwise dispose of, any of its Interest, or any Terminal Contract or any of its rights thereunder.

[16] It is alleged that Smoky breached this provision when it transported six train loads of coal through the terminal. According to the Appellants, on this occasion Smoky "subcontracted" its capacity at the terminal.

[17] Paragraph 8.04 describes the sole method by which a shareholder may dispose of its contracted shipping capacity. Briefly, it must offer that capacity to the other shareholders and only if they do not take up the right may the capacity be subcontracted to a third party.

[18] Paragraph 10 deals with default:

> 10.01 It is an event of default, if a Shareholder (the "Defaulting Shareholder") (the other Shareholders being the "Non-Defaulting Shareholders"):
>
> > (a) fails to observe, perform or carry out any of its obligations hereunder and such failure continues for 30 days after Neptune has given notice in writing to the Defaulting Shareholder specifying the nature of the default and requiring that the default be cured within 30 days; or
> >
> > (b) becomes a bankrupt or commits an act of bankruptcy, or permits or authorizes the appointment of a receiver or if a receiver-manager of its assets is appointed or if the Defaulting Shareholder makes an assignment for the benefit of creditors or otherwise.
>
> Neptune shall give a copy of any notice under this paragraph to the Non-Defaulting Shareholders.
>
> 10.02 Upon the expiration of the 30 day period referred to in subparagraph 10.01(a) hereof or upon Neptune becoming aware of an event described in 10.01(b) hereof, Neptune shall declare a Default and give notice thereof to the Non-Defaulting Shareholders.

[19] In the event of a continuing default, paragraph 11.01 grants other shareholders the option to purchase the defaulting shareholder's shares at book value. In this case, the evidence

suggests that the book value of Smoky's shares is about $880,000, while the market value of Smoky's rights in the Neptune Terminal may exceed $46,000,000. During the course of argument, the chambers judge observed that, from a practical perspective, a plan of arrangement under the *CCAA* could not go forward without a resolution of the dispute between Smoky and the Appellants. (AB 83-84)

[20] The relevant paragraph dealing with dispute resolution is 12.02:

> The parties agree that all disputes or differences between or among the parties hereto, other than a dispute or difference decided by the auditors pursuant to paragraph 12.01, shall be submitted to a single arbitrator under the auspices of and pursuant to the rules of the British Columbia International Commercial Arbitration Centre and pursuant to the Commercial Arbitration Act of British Columbia whose decision shall be final and binding upon the parties to the arbitration. The arbitrator may determine all questions of procedure and after hearing any evidence and representations of the parties, the arbitrator shall make an award and reduce the same to writing together with the reasons therefor.

[21] Paragraph 15.11 provides that the Agreement will be governed by and construed in accordance with the laws of British Columbia.

STATUTORY PROVISIONS

[22] Section 11(4) of the *CCAA* is central to this appeal.

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company. (Emphasis added)

[23] Part I of the *CCAA* (ss. 4 to 8) provides for the making of a compromise or arrangement between the company and its creditors. If accepted by two-thirds of the creditors, the plan may be sanctioned by the court.

[24] Section 2 of the *CCAA* contains the following definitions:

"secured creditor"
"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or 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, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

"unsecured creditor"
"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

[25] Section 12 sets out the claims procedure. Section 12(1) states that a "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act." Section 12(2) mandates how the "amount" of a "claim" is to be determined. Section 12(2)(a) states:

For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount . . .

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor . . .

[26] For reasons that will become apparent, the following provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") are also relevant.

Definitions - s. 2(1)

"claim provable in bankruptcy", "provable claim" or "claim provable"

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

"creditor"

> "creditor" means a person having a claim, unsecured, preferred by virtue of priority under section 136 or secured, provable as a claim under this Act;

. . .

Persons claiming property in possession of bankrupt

81(1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

Claims provable

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

Contingent and unliquidated claims

121(2) The determination of whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

121(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a

rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

[27] Section 15(2) of the B.C. *Arbitration Act*, referred to by the chambers judge, provides:

> In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
> (Emphasis added)

[28] Section 23 states:

> An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
> (Emphasis added)

[29] Under ss. 8 and 9 of the *Domestic Commercial Arbitration, Rules of Procedure* of the B.C. International Commercial Arbitration Centre (as amended June 1, 1998) ("Rules"), arbitration may be commenced by a notice from one party to another and to the Centre or by the filing of a Joint Submission to Arbitrate to the Centre. The arbitration is deemed to have commenced following this filing and the payment of fees (s. 10). There is no evidence to suggest that arbitration was commenced in this case.

[30] Section 33 of the Rules provides:

> An arbitration tribunal shall decide the dispute in accordance with the law unless the parties agree in writing in accordance with section 23 of the *Commercial Arbitration Act* that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
> (Emphasis added)

ANALYSIS

1. Did the Chambers Judge Have the Authority under s. 11 of the *CCAA* to Order a Stay of the B.C. Arbitration Proceedings?

(A) Does the term "proceedings" in s. 11 of the *CCAA* include the proposed arbitration in B.C.?

[31] There is little doubt that the term "proceedings" in s. 11 is broad enough to encompass extra-judicial proceedings. Trial and appellate courts have treated the term expansively, relying upon jurisprudence that takes a broad, liberal approach to the interpretation of the *CCAA*. ***Meridian Developments Inc.* v. *Toronto Dominion Bank; Meridian Developments Inc.* v. *Nu-West Group Ltd.*** (1984), 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.); ***Quintette Coal Ltd.* v. *Nippon Steel Corp.*** (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) (***"Quintette Coal"***). Such courts have observed that, were it otherwise, non-judicial proceedings could operate against the interests of creditors and render impossible the achievement of effective arrangements.

[32] Thus, in ***Quintette Coal***, the term "proceedings" was held to include extra-judicial conduct such as the withholding of payments to the debtor company. In ***Meridian***, it was said to embrace payment pursuant to a letter of credit. Without specific discussion of the point, it seems also to have been assumed that "proceedings" includes the exercise of a contractual right to replace an operator of jointly-owned petroleum properties. ***Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.).

[33] The above jurisprudence persuades me that "proceedings" in s. 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by s. 15(5) of the Rules. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision-making process. Thus, the efficacy of *CCAA* proceedings (many of which are time-sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under s. 11 of the *CCAA*.

(B) Are the Appellants creditors for the purposes of the *CCAA*?

[34] If the Appellants can be considered creditors under the *CCAA*, there is little doubt that the chambers judge had the power to affect their rights in the way he did. It is obvious that the contractual rights of a creditor can be affected permanently under the *CCAA*. To take a simple example, a plan of arrangement or compromise that is approved by the requisite number of creditors can alter permanently the contractual rights of even those creditors that have not approved the plan (*CCAA*, s.6).

[35] To explain my conclusion that the Appellants can be considered creditors under the *CCAA*, it is necessary to examine the statutory linkage between the *CCAA* and the *BIA* and the courts' view of that linkage.

[36] The relevant provisions of the *CCAA* and the *BIA* have been set out above. For the purposes of the claims procedure in s. 12 of the *CCAA*, "claim" is defined as the *BIA's* meaning of "a debt provable in bankruptcy". Could the Appellants' claims in this case constitute a "debt provable in bankruptcy"?

[37] The answer is not readily apparent from the *BIA*, since nowhere does it define "debt provable in bankruptcy". The closest definition is "claim provable in bankruptcy". A contingent and unliquidated claim recoverable by legal process is a "claim provable in bankruptcy" for the purposes of s. 121(1) of the *BIA*: ***Farm Credit Corp.* v. *Holowach (Trustee of)***, [1988] 5 W.W.R. 87 at 90, 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal to the Supreme Court of Canada dismissed at [1989] 4 W.W.R. lxx. Section 81(1) of the *BIA* contemplates proof of a claim arising from "any property, or interest therein" in the possession of the bankrupt at the time of bankruptcy. Some of the Respondents argue that the Appellants' claim against Smoky under the Agreement would fall under one of these sections and is, therefore, a "claim" under the *CCAA* that would give the Appellants access to the s. 12 claims procedure, making them creditors under that statute.

[38] This legal result is contingent on whether the terms "debt" and "claim" are interchangeable under the *BIA*. Both terms are used in s. 121, which is entitled "Claims Provable". There are cases which, without directly considering the point, appear to have assumed that the two terms are synonymous: ***Re Central Capital Corp.*** (1995), 22 B.L.R. (2d) 210 (Ont. Gen. Div.); affirmed (1996), 27 O.R. (3d) 494 (C.A.).

[39] There are also cases where the point has been addressed directly. In ***Algoma Steel Corp.* v. *Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.), the issue was whether the holder of a loan guaranteed by the debtor company should be treated as a creditor for the purposes of the plan of arrangement filed by the debtor company, notwithstanding the fact that the loan holder had made no demand of payment under the loan agreement or the guarantee. Farley J. concluded that the loan holder was a creditor. He distinguished ***Quebec Steel Products (Industries) Ltd.* v. *James United Steel Ltd.***, [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) because of changes that had been made to the wording of s. 12 of the *CCAA* in the meantime. Specifically, he noted that the earlier wording had bundled together the concepts of "claim" and "amount", leading in ***Quebec Steel*** to the application of the common law definition of "debt" as a certain sum of money.

[40] At 6-7, Farley J. said:

> It strikes me that [under the current *CCAA*] the double recitation in s. 12(1) and (2) of "[f]or the purposes of this Act" and the segregation of these subsections was intended to allow "claim" to be determined as any "indebtedness, liability or obligation of any kind" by reference to whether it "could be a debt provable in

bankruptcy within the meaning of the *Bankruptcy Act*". The determination of the amount of that claim is to be determined under another provision, also "[f]or the purposes of this Act". Under the structure and context of the C.C.A.A. could there be a claim (unsecured debt provable as such under the *Bankruptcy Act*) without there being a creditor as the holder of that claim. I think not. I therefore conclude that the B. of M. is creditor of Algoma vis-à-vis the guarantee (see *Re Film House Ltd.* (1974), 19 C.B.R. (N.S.) 231 (Ont. S.C.), varied (1974), 19 C.B.R. (N.S.) 231 at 234 (Ont. S.C.); *Re Froment*, 5 C.B.R. 765, [1925] 2 W.W.R. 415, [1925] 3 D.L.R. 377 (Alta. T.D.), which indicate that the contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid should be considered a debt provable in bankruptcy pursuant to the *Bankruptcy Act*).

[41] He held to similar effect in ***Re Cadillac Fairview Inc.*** (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div.), where the party found to be a "claimant" for the purposes of the *CCAA* had merely launched a lawsuit against the debtor company, seeking, among other things, declarations concerning the validity of certain agreements and recovery of damages for the breach of the agreements by the debtor company. See also ***Re Quintette Coal Ltd.*** (1991), 7 C.B.R. (3d) 165 (B.C. S.C.) at 174 where it was held that "claim" under the *CCAA* included "future prospects".

[42] I find this reasoning persuasive. There is a possible explanation for the fact that the *CCAA* refers to a "debt", rather than a "claim", provable under the *BIA*. At the time the *CCAA* was passed, the *Bankruptcy Act*, R.S.C. 1927, c. 11, contained s. 104, entitled "Debts provable". That section is the forerunner of s. 121, now entitled "Claims provable". The language used in the body of s. 104 was "debts provable"; in the current s. 121, it is "claims provable". The definitions at that time also referred to "debts" rather than "claims". It may be that Parliament failed to re-align the language of the *CCAA* when the relevant language of the *Bankruptcy Act* was amended in 1949, S.C. 1949, 2nd sess., c. 7.

[43] Nor am I convinced there are compelling reasons why the notion of a "debt" should be treated narrowly under the *CCAA*, rather than as broadly as a "claim" under the *BIA*. It is true that, in comparison to *CCAA* proceedings, bankruptcy proceedings are by nature more final. If it is ever to be dealt with, a claim must be resolved during the bankruptcy proceedings. In contrast, if a *CCAA* plan of arrangement is accepted, there is the future possibility of a going concern against which a claim may be asserted.

[44] But there may also be situations (like the present one) where it would be difficult for a plan of arrangement to be prepared and voted upon without some resolution, in the same process, of a claim that is relatively unripe. This appears to have been the reasoning of Blair J. in ***Campeau* v. *Olympia & York Developments Ltd.*** (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). There, the plaintiffs had served a statement of claim (seeking damages

for breach of contract against the debtor company) before an initial stay under the *CCAA* was ordered. In refusing to lift the stay and permit the action to proceed, he noted that, unless the claim was dealt with in the context of *CCAA* proceedings, the creditors would have no way to assess whether to accept or reject the debtor company's plan (notwithstanding that the plan itself had treated the plaintiffs as parties that were unaffected by it). His language at 311 suggests a tacit acceptance of the fact that the plaintiffs were not "creditors" in the same sense as other creditors. He held, nevertheless, that their "claim" should be dealt with under the *CCAA*.

[45] In this case, the essence of the Appellants' claim is that Smoky has breached the Agreement. Although paragraph 11.01 of the Agreement grants an option to purchase the defaulting shareholder's shares, it is clear from paragraph 11.02 that other remedies are contemplated. Viewed this way, the Appellants' claim is not significantly different than the breach of contract claims in some of the cases just discussed. To the extent that the Appellants might exercise an option to acquire Smoky's shares, moreover, it could be said that they claim a right to "property" in Smoky's possession, a right that would be provable under s. 81 of the *BIA*.

[46] For these reasons, I conclude that the Appellant's claim against Smoky can be treated under the claims process of s. 12 and that they are creditors for the purposes of the *CCAA*. In case I am wrong, I will now consider whether, if the Appellants cannot be considered creditors, the chambers judge nevertheless had the power to make the order.

(C) Even if the Appellants are not creditors for the purposes of the *CCAA*, does s. 11 authorize the order made in this case?

[47] The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as ***Norcen***, *supra*, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the *CCAA*. They assert that, if the order is upheld, they will have lost forever the opportunity to resolve the dispute pursuant to the arbitration procedure accepted by the parties to the Agreement. As discussed later, in my view the nature of the contractual right being affected is an important factor to take into account.

[48] The Respondents disagree with the Appellants' assessment of the jurisprudence. They also maintain that the impugned order affects the Appellants' procedural, not substantive, rights.

[49] In my opinion, the language of s. 11(4), considered in the context of the *CCAA's* purpose, authorizes the order made by the chambers judge. To recapitulate, that order declared that

the Alberta Court of Queen's Bench "has jurisdiction to hear and determine the issue of whether Smoky has been or is in default under the Neptune Shareholders' Agreement and any and all related issues arising therefrom", required the parties to appear before him for further directions, and dismissed the Appellants' motion for a stay pursuant to the B.C. *Arbitration Act*. Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).

[50] The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.

[51] This interpretation is supported by the legislative objectives underlying the *CCAA*. The purpose of the *CCAA* and the proper approach to its interpretation have been described as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order [sic] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> per Farley J. in ***Re Lehndorff General Partner Ltd.*** (1993), 17 C.B.R. (3d) 24 at 31 (Ont. Gen. Div.)

[52] As has been noted often, the *CCAA* was enacted by Parliament in 1933 during the height of the Depression. At that time, corporate insolvency led almost inevitably to liquidation because that was the only option available under legislation such as the *Bankruptcy Act* and the *Winding-Up Act*. In the result, shareholder equity was destroyed, creditors received very little, and the social evil of unemployment was exacerbated. The *CCAA* was intended to provide a means of enabling the insolvent company to remain in business: ***Hongkong Bank of Canada*** **v.** ***Chef Ready Foods Ltd.*** (1990), 4 C.B.R. (3d) 311 (B.C. C.A.); ***Quintette Coal***, *supra*.

[53] The courts have underscored that the *CCAA* requires account to be taken of a number of diverse societal interests. Obviously, the *CCAA* is designed to "provide a structured

environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both": ***Re Lehndorff General Partner Ltd.***, *supra*, at 31. It is intended to "prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed": ***Meridian***, *supra*, at 114. But the *CCAA* also serves the interests of a broad constituency of investors, creditors and employees: ***Chef Ready***, *supra*, at 320; ***Quintette Coal***, *supra*, at 314. These statements about the goals and operation of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

[54] There are a number of cases where third party rights have been affected by a stay order. ***Norcen*** provides a convenient starting point.

[55] Under the terms of the contract pursuant to which the debtor company (Oakwood) operated jointly owned oil and gas properties, the parties were entitled to replace the operator in the event of insolvency. Norcen was a party to the operating agreement, but not a creditor of Oakwood, nor present at the initial *CCAA* application. The stay order specifically enjoined Oakwood's removal as operator under any operating agreements. Norcen applied to vary the stay order and replace Oakwood pursuant to the terms of its operating agreement.

[56] In denying Norcen's application, Forsyth J. agreed that, by bringing its *CCAA* application, Oakwood had declared itself insolvent and that, normally, this would bring into play the replacement of operator provisions. He acknowledged at 11 (C.B.R.) that Norcen's rights might be affected permanently under the operating agreement were it not prevented from replacing Oakwood: if Oakwood's plan of arrangement was approved by its creditors and its insolvency thereby "cured", Norcen might lose forever its claim to replace Oakwood as operator. While not deciding the issue of whether the insolvency was capable of being "cured", he approached the case as involving more than a mere suspension of Norcen's rights. He concluded at 12, nevertheless, that the s. 11 powers were broad enough to affect the rights of non-creditors, noting that there was much room for discretion within the application of s. 11 "to refuse a stay when third party rights will be seriously prejudiced by its terms."

[57] Having determined that the s. 11 powers permitted interference with Norcen's contractual rights, Forsyth J. addressed the *CCAA*'s constitutional validity, observing that it had been upheld by the Supreme Court of Canada in ***Re Companies' Creditors Arrangement Act; A.G. Can.* v. *A.G. Que.***, [1934] S.C.R. 659, 16 C.B.R.1, [1934] 4 D.L.R. 75. Thus, he said, the continuance of insolvent companies must be considered a constitutionally valid statutory objective. "[I]t follows that a stay which happens to affect some non-creditors in pursuit of that end is valid" (p. 16). He concluded that continuance of a company

involves more than a consideration of creditor claims, adding that s. 11 of the *CCAA* could be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. In *obiter*, he expressed the view that fairness required that such interference "should be effective only for a relatively short period of time" (p. 16).

[58] A related case is ***Re T. Eaton Co.*** (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.). Dylex (not a creditor of T. Eaton but an operator of stores in malls where T. Eaton was the anchor tenant) applied to amend a *CCAA* stay order so that it could exercise rights pursuant to its leases. Those leases permitted Dylex to alter the lease terms if T. Eaton ceased to operate in the shopping centres. Houlden J.A. denied the motion, noting that, if such rights were accorded to Dylex, there might be other tenants who would make the same claim. This would likely increase the claims of landlords against T. Eaton and seriously impact its re-structuring plan. He took account of T. Eaton's position as a large employer and purchaser from suppliers. At 295-96, without extensive analysis, he opined that s. 11 and the inherent jurisdiction of the Court gave him the power to make orders against non-creditor third parties when their actions would potentially prejudice the success of the plan. I acknowledge that it is not clear that his order had the effect of altering contractual rights permanently, since, depending on the outcome of the re-organization proceedings, at a future time the tenants might still be able to exercise their rights under the leases. In this regard, the situation was akin to that in ***Norcen***.

[59] In ***Re Dylex Ltd.*** (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.), the debtor company was permitted to terminate its leases in shopping malls, as part of its restructuring program. Farley J. viewed s. 11 as giving the court the inherent jurisdiction, in the interim between the filing and the approval of a plan, to "fill in gaps in [the] legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan" (p. 110).

[60] To summarize, the language of s. 11(4) is very broad. The *CCAA* must be interpreted in a remedial fashion. Cases support the view that third-party rights may be affected by a stay order, although there are none where the third-party rights appear to have been affected in quite the same way as those of the Appellants as a result of this order. I am satisfied, nevertheless, that the *CCAA* gives the chambers judge the discretion to make the impugned order. It remains to consider whether he properly exercised that discretion.

2. Did the Chambers Judge Properly Exercise his Discretion under s. 11(4) of the *CCAA*?

[61] The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision-making, intended

that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

[62] A similar opinion was expressed by Macfarlane J.A. in ***Re Pacific National Lease Holding Corp.*** (1992), 15 C.B.R. (3d) 265 (B.C. C.A.). In considering whether to grant leave to appeal, he observed at 272:

> . . . 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. . . .
>
> 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.

[63] The Appellants point to cases where a specific issue arising under the *CCAA* has been sent for resolution to a forum other than the *CCAA* court. In each of those cases, however, it has been determined that resolution in the other forum would promote the objectives of the *CCAA*. In each such case, moreover, the *CCAA* judge has retained control over the impact of the outside determination.

[64] For example, in ***Re Philip's Manufacturing Ltd.*** (1991), 9 C.B.R. (3d) 1 (B.C. S.C.), the debtor company's landlord alleged that its leases were about to expire since the company had not given requisite notice. The judge noted that it was essential to the reorganization plan that the company be able to remain in the leased premises. He permitted the landlord to pursue proceedings under the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54. But that legislation contained a summary procedure for determining the issue at hand (whether the landlord was entitled to a writ of possession). The judge, moreover, maintained some control over the process by ordering that, if an order of possession was granted, it would be stayed for as long as the *CCAA* stay, "to be dealt with in the context of any reorganization plan ultimately brought before the court" (para. 44). Additionally, the summary procedure was to occur in the B.C. Supreme Court, the same court that supervised the *CCAA*.

[65] Similarly, in ***Re Cadillac Fairview Inc.*** (1995), O.J. No. 138 (Ont. Gen. Div.), an issue arose about the quantification of a claim affecting the debtor company. Farley J. permitted this issue to be determined by a court in Chicago, because that court undertook to resolve the matter expeditiously and in coordination with the *CCAA* proceedings.

[66] On the other hand, in ***Landawn Shopping Centres Ltd.* v. *Harzena Holdings Ltd.*** (1997), 44 O.T.C. 288 (Ont. Gen. Div.), a plan of arrangement was already in effect when

a landlord sought to proceed to arbitration with its claim against the debtor company. Instead, the court ordered that the claim be dealt with by the court under the terms of the plan of arrangement.

[67] These cases compel the conclusion that a judge has the discretion under the *CCAA* to permit issues to be determined in another forum but is under no obligation to do so. The proper exercise of the discretion will be very fact-dependent.

[68] As noted by Gibbs J.A. in ***Quintette Coal***, *supra*, at 312, the judicial exercise of discretion under s. 11 should "produce a result appropriate to the circumstances." The power under s. 11 should be exercised in a manner to give effect to the purpose of the *CCAA*, and not to "seriously ... impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."

[69] In this case, the chambers judge considered a number of matters in refusing to permit the arbitration. Among these were his view that the arbitration would compromise the *CCAA* process; that the effect of his order would not be to preclude or postpone the resolution of the dispute but to expedite it; that an expedited resolution of the dispute was critical to the *CCAA* proceedings given its possible impact on a plan of arrangement; and that it was desirable for Smoky's officers to focus on the re-organization.

[70] These were all legitimate matters to consider. Another factor, not mentioned by the chambers judge, is that arbitration had not been commenced in this case by the time the initial *CCAA* order was made. There may be reasons why the Appellants had not moved toward arbitration more rapidly. But the fact remains that several months had elapsed between the origin of the dispute under the Agreement and the *CCAA* petition, during which time no steps to commence arbitration were taken by the Appellants.

[71] It is also important to consider the nature of and the extent to which the Appellants' contractual rights may be compromised as a result of the order under appeal. I agree there are some potential advantages to the Appellants under arbitration. Specifically, they would be able to play a role in selecting the decision-maker. If their interpretation of s. 33 of the Rules and s. 23 of the B.C. *Arbitration Act* is correct, arguably the arbitration would limit Smoky's ability to rely on certain arguments that might be available in a court proceeding (for example, equitable arguments such as relief from forfeiture).

[72] But as the Appellants acknowledged during argument, no decision has yet been made about what rules will apply to the resolution of this dispute under the procedures to be determined by the chambers judge. It remains open to the Appellants to argue that Rule 33 and s. 23 of B.C. *Arbitration Act* ought to govern the resolution of their dispute in the *CCAA* proceedings. The only "rights" of the Appellants that have been affected so far are that they cannot help select the decision-maker and they must participate in proceedings

in the Court of Queen's Bench of Alberta. I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the *CCAA* proceedings. I assume that, in settling the details of the *CCAA* procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

3. What is the Relationship between the Discretion of the Chambers Judge under s. 11 of the *CCAA* and s. 15 of the B.C. *Arbitration Act*?

[73] It is apparent that I have taken a different approach than the chambers judge, who focussed largely on s. 15 of the B.C. *Arbitration Act*. He was correct in his opinion that, under that legislation, a stay must be ordered unless one of the three disabling events exists. If a case is governed by that legislation, a court should honour the choice of the parties to go to arbitration and has very limited power to refuse a stay of competing proceedings. ***Kaverit Steel and Crane Ltd.* v. *Kone Corp.*** (1992), 87 D.L.R. (4th) 129 (Alta. C.A.); ***Prince George (City)* v. *McElhanney Engineering Services Ltd.***, [1995] 9 W.W.R. 503 (B.C. C.A.).

[74] He concluded that, as a result of Smoky's insolvency, the appointment of a Monitor, and the court's role under the *CCAA*, the agreement to arbitrate was "incapable of being performed". The Appellants say this conclusion was wrong.

[75] But even if the chambers judge erred in interpreting s. 15, the outcome of this case would not change. There would then be a conflict between the *CCAA* and a provincial statute. The Appellants do not contest the constitutional validity of the *CCAA*. The authorities are clear that, in the event of a conflict with a provincial law, the *CCAA* must prevail. ***Wynden Canada Inc.* v. *Gaz Métropolitain Inc.*** (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); ***Re Pacific National Lease Holding Corp.***, *supra*; ***Pacific National Lease Holding Corp.* v. *Sun Life Trust Co.*** (1995), 34 C.B.R. (3d) 4 (B.C. C.A.). Accordingly, it is not necessary to decide whether he misapplied s. 15.

[76] For these reasons, I would dismiss the appeal.

APPEAL HEARD on APRIL 13, 1999

REASONS FILED at CALGARY, Alberta,
this 9th day of JUNE, 1999

HUNT J.A.

I concur:

PICARD J.A.

I concur: _____
McINTYRE J.A.

Tab 15

CITATION: Timminco Limited (Re), 2012 ONSC 2515
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120427

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **James C. Orr and N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, *Penneyfeather v. Timminco Limited et al* (Court File No: CV-09-378701-00CP)**

P. O'Kelly and A. Taylor, for the Applicants

P. LeVay, for the Photon Defendants

A. Lockhart, for Wacker Chemie AG

K. D. Kraft, for Chubb Insurance Company of Canada

D. J. Bell, for John P. Walsh

A. Hatnay and James Harnum for Mercer Canada, Administrator of the Timminco Haley Plan

S. Weisz, for FTI Consulting Canada Inc., Monitor

HEARD: **March 26, 2012**

ENDORSEMENT

[1] St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and

extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

[2] The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;

(b) a motion to substitute the Representative Plaintiff;

(c) a motion to force disclosure of insurance policies;

(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;

(e) settlement discussions;

(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;

(g) a motion for particulars; and

(h) a motion served but not heard to strike portions of the Statement of Claim.

[3] On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

[4] The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

[5] On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

[6] Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could

seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

[7] Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Canadian Shopping Centres Inc. v. Dutton*, (2001) 2 S.C.R. 534 at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

[8] Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

[9] Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank of Canada*, (1992) O.J. No. 889 at paras. 13-15 (C.A.) and *Re Carey Canada Inc.* (2006) O.J. No. 4905 at paras. 7, 16-17.)

[10] In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

[11] The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

[12] Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

[13] Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

[14] It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

[15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[16] Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590 (S.C.J.) at para. 27.

[17] Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re), supra*, at para. 27.

[18] Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

[19] I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

[20] It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an

"equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

[21] In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

[22] Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also follows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

[23] With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

[24] I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

[25] In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

MORAWETZ J.

Date: April 27, 2012

Tab 16

Ontario Supreme Court
Cadillac Fairview Inc., Re
Date: 1995-01-19

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

Re plan of compromise or arrangement of CADILLAC FAIRVIEW INC. and all other companies set out in Sched. "A" attached hereto;

CADILLAC FAIRVIEW INC. and all those companies set out in Sched. "A" (applicants)[1]

Ontario Court of Justice (General Division – Commercial List) Farley J.

Heard – January 18, 1995.

Judgment – January 19, 1995.

Earl A. Cherniak, Q.C., Robert J. Morris and Lyndon A.J. Barnes, for applicants Cadillac Fairview Inc. and Cadillac Fairview Corporation Limited.

W.A. Kelly, Q.C., J.C. Orr and H.A. Daley, for JMB/CF Advisors – CFCL, JMB/CF Advisors – CFUS, JMB Realty Corporation and related entities.

David Byers, for mortgage lenders.

Charles F. Scott, for syndicate lenders.

Steven Sharpe, for Goldman, Sachs and for Whitehall

Peter Roy, for Subordinated Debt Committee.

James Dube, for Canadian Imperial Bank of Commerce.

T.M. Dolan, for Toronto Dominion Bank.

(Doc. B38/94)

[1] January 19, 1995. FARLEY J.: – This motion came on at 5:00 p.m. It was for this Court's advice and directions pursuant to para. 35 of my December 23, 1994 Order with respect to the adjudication of claims relating to:

(a) the Advisory Agreement dated November 2, 1987 among Cadillac Fairview Inc., The Cadillac Fairview Corporation Limited and JMB/CF Advisors – CFCL;

(b) the Advisory Agreement dated November 2, 1987, among Cadillac Fairview Inc., Cadillac Fairview U.S. Inc. and JMB/CF Advisors – CFUS; and

[1] Schedule "A" was not provided by the court.

(c) any other claims between the Applicants and their related United States companies (as listed in Sched. "D" to the December 23, 1994 Order) and JMB Realty Corporation and its related entities.

[2] The grounds for the motion were succinctly put as "(a) the Advisory Agreements and the claims arising in respect thereof are of critical importance to the Applicants' Plan of Compromise; (b) it is essential that such claims be adjudicated quickly in order that such Plan can be formulated and presented to creditors.".

[3] The Applicants terminated the Advisory Agreements following the grant of the December 23, 1994 Order. Apparently the amounts estimated to be forthcoming if the terminations had not taken place would have been in excess of several hundred million dollars. It is understood that the Applicants take the position that the JMB entities ("JMB") have either breached the Agreements in some way that would entitle the Applicants to terminate them or that the Agreements were void or voidable pursuant to s. 132 of the *Business Corporations Act,* R.S.O. 1990, c. B-16, as amended, ("OBCA") because the provisions of that section were never complied with at any time. Under the second alternative, the Applicants assert that they have a claim for the return of several hundred millions of dollars already paid.

[4] This afternoon JMB advised the Applicants that it had initiated a lawsuit against them (and Cadillac Fairview U.S., Inc.) in Chicago:

> 2. In this action, JMB seeks: (a) declarations that its Advisory Agreements are valid and enforceable (Count 1); (b) recovery of the damages suffered as a result of defendants' breaches of the Advisory Agreements (Count II); and (c) an injunction and other relief to prevent defendants from fraudulently transferring funds from the U.S. operations and entities to or for the benefit of Canadian entities or a particular group of creditors of CFI (Counts III-IV)

[5] In these reasons I will deal with the situation as if the JMB Chicago action had not been initiated and then I will deal with that aspect secondly. However, I would observe that the return date for the Chicago action is 11:00 a.m. January 19, 1995 (Chicago time – 12 noon Toronto time). It was therefore requested that I make my reasons available as soon as possible on the morning of January 19th. I also note that the speed with which JMB has acted in the Chicago action confirms that JMB and its legal counsel are able to act very

expeditiously; thus there would not appear to be any difficulty in adhering to a tight litigation timetable so long as there was a reasonable (in the circumstances) allowance of time.

[6] The Applicants proposed in Sched. C a timetable which would allow a determination of the Advisory Agreements question and claims arising therefrom vis-à-vis the Applicants and JMB in a period of time immediately after March 3, 1995, with the trial of the issues to take place according to the time the Court could clear. The Applicants propose that it be JMB which initiate the claim whereas JMB proposes that it be the Applicants which issue a Statement of Claim. Given the nature of questions to be answered, I see no difference in substance as to which initiates the claim – they are opposite sides of the same coin. Since it seems to be a matter of importance to JMB and the Applicants did not make any objection, I would think that we can proceed with the Applicants issuing a Statement of Claim – but as discussed, infra, in a trial of issue format.

[7] Mr. Kelly was given, by my Registrar during the hearing, a copy of the Trial Requirements Memo which has been widely circulated over the last half-year in the Commercial List, which memo merely formalizes the procedures we have adopted previously for Commercial List cases. I would note that we have received no "complaints" or query from the bar with this memo except for the question as to the use of a joint expert (but this is only a recommendation for consideration and I doubt it would come into play in this case; in any event it appears that the bar may be more comfortable with experts for both sides, in which case there should be an early exchange of reports and the opportunity to critique). Allow me to emphasize that this type of litigation as we have in the subject case is what has been termed "real time" litigation (vs. "autopsy" litigation). If it develops into "autopsy" litigation then clearly under those circumstances there will be a diminution in "value" over which all interested parties would be staking their claims in this type of litigation. This is not "hurried up" justice since, if so, this could be justice denied in the same way as justice delayed is. It is, however, justice on a timing to meet the exigencies of the circumstances. Therefore, axiomatically the Court cannot (and will not in the interests of ensuring that there is justice for all concerned) allow the case to be "hijacked" by tactics.

[8] I referred Mr. Kelly to *Ashmore v. Corp. of Lloyd's,* [1992] 2 All E.R. 486 (H.L.), a very instructive decision for a multiple number of reasons. I think an excerpt from the headnote is particularly apposite (see p. 486):

> **Held** – the control of proceedings was always a matter for the trial judge and the parties were not entitled as of right to have their case tried to a conclusion in such manner as they thought fit and if necessary after all the evidence had been adduced and could have no legitimate expectation that such a course would be followed. A party's only legitimate expectation was that he would receive justice which could only be achieved by assisting the judge and accepting his rulings. Furthermore the decision or rulings of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by the appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.

I also note Lord Templeman's views at p. 493:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable, without judgment or discrimination. In *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 959, [1991] 2 AC 249 at 280-281 I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So, too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong.

[9] Counsel must represent their clients' interests (and we in society expect – in fact demand – that they do it well). Counsel are also officers of the Court – and thus we must rely on them to be ardent supporters of the justice system – a system (with an independent judiciary and capable counsel) without which we in society would be lacking one of our most fundamental and cherished rights – in fact without the system of justice all of our other rights and legitimate expectations would be in jeopardy. We must jealously and zealously preserve this system. I note too in passing that the system is to be there for everyone – everyone is entitled to their day in Court – but not someone else's day. Thus Court time must be enforceable and co-operatively used so that others who wish access to justice will have a reasonable and legitimate opportunity to do so. I raise these aspects generally; I do not wish in any way that they be misconstrued as being directed at Mr. Kelly (or his clients). Mr. Kelly and Mr. Cherniak are two very experienced counsel who I have no doubt will provide not only

excellent legal advice but also excellent practical advice to their clients – after all, when a client says to counsel "Win this case", he is really saying "Help me solve my problem". These comments are directed at all counsel and parties in these proceedings – and to any other litigants in any cases generally. I would also emphasize that the success which the Commercial List has apparently enjoyed is, to my mind, based on the 3 Cs – co-operation, communication and common sense.

[10] In the conclusion re scheduling I would therefore ask counsel to discuss and hopefully agree on a timetable which would allow them to be trial-ready for the week of March 6, 1995. I would ask for this and the issues to be tried to be given me by Friday afternoon, January 20, 1995.

[11] I should also note that it appears that JMB's claim would be unsecured. It therefore strikes me that given the secured debts and the "values" present, it would be highly undesirable for JMB not to co-operate in a reorganization since it would be apparent that in a pure bankruptcy it would recover nothing, given its underwater position. I would also observe that, while (and I do not doubt that they will do so) JMB and the Applicants will vigorously advance its interests, one may wish to step back and objectively assess what those interests are. Clearly as well any adviser (including legal advisers) who materially assists a party in reaching a better than trial (and appeal) result with its uncertainties, inability to synergize benefits (win/win brainstorming), costs (legal, financial, other out-of-pocket expenditures, time, loss of opportunity, etc.) and length of time (which may result in the matter becoming worthless or certainly less valuable) should be entitled to a substantial premium in fees (vs. the usually inefficient and counter-productive process of it being a mindless multiplicand of hourly rate times hours docketed). This is not restricted to the multi-million dollar case; it is equally applicable to and probably more important in the small-dollar case. Lastly, I would note that for the purposes of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA") proceedings it is only necessary to determine the value of JMB's on-going claims; it is not necessary to determine whether JMB must disgorge its past receipts. However, if the parties sit down and truly communicate (i.e., try to understand what the other side is trying to convey), then perhaps the two elements can be dealt with. I am of the view that the parties should do this and I therefore expect that in the case timetable they will schedule meetings of counsel and parties to that end – as well as adhering to the Commercial

List's requirements of continually canvassing the prospects of settlement or resolution. This is so much more productive than the Götterdämmerung scenario.

[12] As for the importance of determining the JMB claim, it appears to me that it is of such a potential magnitude that it would have a significant impact upon any class of creditors drawn up in any plan to be formulated under the CCAA regime by the Applicants. It may well give JMB a veto position, especially if current projections hold. However, even if it were valued at less than what is currently projected (but well above zero), then one should not lose sight that it will impact the overall question – that is, in my view, it is not necessary to have a veto for it to loom important since that presupposes that all other unsecured claimants would vote the same way. Clearly, this claim at present is not of the nature of a $1 million dollar claim in a class where there are 99 other claims of other creditors of $1 million dollars each – thereby becoming submerged as to number and value. I think it sophistry to insist that there be a plan proposed in detailed form by the Applicants prior to there being any determination of a claim which is of such importance as the JMB claim.

[13] I am further of the view that my analysis (relating to the fallout regarding the Algoma guarantee of its U.S. subsidiary Cannelton) in *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) is correct vis-à-vis the question of JMB having a claim provable in bankruptcy and therefore JMB should receive "creditor" treatment. I do not think that the analysis in *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.,* [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) "survives" the change in the legislation. I would note that my *Algoma* decision given orally might be reasonably misconstrued with reference to p. 7 (as it appears JMB has done so). It is clear that a U.S. corporation can be a "company" within the meaning of CCAA – but provided that it has assets or does business in Canada (see definition of "company" in s. 2 which conceivably could allow the extension to a U.S. corporation with a bank account in Canada).

[14] With respect to third party aspects I am of the view that while the *Rules of Civil Procedure* allow for third party proceedings and they may be the more efficient way of dealing with litigation which is not so "time critical" as this appears to be, it is not mandatory to incorporate them since they can be dealt with otherwise.

[15] In another Algoma case, *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.), the Court said that, regarding the Kelsey-Hayes claim at p. 14:

> The fact that s. 12(2)(iii) provides that the amount of a creditor's claim, if not admitted by the company, "shall be determined by the
>
> court on summary application by the company or by the creditor" does not compel the court to determine the valuation summarily. The provision simply authorizes the proceedings to be brought summarily, that is, by way of originating notice of motion or application rather than by the lengthier, and more complicated, procedure of an action. In an appropriate case, therefore, there is no reason why the determination cannot be made after a trial either of an issue or an action in the course of which production and discovery would be available. In the absence of such a trial, it cannot be said, in our view, that the valuation of the claim of Kelsey-Hayes against Algoma in the sum of $1 is correct.

It was clear from the Court's example at p. 18 that it was concerned about possible hardship to a worthy claimant – and as well generally that the CCAA plan approved by the stakeholders in Algoma not be disturbed (although the Court appears at p. 13 to have misconstrued my analysis when it said: "Mr, Justice Farley held that he had no authority to permit Kelsey-Hayes to proceed against *Algoma and went on to confirm the valuation of the claim at $1*" (emphasis added)). Firstly, I believe that I indicated I had no authority to permit Kelsey-Hayes to proceed against *Royal Insurance Company (not* Algoma) by virtue of the wording of s. 132(1) of the *Insurance Act,* R.S.O. 1990, c. I.18. Secondly, despite my adjourning the first hearing for two reasons – (i) to require Kelsey-Hayes to notify Royal Insurance of the claims proceedings so that its views could be known about a direct claim against it and (ii) to present some evidence (really *any* evidence) about its claim when all that in reality had been advanced by Kelsey-Hayes was that it only wished to proceed against the insurance pot – but in fact, Kelsey-Hayes presented no evidence in support of its claim at the time of the resumed hearing either. Thirdly, I would ob serve that I do not believe the question of summary proceedings was even canvassed by Kelsey-Hayes let alone objected to at the stage of proceedings before me. However, I would add that the decision of the Court of Appeal is a model of practicality and ingenuity.

[16] I do not see the questions relating to the Advisory Agreements as being very difficult to grasp or complex, particularly when one recalls the dictates of Lord Templeman. In my view, the discovery process (examination and production) can be expeditiously dealt with when one recalls the governing feature is *relevance.* The s. 132 OBCA question is a very restricted one which will likely almost exclusively centre upon the corporate records. The question of "fundamental" breach would appear to be aptly named in this situation, since it would seem that the allegations are of such a nature that the ultimate decision would be clearly apparent

on one side – or the other. That is, it does not seem to lend itself to the murky middle zone which may get the parties involved in attempting a microscopic examination of the universe. Rather, it appears that if there is a fundamental breach it should be apparent to anyone with 20-100 eyesight (without the benefit of corrective lenses) without the necessity of such a detailed examination of minutiae. The fact that millions of dollars are at issue is meaningless as to the principles and facts involved; likely it only means that clients will pay their counsel great sums to fight the case.

[17] I would be of the view that, with the use of the 3 Cs, the Trial Requirements Memo, and the efficient and effective use of time, the parties will be able to meet the timetable requirements discussed above with trials of issue tentatively scheduled for the week of March 6, 1995. This will allow for such viva voce evidence as may be reasonably necessary. I would therefore ask counsel to formalize the specific issues to be tried and give that to me with their case timetable. I have no doubt that these counsel will ensure that the Court has all the necessary evidence before it to make the appropriate decisions (and the corollary of not having surplus and unneeded evidence).

[18] It seems to me that it would be highly desirable for those voting on a plan to have as much certainty as possible as to what would be the implications of such an approved plan (i.e., what claims are accepted as involved in the question of what is proposed to be compromised) and who will have what percentage of the vote in any class. I fully recognize that any trial decision can be appealed but I also note the extreme co-operation and accommodation which the Court of Appeal has shown in dealing with "real time" litigation appeals.

[19] I turn to the Chicago action now. It is difficult for one, I believe, to draw any other conclusion, given that JMB was aware of this motion by the Applicants, than that the Chicago proceedings are tactical. It would also appear that what JMB wishes to achieve in the Chicago proceedings is essentially what would be determined in the trials of issue contemplated in these proceedings. I also note that in *Re Tridont Health Care Inc.* (1991), 4 C.B.R. (3d) 290 (Ont. Bktcy.), I commented that the Commercial List procedures then could in essence be the "happy marriage" of a bankruptcy proceeding and an ordinary civil proceeding. Then I am of the view that, notwithstanding the use of "in Canada" in several places in the stay of proceedings paras. 10(a) and (e), one should not overlook that the subsequent wording of

these clauses is not so restricted. It would therefore appear to me at first glance that JMB, by its Chicago proceedings, may have – and perhaps inadvertently so – transgressed against the prohibition in paras. 10(a) and (e). Clearly JMB is now in an Ontario Court while at the same time it is suing the Applicants in the Chicago proceedings. I would further note that the December 23, 1994 Order had an appropriate comeback clause (para. 36) which to date JMB has not availed itself of if it felt that the relief granted in the Order were too extensive or otherwise inappropriate.

[20] Lastly, I would indicate that para. 39 of that Order requests the aid and recognition of any Court including any Court of the United States (Federal or State) or any administrative body in the United States of America "to act in aid of and to be complementary to this Court in carrying out the terms of this Order". Certainly there is recognition of the intertwining of our economic relations in the NAFTA Treaty entered into between Canada and the United States.

[21] As I mentioned in my paper "Transnational Insolvencies and Restructurings: The Need For Cooperation And Co-ordination" (to be given at the International Bar Association, Lagos, Nigeria, February 27-28, 1995) at p. 17:

> ...would be the North American Free Trade Agreement which includes in its chapter relating to investments Article 1109 concerning transfers:
>
> Article 1109:
>
> 1. Each party shall permit all transfers relating to an investor of an investor of another Party in the Territory of the Party to be made freely and without delay...
>
> 4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application if its laws relate to:
>
> (a) bankruptcy, insolvency or the procedures of the rights of creditors;...
>
> At this stage the ramifications of such clause have not been considered by any court.

[22] As well, we have the mutual advantage of our two legal systems having common roots in the common law and evolving in such ways as to meet the needs of the situations as they arise as opposed to being hide-bound by codes as in other areas of the world where there is not the concept of inherent jurisdiction (see *Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd.* (1971), 21 D.L.R. (3d) 75 (Man. C.A.) at pp. 80-81, *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at pp. 35-38, and my decision *887574 Ontario Inc. v. Pizza Pizza Ltd.* (Ont. Gen. Div. [Commercial List]) released January 1, 1995). Lastly, I would observe that our Courts give full recognition to comity and that this is being expanded to meet the needs of modern day international aspects: see

Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407 (Gen. Div.), especially at p. 411 where MacPherson J. stated:

> The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing interjurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095 [S.C.R.]:
>
> "Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem,* such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected."*
>
> (Emphasis added)
>
> *Morguard Investments was,* as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule – there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process.

[23] I would therefore respectfully request the Chicago Court to take these factors into consideration before advancing further with the proceedings before it. I note that this case is significantly different from *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96 since there is already in existence (and known to JMB) the proceedings here in Toronto and the December 23, 1994 Order including the stay provisions. It may very well be that with more time for reflection (and

further submissions if necessary) Courts on both sides of our border will be able to determine the most appropriate way of proceeding, without the pressure of last minute and unannounced actions.

[24] Counsel demonstrated their customary ability in being able to reach conclusions expeditiously and co-operatively in that they agreed that costs in this motion should be in the event and in the amount of $5,000. JMB is to pay the Applicants that amount forthwith.

Order accordingly.

Tab 17

DATE: 20060523
DOCKET: C45225

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES'S CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MCMURTRY C.J.O., WEILER and BLAIR JJ.A.**

COUNSEL: **Paul Macdonald and Brett Harrison for Sunrise Partners Ltd.**

Larry Ellis for the Monitor

Robert Staley and Derek Bell for Informal Committee of Senior Debenture Holders

Aubrey Kauffman for 2074600 Ontario Inc.

HEARD & RELEASED ORALLY: **May 16, 2006**

On appeal from the order of Justice Farley of the Superior Court of Justice dated March 7, 2006.

ENDORSEMENT

[1] The appellants are the holders of certain Convertible Notes of Stelco. They seek to set aside the order of Farley J. dated March 7, 2006, which they describe as imposing "an expedited, summary 'CCAA-style' claims process" for the determination of certain inter-creditor claims in the Stelco restructuring. They assert that the order was made without jurisdiction either under the CCAA or through the exercise of the court's inherent

jurisdiction, and that the order deprives them of their rights to require those who wish to assert Subordination Claims as against other Stelco creditors to prove those claims in a ordinary civil lawsuit with all the bells and whistles that go with such a proceeding.

[2] The respondents say that the March 7 order was a discretionary, interlocutory, scheduling order made in the course of the CCAA proceedings by the experienced supervising judge, familiar with those proceedings, and that the decision should be granted deference and left in place.

[3] We agree with the respondents.

[4] The Stelco restructuring Plan under the CCAA was negotiated and approved by all creditors – including the appellant Convertible Noteholders and the respondent Senior Bondholders. It was sanctioned by Justice Farley on January 20, 2006.

[5] The Plan establishes a pool of cash, warrants, and securities of various kinds for purposes of satisfying the claims of Stelco's creditors. These are known as the "Turnover Proceeds". Distributions cannot be made out of the pool in relation to the Convertible Noteholders and the Senior Bondholders until the issue of the latter's subordination claims has been determined. This is because the instruments establishing the rights of the Convertible Noteholders and the Senior Bondholders provide that the latter are entitled to be paid in full before the former can recover anything. Thus, it is necessary to fix the Senior Bondholder's claim – which in turn requires a valuation of the securities in the pool – to determine the respective distributions from the Turnover Proceeds.

[6] Section 6.01(2) of the Plan specifically provides that the Plan is not to prejudice the rights of the holders of the Senior Debt to pursue their subordination claims or the rights of the Convertible Noteholders to raise any defences. "In that regard", it then stipulates that the Monitor (who holds the Turnover Proceeds) will apply within 30 days of the Plan Implementation Date for an order "seeking directions in respect of a process to determine *on a timely basis* entitlements to the Turnover Proceeds".

[7] The appellants are creditors of Stelco and at least some of them participated in the negotiation of the Plan. In any event they voted on approval and the Plan was approved and is binding on them.

[8] In short, the parties negotiated as part of the Plan, and agreed to – and the Court sanctioned -- a mechanism for resolving "entitlements to the Turnover Proceeds". That is what this dispute is about. The evidence before Farley J. indicated that a significant portion of the Turnover Proceeds consists of potentially volatile marketable securities that could not be traded until this dispute is resolved. The procedure created by Farley J. reflects this dynamic of the Stelco process and responds to the particular exigencies of this restructuring.

[9] Mr. Macdonald argues that the appellants should be entitled to their full rights of process under the Rules of Civil Procedure and to put the respondents to compliance with the Class Proceedings Act. We do not agree. That is not what the Plan calls for, nor is it what we would expect in the context of a complicated and time-driven CCAA proceeding such as the Stelco restructuring. The Plan contemplates *directions* with respect to a *process to determine* entitlements to the Turnover Proceeds *on a timely basis*. If the parties and the Court had intended the subordination claims issue to be resolved by way of a regular lawsuit, they would simply have said so or left the Convertible Noteholders and the Senior Bondholders to their normal remedies. They did not.

[10] This is not a pure inter-creditor dispute that is unconnected to the debtor, Stelco. It is a dispute that invokes – at least insofar as the subordination claims that have to be resolved for purposes of distribution of the Turnover Proceeds are concerned – the provisions of the Plan and the court's control of its own process in relation to matters pertaining to the roll out of the Plan.

[11] Thus, the circumstances differ from those involved in either of the two prior Stelco cases to which we were referred. In *Re Stelco* (2005), 75 O.R. (3d) 5 (C.A.) – the directors case – the court was dealing with a matter relating to the company's role in the restructuring process as opposed to the court's role in the restructuring process. The present case pertains to the court's control over the restructuring process. In *Re Stelco*, [2005] O.J. No. 4883 (C.A.) – the classification case – the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company. As pointed out above, however, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

[12] The Monitor duly applied to the Court, as required, and Farley J., exercising his jurisdiction as the supervising judge of the Stelco restructuring put a timely process in place – in CCAA Commercial List fashion – to resolve the entitlements to the Turnover Proceeds. His jurisdiction over the process of the CCAA restructuring extends at least to continued process-related matters concerning the rollout of the Plan in accordance with its provisions.

[13] Farley J. is entitled to considerable deference in respect of this type of discretionary decision, which, as the respondent submits, is in the nature of an interlocutory, scheduling order. We see no basis for interfering with his order

[14] Accordingly, the appeal is dismissed.

[15] The respondent Informal Committee of Senior Debenture Holders is entitled to the costs of the motion before Labrosse J.A., fixed at $500.00, and to the costs of the appeal, fixed in the total amount of $12,500.00 inclusive of disbursements and GST.

"R.R. McMurtry C.J.O."
"K.M. Weiler J.A."
"R.A. Blair J.A."

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD

Court File No. CV-13-10279-00CL

ONTARIO
Superior Court of Justice

(Commercial List)

Proceeding Commenced at Toronto

BOOK OF AUTHORITIES
(re: Allen-Vanguard Motion)

McCarthy Tétrault LLP
Barristers and Solicitors
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Kevin McElcheran LSUC# 22119H
Tel.: (416) 601-7730
Fax: (416) 868-0673

Heather Meredith LSUC# 48354R
Tel.: (416) 601-8242
Fax: (416) 868-0673

Lawyers for Growthworks Canadian Fund Ltd.

#13152620