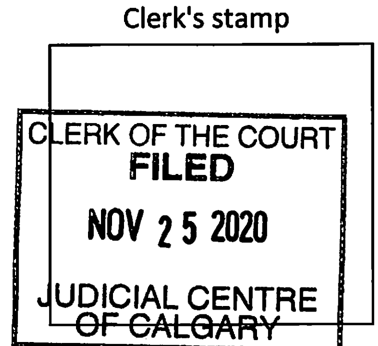
Clerk's stamp



COURT FILE NUMBER	2001-05482
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.
DOCUMENT	BENCH BRIEF OF GOWLING WLG (CANADA) LLP, THOMAS CUMMING, CAIREEN HANERT and ALISON GRAY
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** Barristers 800, 304 8th Avenue SW Calgary, Alberta T2P 1C2 Gavin Price Phone: 403-571-1520 Fax: 403-571-1528 11396-471

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. LAW 1

III. LIST OF CASE AUTHORITIES & STATUTES 9

I. INTRODUCTION

1. This Bench Brief is submitted to this Honourable Court to set out the law in relation to the duty of good faith in the context of insolvency proceedings.

2. Further submissions and argument will be made at the hearing of the Application of Jerry Shankowski and 945441 Alberta Ltd. as it relates to relief sought against the professional advisors to JMB Crushing Systems Inc. and 2161889 Alberta Ltd., the Monitor, and the professional advisors to the Monitor.

II. LAW

<u>Good Faith in Insolvency Proceedings</u>

3. "Good faith" is not defined in the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended (the "**CCAA**"). The duty of good faith has been referred to from time to time in the case law as part of insolvency proceedings under the CCAA, but it has only recently been enacted as a specific provision in the CCAA. Section 18.6 came into force on November 1, 2019 and provides:

> **Good faith**
>
> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended, s 18.6 [**Tab 1**]

4. As a result of section 18.6, the concept of good faith will remain the same under the CCAA, but the scope has been expanded to cover all parties under all circumstances.

5. Not surprisingly, there is very little case law on section 18.6. However, the Supreme Court of Canada recently provided some commentary on section 18.6 in a decision issued on May 8, 2020.

> One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges … From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

The CCAA capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and “meet contemporary business and social needs” (Century Services, at para. 58) in “real-time” ... The anchor of this discretionary authority is s. 11, which empowers a judge “to make any order that [the judge] considers appropriate in the circumstances”. This section has been described as “the engine” driving the statutory scheme …

The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three “baseline considerations”, which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness “is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA” (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA, which provides:

Good faith

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

Good faith — powers of court

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

…

> The third consideration of due diligence requires some elaboration. Consistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage ... The procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights ... A party's failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA regime ... [emphasis added; citations omitted]

9354-9186 Québec Inc. v Callidus Capital Corp.,
2020 SCC 10 at paras 47-51 [**Tab 2**]

6. Section 18.6 was also referred to by Justice Horner in *Re Accel Canada Holdings Limited* in the context of an application by a party claiming to have a valid and enforceable claim against one of the debtor companies that gave rise to a secured interest in that debtor company's assets. The Court referred to section 11 of the CCAA, and noted that a court "must bear in mind the requirements of appropriateness, good faith, and due diligence when exercising its authority under the CCAA".

Re Accel Canada Holdings Limited, 2020
ABQB 204 at paras 21-23 [**Tab 3**]

7. Determining what constitutes good faith is context-specific. In the insolvency context, a useful discussion is found in *Springridge Farms Ltd. (Trustee of) v Spence*. Although this discussion was in the context of bankruptcy, the discussion of good faith is equally applicable in the CCAA context.

> … I will deal firstly with the meaning of "good faith," and I have found the following definitions or references to these words:
>
>> (a) Webster's Third New International Dictionary (Unabridged):
>>
>> Good faith — a state of mind indicating honesty and lawfulness of purpose ... belief that one's conduct is not unconscionable or that known circumstances do not require further investigation.
>>
>> (b) *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979):
>>
>> Good faith ... encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and

> inner spirit and, therefore, may not conclusively be determined by his protestations alone. ... Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. ... In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose ... .

…

> In some instances "good faith" is described as being the opposite of "bad faith." Others indicate that there can be an absence of good faith which does not amount to bad faith. In any event, <u>I conclude that the phrase "in good faith" quite simply means to act honestl</u>y; whether failure to act honestly constitutes bad faith, is a question I need not answer. [emphasis added]

Springridge Farms Ltd. (Trustee of) v Spence,
1991 CarswellSask 43 at paras 19-20 **[Tab 4]**

8. Good faith has been considered by the courts in the context of performance of contracts, most recently by the Supreme Court of Canada in *Bhasin v Hyynew*. In *Bhasin*, the Court held that there is a common law duty that applies to all contracts that requires the parties to act honestly in the performance of their contractual obligations.

> Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. <u>While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce</u>. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties …

…

> The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. <u>While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases.</u> It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. <u>Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.</u>

…

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest … Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency … The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.
>
> …
>
> … I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.
>
> …
>
> The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*aberrimae fidee*) such as insurance contract, with, among other things obliges the parties to disclose material facts … But a clear distinction can be drawn between a failure to disclose material fact, even from intention to end the contractual arrangement, and active dishonesty. [emphasis added; citations omitted]

Bhasin v Hrynew, 2014 SCC 71 at paras 60, 65, 70, 73, 86 [**Tab 5**]

9. Therefore, acting in good faith does not imply or include a duty to disclose.

10. In any event, the relevant Orders of this Honourable Court in these proceedings placed the onus on persons seeking to claim liens to provide all documentation and information required to support their claim, and provided a mechanism for them to obtain any additional information that they required from the Monitor.

11. Under paragraph 7 of the Order in respect of Lien Claims against the MD of Bonnyville pronounced on May 20, 2020 (the "**Lien Process Order**"), any person wishing to assert a lien claim against the land (the MD of Bonnyville's yard) and who had not yet registered a lien against the lands was required to deliver a lien notice by email to the Monitor's attention within the time frame prescribed by the Builder's Lien Act, RSA 2000, c B-7 (the "**BLA**") in order to preserve and perfect their lien claim. The lien notice was attached as Schedule "A" to the Lien Process Order and required a person claiming a lien to set out the full particulars of its claim, including all applicable contracts, sub-contracts, the nature of the work completed or materials furnished, the last day on which any work was completed or materials furnished together with other relevant information.

12. Under paragraph 26 of the amended and restated Initial Order of the Honourable Madam Justice K.M. Eidsvik provided for information being disseminated to creditors:

> 26. The Monitor shall provide any creditor of the Applicants and the Interim Lenders with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

13. Further, the BLA provides in section 33 for the provision to subcontractors of the contract between the owner and the contractor:

> **Inspection of contract, etc.**
>
> **33(1)** A lienholder, by notice in writing, may at any reasonable time demand,
>
> (a) of the owner or the owner's agent, the production for inspection of the contract with the contractor,
>
> (b) of the contractor, the production for inspection of
>
> (i) the contract with the owner, and
>
> (ii) the contract with the subcontractor through whom the lienholder's claim is derived,
>
> and
>
> (c) of the subcontractor through whom the lienholder's claim is derived, the production for inspection of the contract with the contractor,

and the production for inspection of a statement of the state of accounts between the owner and contractor or contractor and subcontractor, as the case may be.

(2) If, at the time of the demand or within 6 days after it, the owner or the owner's agent, the contractor or the subcontractor, as the case may be,

(a) does not produce the written contract and statement of accounts, or

(b) if the contract is not in writing,

(i) does not, in writing, inform the person making the demand of the terms of the contract and the amount due and unpaid on the contract, or

(ii) knowingly and falsely states the terms of the contract or the amount due or unpaid on it,

then, if the lienholder sustains loss by reason of the refusal or neglect or false statement, the owner, contractor or subcontractor, as the case may be, is liable to the lienholder in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of the lienholder's lien.

(3) A lienholder, by notice in writing, may at any reasonable time demand of a mortgagee or the mortgagee's agent or unpaid vendor or the unpaid vendor's agent

(a) the terms of any mortgage on the land or any agreement for sale of the land in respect of which the work is or is to be done or in respect of which materials have been or are to be furnished, and

(b) a statement showing the amount advanced and the amount currently due and owing on the mortgage or the amount owing on the agreement, as the case may be.

(4) If the mortgagee or vendor or the mortgagee's or vendor's agent fails to inform the lienholder within 6 days after the date of the demand

(a) of the terms of the mortgage or agreement, and

(b) of the amount owing on it,

then, if the lienholder sustains loss by reason of the failure or by reason of any misstatement by the mortgagee or vendor of the terms or amount owing, the mortgagee or vendor is liable to the lienholder in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of the lienholder's lien.

(5) The court may on application at any time before or after proceedings are commenced for the enforcement of the lien make an order requiring

(a) the owner or the owner's agent,

(b) the contractor,

(c) a subcontractor,

(d) the mortgagee or the mortgagee's agent, or

(e) the unpaid vendor or the unpaid vendor's agent,

as the case may be, to produce and allow a lienholder to inspect any contract, agreement, mortgage, agreement for sale, statement of the amount advanced or statement of the amount due and owing, on any terms as to costs that the court considers just.

RSA 2000 cB-7 s33; 2009 c53 s28
Builder's Lien Act, RSA 2000, c B-7, s 33 **[Tab ●]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2020.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: ______________________________
Gavin Price
Counsel for Gowling WLG (Canada) LLP, Thomas Cumming, Caireen Hanert and Alison Gray

III. LIST OF CASE AUTHORITIES & STATUTES

1. Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended, ss 11 and 18.6
2. *9354-9186 Québec Inc. v Callidus Capital Corp.,* 2020 SCC 10
3. *Re Accel Canada Holdings Limited*, 2020 ABQB 204
4. *Springridge Farms Ltd. (Trustee of) v Spence*, 1991 CarswellSask 43
5. *Bhasin v Hrynew*, 2014 SCC 71
6. Builder's Lien Act, RSA 2000, c B-7, s 33

Tab 1

Companies' Creditors Arrangement Act, RSC 1985, c C-36

Current version: in force since Nov 1, 2019

Link to the latest version :	http://canlii.ca/t/7vdw
Stable link to this version :	http://canlii.ca/t/543rw
Citation to this version:	Companies' Creditors Arrangement Act, RSC 1985, c C-36, <http://canlii.ca/t/543rw> retrieved on 2020-11-25
Currency:	This statute is current to 2020-11-02 according to the Justice Laws Web Site

Companies' Creditors Arrangement Act

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

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

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Interpretation

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

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

General power of court

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

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

Relief reasonably necessary

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 their respective jurisdictions.

R.S., c. C-25, s. 17.

18 [Repealed, 2005, c. 47, s. 131]

18.1 [Repealed, 2005, c. 47, s. 131]

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

PART III

General

Duty of Good Faith

Good faith

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

Good faith — powers of court

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

1997, c. 12, s. 125 2005, c. 47, s. 1312019, c. 29, s. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Tab 2

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers
Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

Table of Authorities

Cases considered by *Wagner C.J.C., Moldaver J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

BA Energy Inc., Re (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

Blackburn Developments Ltd., Re (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

Boutiques San Francisco inc., Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

Bridging Finance Inc. v. Béton Brunet 2001 inc. (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, (sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — referred to

Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — considered

Dugal v. Manulife Financial Corp. (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

Ernst & Young Inc. v. Essar Global Fund Limited (2017), 2017 ONCA 1014, 2017 CarswellOnt 20162, 54 C.B.R. (6th) 173, 139 O.R. (3d) 1, 420 D.L.R. (4th) 23, 76 B.L.R. (5th) 171 (Ont. C.A.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 ABQB 379 (Alta. Q.B.) — referred to

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — referred to

HSBC Bank Canada v. Bear Mountain Master Partnership (2010), 2010 BCSC 1563, 2010 CarswellBC 2962, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]) — referred to

Hayes v. Saint John (City) (2016), 2016 NBBR 125, 2016 NBQB 125, 2016 CarswellNB 253, 2016 CarswellNB 254 (N.B. Q.B.) — referred to

Houle v. St. Jude Medical Inc. (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

Langtry v. Dumoulin (1885), 7 O.R. 644 (Ont. Div. Ct.) — referred to

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Marcotte c. Banque de Montréal (2015), 2015 QCCS 1915, 2015 CarswellQue 4055 (C.S. Que.) — referred to

McIntyre Estate v. Ontario (Attorney General) (2002), 2002 CarswellOnt 2880, 23 C.P.C. (5th) 59, 218 D.L.R. (4th) 193, 61 O.R. (3d) 257, 164 O.A.C. 37 (Ont. C.A.) — referred to

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 192, 2005 CarswellBC 705, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2015), 2015 ONCA 681, 2015 CarswellOnt 15461, 391 D.L.R. (4th) 283, 127 O.R. (3d) 641, 340 O.A.C. 234, 32 C.B.R. (6th) 21 (Ont. C.A.) — referred to

North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — referred to

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — referred to

Pole Lite ltée c. Banque Nationale du Canada (2006), 2006 CarswellQue 3438, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Schenk v. Valeant Pharmaceuticals International Inc. (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

Stanway v. Wyeth Canada Inc. (2013), 2013 BCSC 1585, 2013 CarswellBC 2630, 41 C.P.C. (7th) 209, [2014] 3 W.W.R. 808, 56 B.C.L.R. (5th) 192 (B.C. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re)* 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

s. 43(7) — referred to

s. 50(1) — referred to

s. 54(3) — considered

s. 108(3) — referred to

s. 187(9) — considered

Champerty, Act respecting, R.S.O. 1897, c. 327
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "debtor company" — referred to

s. 3(1) — referred to

s. 4 — referred to

s. 5 — referred to

s. 6 — referred to

s. 6(1) — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(b) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 22(1) — referred to

s. 22(2) — referred to

s. 22(3) — considered

s. 23(1)(d) — referred to

s. 23(1)(i) — referred to

ss. 23-25 — referred to

s. 36 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

s. 6(1) — referred to

APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

Wagner C.J.C., Moldaver J. **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

8 Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

9 Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

10 The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

11 Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

B. The Initial Competing Plans of Arrangement

12 On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

13 However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

14 The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

16 On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

17 Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] ... the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

19 The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

20 Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

21 On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

22 The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. Quebec Superior Court (2018 QCCS 1040 (C.S. Que.)) (Michaud J.)

23 The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

24 With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

25 The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], at para. 70).

26 Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

27 With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1)

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

29 After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 (Ont. S.C.J.), at para. 41, and *Hayes v. Saint John (City)*, 2016 NBQB 125 (N.B. Q.B.), at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332 (Ont. S.C.J.), at para. 23).

30 Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

36 Bluberi and Bentham (collectively, “appellants”), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge’s exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (”*BIA*”), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (”*WURA*”), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada’s insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially “catastrophic” impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor’s insolvency; preserving and maximizing the value of a debtor’s assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes “avoiding the social and economic losses resulting from liquidation of an insolvent company” (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also “has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm’s financial distress ... and enhancement of the credit system generally” (Sarra, *Rescue! The Companies’*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Creditors Arrangement Act, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing 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. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 305 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

55 With the foregoing in mind, we turn to the issues on appeal.

B. Callidus Should Not Be Permitted to Vote on Its New Plan

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

58 Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

from voting on a plan of arrangement, including a plan it sponsors.

59 Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

60 We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross*; *1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of *debtor companies* to organize a restructuring plan that confers additional benefits to *related parties*" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

64 Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] 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" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

66 Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

67 Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

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

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

69 Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

70 Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

72 While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

73 First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with *greater* judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

75 We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation .... If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

76 Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

77 In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4] . The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

79 Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

81 As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

82 In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the CCAA

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

86 Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

> **Interim financing**
>
> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

87 The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

88 The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

> **Priority — secured creditors**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

factors:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

92 As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

93 Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J*. 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (Ont. S.C.J.); *Musicians' Pension Fund of Canada (Trustee of)*).

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1885), 7 O.R. 644 (Ont. Div. Ct.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

95 Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 (C.S. Que.), at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 (Ont. S.C.J.), at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Ont. Div. Ct.); see also *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192 (B.C. S.C.), at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

97 We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

99 A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

100 There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

101 The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Crystallex International Corp., Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

103 We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

104 None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

105 In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Musicians' Pension Fund of Canada (Trustee of)*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

106 While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

• the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

• the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

• the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

• the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

• the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

• the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

108 To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

109 First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

110 Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . . . .
>
> ... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

114 We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

115 Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

116 Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

117 For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeal allowed.
Pourvoi accueilli.

Footnotes

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040 (C.S. Que.), at para. 10 (CanLII)).

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

5 A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Pole Lite ltée c. Banque Nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.); G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 3

2020 ABQB 204
Alberta Court of Queen's Bench

Accel Canada Holdings Limited, Re

2020 CarswellAlta 558, 2020 ABQB 204, [2020] A.W.L.D. 1913, 318 A.C.W.S. (3d) 538, 79 C.B.R. (6th) 66

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

K.M. Horner J.

Heard: March 5-6, 13, 2020
Judgment: March 13, 2020
Written reasons: March 26, 2020
Docket: Calgary 1901-16581

Counsel: William Roberts, Jonathan Selnes, for Accel Canada Holdings Limited and Accel Energy Canada Limited
Michael Bokhaut, for Accel Canada Holdings Limited and Accel Energy Canada Limited
Chris Simard, Alexis Teasdale, Keely Cameron, for Third Eye Capital Corporation
Paul G. Chiswell, for TransAlta Energy Marketing Corp.
Courtney Kachur, for BP Canada Energy Group ULC
Robyn Gurofsky, Jack Maslen, for PricewaterhouseCoopers Inc.
Sam Gabor, for ICC Credit Holdings Limited
John Sandrelli, for ICC Credit Holdings Limited
Gordon Cameron, Guy Martel, for Stream Asset Financial Winterfresh LP and Stream Asset Financial Sega LP
Gordon Mason, Danny Vue, for Stream Asset Financial Winterfresh LP and Stream Asset Financial Sega LP
Jeffrey Oliver, for B.E.S.T. Active 365 Funds LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership
David Legeyt, for ARC Resources Ltd.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.b What constituting preference
XI.2.b.iii Miscellaneous

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — What constituting preference — Miscellaneous
Primary secured lender (creditor) entered into agreement to provide one of related companies with $800,000 at interest rate of 12 percent per annum in order to satisfy emergency payroll obligations of companies — Companies became insolvent and entered proceedings under Bankruptcy and Insolvency Act (BIA), then Companies' Creditors Arrangement Act — Creditor brought application for declaration it had enforceable claim against Energy for $12,205,838.90 which ranked above all other creditors — Application dismissed — Transaction was preference transaction under s. 95 of BIA, and was rendered void and

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

set aside — Relevant company was insolvent at date of transaction and creditor was dealing with related companies at arm's length — Trust regarding funds at issue was not shown to exist for lack of certainty of intention to create trust — Transaction gave creditor security interest in preference to other creditors, as explicitly stated in term sheet, which stated that creditor was to receive perfected first priority security interest in all assets of borrower including all tangible and intangible assets now owned or hereafter acquired — Transaction was presumed to have been done with view to creating preference, under s. 95(2) of BIA — Dominant intent of agreement was to provide immediate funding to its employees, likely to protect its assets in short term, and not for purpose of continuing on business.

Table of Authorities

Cases considered by *K.M. Horner J.*:

Air Canada v. M & L Travel Ltd. (1993), 50 E.T.R. 225, 108 D.L.R. (4th) 592, [1993] 3 S.C.R. 787, 67 O.A.C. 1, 159 N.R. 1, 15 O.R. (3d) 804 (note), 1993 CarswellOnt 568, 1993 CarswellOnt 994, 15 O.R. (3d) 804 (S.C.C.) — referred to

Alberta Treasury Branches v. Samco Holdings Ltd. (2003), 2003 ABQB 963, 2003 CarswellAlta 1746, 48 C.B.R. (4th) 1, 25 Alta. L.R. (4th) 83, 347 A.R. 359, [2004] 9 W.W.R. 590 (Alta. Q.B.) — considered

Allan Realty of Guelph Ltd., Re (1979), 29 C.B.R. (N.S.) 229, 24 O.R. (2d) 21, 6 E.T.R. 50, 97 D.L.R. (3d) 95, 1979 CarswellOnt 184 (Ont. Bktcy.) — referred to

BA Energy Inc., Re (2009), 2009 ABQB 647, 2009 CarswellAlta 1818, 15 Alta. L.R. (5th) 86, [2010] 2 W.W.R. 125, 63 B.L.R. (4th) 219, 481 A.R. 365 (Alta. Q.B.) — referred to

Bilek v. Salter Estate (2009), 2009 CarswellOnt 6507 (Ont. S.C.J.) — considered

Builders' Floor Centre Ltd. v. Thiessen (2013), 2013 ABQB 23, 2013 CarswellAlta 269, 98 C.B.R. (5th) 116, 75 Alta. L.R. (5th) 62, 19 C.L.R. (4th) 74, [2013] 7 W.W.R. 333, 11 B.L.R. (5th) 92, 554 A.R. 152 (Alta. Q.B.) — considered

HXP Debenture Trust v. Guillaume (2015), 2015 SKQB 225, 2015 CarswellSask 446, 28 C.B.R. (6th) 66, [2015] 10 W.W.R. 799, 479 Sask. R. 289 (Sask. Q.B.) — considered

Hofer (Re) (2019), 2019 ABQB 405, 2019 CarswellAlta 1102, 70 C.B.R. (6th) 243 (Alta. Q.B.) — referred to

Lucas v. Puthon (2013), 2013 ONSC 2799, 2013 CarswellOnt 5839, 88 E.T.R. (3d) 287 (Ont. S.C.J.) — considered

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, (sub nom. *Luscar Ltd. and Norcen v. Pembina Resources Ltd.)* 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251, 1994 ABCA 356 (Alta. C.A.) — considered

Luscar Ltd. v. Pembina Resources Ltd. (1995), 31 Alta. L.R. (3d) xli, [1995] 8 W.W.R. lxxv, 193 N.R. 398 (note), 184 A.R. 159 (note), 122 W.A.C. 159 (note), [1995] 3 S.C.R. vii (S.C.C.) — referred to

Montor Business Corp. (Trustee of) v. Goldfinger (2016), 2016 ONCA 406, 2016 CarswellOnt 8324, 36 C.B.R. (6th) 169, (sub nom. *Summit Glen Waterloo/2000 Developments Inc. (Bankrupt), Re)* 351 O.A.C. 241, 58 B.L.R. (5th) 243 (Ont. C.A.) — considered

Okanagan Equestrian Society v. North Okanagan (Regional District) (2018), 2018 BCSC 800, 2018 CarswellBC 1203, 75 M.P.L.R. (5th) 92 (B.C. S.C.) — referred to

Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd. (2013), 2013 ABCA 330, 2013 CarswellAlta 1795, 7 C.B.R. (6th) 329, (sub nom. *Orion Industries Ltd. (Bankrupt) v. Neil's General Contracting Ltd.)* 556 A.R. 389, (sub nom. *Orion Industries Ltd. v. Neil's General Contracting Ltd.)* 584 W.A.C. 389, 89 Alta. L.R. (5th) 14 (Alta. C.A.) — considered

Principal Group Ltd. (Trustee of) v. Anderson (1994), 29 C.B.R. (3d) 216, (sub nom. *Principal Group Ltd. (Bankrupt) v.*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Anderson) 164 A.R. 81, 1994 CarswellAlta 355 (Alta. Q.B.) — considered

Principal Group Ltd. (Trustee of) v. Anderson (1997), 1997 CarswellAlta 463, (sub nom. *Ernst & Young Inc. v. Anderson)* 147 D.L.R. (4th) 229, 32 B.L.R. (2d) 42, [1997] 7 W.W.R. 336, 46 C.B.R. (3d) 101, (sub nom. *Principal Group Ltd. (Bankrupt) v. Anderson)* 200 A.R. 169, (sub nom. *Principal Group Ltd. (Bankrupt) v. Anderson)* 146 W.A.C. 169, [1997] 8 W.W.R. 689, 51 Alta. L.R. (3d) 45 (Alta. C.A.) — referred to

Rehman, Re (2015), 2015 ONSC 188, 2015 CarswellOnt 5063, 25 C.B.R. (6th) 103 (Ont. S.C.J. [Commercial List]) — considered

St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc. (2005), 2005 NBCA 55, 2005 CarswellNB 285, 2005 CarswellNB 286, 255 D.L.R. (4th) 137, 13 C.B.R. (5th) 125, 9 B.L.R. (4th) 1, (sub nom. *St. Anne-Nackawic Pulp Co. (Bankrupt), Re)* 286 N.B.R. (2d) 95, (sub nom. *St. Anne-Nackawic Pulp Co. (Bankrupt), Re)* 748 A.P.R. 95 (N.B. C.A.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc. (2012), 2012 ONSC 2182, 2012 CarswellOnt 5802, 349 D.L.R. (4th) 431, 25 C.P.C. (7th) 110 (Ont. S.C.J.) — considered

Urbancorp Toronto Management Inc. (Re) (2019), 2019 ONCA 757, 2019 CarswellOnt 15220, 74 C.B.R. (6th) 23 (Ont. C.A.) — considered

Van Melle v. Muir (December 6, 2000), Doc. C17782/97 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Pt. III — referred to

s. 2 "transfer at undervalue" — considered

s. 95 — considered

s. 95(1) — considered

s. 95(1)(a) — considered

s. 95(2) — considered

s. 96 — considered

s. 96(1) — considered

s. 96(1)(a) — considered

s. 96(1)(a)(iii) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

s. 11 — considered

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 20(1)(b) — considered

s. 36.1(1) [en. 2007, c. 36, s. 78] — considered

s. 36.1(2) [en. 2007, c. 36, s. 78] — considered

APPLICATION by creditor for declaration regarding claim against debtor.

***K.M. Horner J.* (orally):**

I. Background

1 On March 13, 2020 I delivered an Oral Decision on this Application and noted that written Reasons would follow. These are those Reasons.

2 In these proceedings, Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively "Accel" and separately "Holdings" and "Energy") applied on November 22, 2019 to this Court for an Order in proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] to continue under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], which was granted. On November 27, 2019, that Order was amended and restated with the Stay granted therein extended to January 31, 2020, and then on January 21, 2020 further extended to March 13, 2020. On March 13, 2020, that Stay was further extended to April 24, 2020.

3 The application before the Court was brought forward by Third Eye Capital Corporation ("TEC") and is opposed by four other parties in these proceedings: Accel; Stream Asset Financial Winterfresh LP and Stream Asset Financial Sega LP (collectively "Stream"); ICC Credit Holdings Limited ("ICC"); and the Monitor.

4 TEC is seeking an Order providing that:

1) TEC has a valid and enforceable claim against Energy for $12,205,838.90 (as of January 27, 2020), plus all applicable interest and costs, pursuant to the September 13, 2019 agreement (the "Term Sheet") executed by TEC, Energy and Regent Equipment Leasing Ltd ("Regent");

2) TEC has a valid and enforceable security interest in all of Energy's assets pursuant to the September 20, 2019 Fixed and Floating Charge Debenture (the "Debenture"), which secures Energy's obligations under the Term Sheet;

3) TEC's security interest ranks in priority to those of all other creditors in the assets of Energy;

4) The Term Sheet be rectified to replace "Regent Holdings LLC" with "Regent Equipment Leasing Ltd"; and

5) The Debenture be rectified to reflect the intent of the parties to provide a fixed and floating charge debenture to secure the obligations under the Term Sheet.

II. Facts

5 TEC is the primary secured lender of Holdings. On September 13, 2019, TEC entered into the Term Sheet with Energy and Regent. Under the Term Sheet, TEC provided Energy with $800,000 at an interest rate of 12% per annum in order to satisfy Accel's emergency payroll obligations. According to Accel, Energy performed payroll functions for both itself and

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Holdings, such that the $800,000 advance provided payment to employees of both Accel entities.

6 In exchange for the $800,000 payroll advance, the Term Sheet requires Energy to undertake additional obligations as well as provide mandatory payments on or before September 20, 2019 or September 25, 2019, as specified within the Term Sheet. The additional obligations that Energy undertook pursuant to the Term Sheet include:

> a) Payment of $4,400,702.65 plus all accrued and unpaid interest, fees or penalties thereon, pursuant to a Reservation of Rights letter dated June 3, 2019 and executed by TEC, several individuals, and several Accel entities including Holdings but not including Energy (the "Standstill Agreement");
>
> b) Payment of $7,350,000 plus all accrued and unpaid interest, fees or penalties thereon, owed by various Accel entities to TEC and other related entities; and
>
> c) An unspecified amount in relation to all other fees, interest, penalties and obligations owing and outstanding under certain agreements as between TEC, Holdings, ACCEL Energy Limited and ACCEL Canada Resources Limited (the "Accel Credit Agreements").

7 The Monitor notes that in these proceedings TEC appears to only be claiming the $4,400,702.65 and $7,350,000 plus the initial $800,000 as secured against Energy and not the amount relating to the Accel Credit Agreements. The Monitor indicates that those other obligations set forth in the Term Sheet appear to refer to an additional $300 million of debt obligations, presumably being the debt addressed by the Standstill Agreement, as discussed below.

8 The Term Sheet also provides for "Regent LLC" to subordinate its security against Energy to that of TEC, regardless of any registration or other priority ranking. "Regent LLC" is also listed as a Guarantor under the Agreement. However, Regent is the party that executed the Term Sheet, there does not appear to be any security held by "Regent LLC" against Energy, and "Regent LLC" is not listed in the Alberta Corporate Registry.

9 TEC and Energy subsequently entered into the Debenture dated September 20, 2019. TEC relies on the Debenture as providing security to TEC against Energy for the obligations arising under the Term Sheet. The Monitor notes that the Debenture fails to define the "Credit Agreement" that it intended to secure, such that the actual effect of the Debenture is arguably unclear. On September 20, 2019, TEC registered a security agreement and land charge against Energy's property.

10 The Standstill Agreement, which is referenced in the Term Sheet, indicates that TEC will defer from exercising its rights and remedies arising from the "ACHL Debt Documents" during the Standstill Period, which ends on September 30, 2019 or upon other specified occurrences. The Standstill Agreement states that the outstanding amount of Holdings' debt owed to TEC under the ACHL Debt Documents is $321,669,513.15.

11 As the Monitor points out, the Standstill Agreement, although signed by several Accel entities, was not signed by Energy, and Energy had no obligations to TEC under the Standstill Agreement until the Term Sheet was executed.

12 The Standstill Agreement also provides that Holdings will "irrevocably authorize and direct its customers, marketers and production settlement payors" to provide TEC with at least $4 million per month from June — September of 2019. Those payments would go toward the debt owing to TEC from Holdings, all of which would become due if those monthly payments were not made to TEC's satisfaction.

13 In accordance with this provision in the Standstill Agreement, Holdings issued certain orders in the form of an irrevocable direction to pay ("IDP") to BP Canada Energy Group ULC ("BP Canada"). While several IDPs were issued by Holdings to BP Canada, of particular relevance in this proceeding is the IDP dated August 2, 2019 (the "August IDP"), in which Holdings stated that:

> You are hereby irrevocably authorized and directed to pay out any net funds owing now, or that may be owing in the future from the ACHL July 2019 production settlement, up to the sums listed below, to ACHL from BP Canada, netting any agreed set-offs and/or other rights and remedies available to BP Canada under any agreement between BP Canada and ACHL or under law, as follows:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

1. All net funds to Third Eye on or before August 29, 2019.

with a balance of zero dollars to be paid to ACHL, and for so doing this shall be your full and irrevocable authority.

14 The funds contemplated by the August IDP were paid to Holdings instead of TEC.

15 After the August IDP payment was provided to Holdings, approximately $8.3 million was diverted from an inter-company Accel bank account to Regent in relation to certain agreements involving Energy, Regent, and Stream (the "Regent/Stream Agreement").

16 The Regent/Stream Agreement functioned to assign Stream's status as Energy's primary secured creditor to Regent. Of relevance to this application is that Stream also received a Gross Overriding Royalty through a series of subsequent transactions, which Stream could cause Regent to purchase back for 90 million dollars by exercising Streams' "Put Option" right. Energy also agreed to guarantee Regent's obligation to the pay the $90 million payment that would be owing from Regent to Stream if the Put Option were exercised.

17 Stream assigned Energy's debt to it to Regent on August 29, 2019, and subsequently exercised its Put Option for $90 million on September 13, 2019.

III. Analysis

18 First, I will address whether TEC has a valid and enforceable claim against Energy that gives rise to a security interest in Energy's assets by virtue of the Term Sheet and Debentures (collectively, the "Agreements").

19 The parties generally advance two arguments in this regard. First, whether the Agreements giving rise to TEC's claim are enforceable in light of alleged ambiguity, the circumstances of the transaction, and certain drafting deficiencies. TEC's requests for rectification of the Agreements also relate to certain of the drafting issues in the Agreements. Second, whether the Agreements are voidable as a reviewable transaction under the *BIA*, RSC 1985, c B-3.

20 The disputes concerning the enforceability of the Agreements as well as rectification would be rendered moot if the transaction is voided under the *BIA*. Therefore, and given the time sensitive nature of these proceedings, I will first address whether the Agreements constitute a reviewable transaction, assuming that they are enforceable as against Energy and Regent and that the Debenture was intended to secure the Term Sheet.

21 The Monitor urges this court to set aside the Agreements, whether as a reviewable transaction under the *BIA* or through an exercise of this Court's discretion to determine the amount of a secured claim under section 20(1)(b) of the *CCAA*. The Monitor further urges this court to consider the *CCAA's* underlying objectives. The Monitor also notes the recent imposition of a duty of good faith under section 18.6 of the *CCAA*, which came into force on November 1, 2019, although that provision has yet to be judicially interpreted. Section 18.6 provides that:

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

22 The Supreme Court of Canada discussed the nature of a Court's discretion under the *CCAA* in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services]. The Supreme Court discussed potential limits to a court's

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

authority in *CCAA* proceedings, especially considering the contrast between *CCAA* sections that provide for specific orders and section 11 of the *CCAA*, which states that:

> 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.

23 The Supreme Court stated that the general language within the *CCAA* should not be restricted by the availability of more specific orders, although a court must bear in mind the requirements of appropriateness, good faith, and due diligence when exercising its authority under the *CCAA*: *Century Services* at para 70. *CCAA* decisions are often exercised through the court's judicial discretion with the purpose of furthering the *CCAA*'s purposes: *Century Services* at paras 58 — 59. The *CCAA* provides for maintaining the *status quo* of an organization while attempts are made to ensure a reorganization that is fair to all stakeholders: *Century Services* at para 77. Finally, it should be noted that "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": *Century Services* at para 23.

24 Although the Monitor suggests that it is not necessary to rely directly on the *BIA* reviewable transaction provisions in order to exercise my discretion, the Supreme Court in *Century Services* at para 65 notes that it is most appropriate for a court to first consider the specific statutory provisions and powers of the *CCAA* before turning to any equitable or inherent jurisdiction of the court.

25 Accordingly, I will consider whether the Agreements are reviewable under either section 95 or 96 of the *BIA* before deciding whether to exercise my discretion under the *CCAA*.

26 Each of the Monitor, Stream, ICC, and Accel agree that the Agreements should be declared void as an improper preference under section 95 of the *BIA* or as a transfer at undervalue under section 96 of the *BIA*. TEC disputes that the evidence before the Courts meets of the requirements of either section.

27 Section 36.1(1) of the *CCAA* incorporates sections 95 and 96 of the *BIA* into compromises or arrangements under the *CCAA*.

28 Section 36.1(2) further clarifies that:

> **(2)** For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*
>
> (a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
>
> (b) to "trustee" is to be read as a reference to "monitor"; and
>
> (c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

29 I will therefore consider whether the Agreements constitute a reviewable transaction under the *BIA*, keeping in mind the underlying objectives of insolvency legislation and proceedings.

Did the transaction constitute a preference?

30 Section 95 of the *BIA* states that

> **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and . . .

31 The parties agree that the transaction occurred within the period prescribed in section 95 of the *BIA*; Energy was insolvent at the date of the transaction; and TEC was dealing with Energy and Regent at arm's length.

32 TEC disputes that Energy intended to prefer, or that the transaction had the effect of preferring, one creditor over another as required under section 95 of the *BIA*. Specifically, TEC argues that the Agreements have no preferential effect on the basis that TEC's initial interest was in the form of a trust, by virtue of the August IDP, such that taking the security interest actually weakened TEC's priority as a creditor.

33 I must therefore determine whether the August IDP constitute a trust in order to determine whether the transaction had the effect of preferring one creditor over another.

Is the August IDP a trust?

34 TEC states that the August IDP makes it clear that BP Canada was to pay certain amounts owing to Holdings directly to TEC, and that the nature of the arrangement constitutes a trust in favour of TEC. TEC argues that an IDP is a class trust and that Energy intended to create a trust in the circumstances. TEC also refers to statements by Holdings that indicate that funds removed from the Accel inter-company account would be "replenished" as evidence of "trust language". Those statements were made after the inter-company payment was made to Regent, allegedly in part by funds provided to Holdings in violation of the August IDP.

35 ICC and Stream each refute this argument and submit that the IDP simply created a commercial agreement for funds to be paid from BP Canada directly to TEC, instead of to Holdings.

36 TEC relies on *Van Melle v. Muir*, [2000] O.J. No. 5717 (Ont. S.C.J.) for the statement that than an IDP is a classic trust document: at paras 34 — 35.

37 *Van Melle* states at para 34 that:

> An irrevocable direction for a valuable consideration requiring that funds shall be applied to the debt owing to a creditor, creates a beneficial property interest in favour of the creditor. Such a direction, followed by receipt of the funds, on closing, makes a solicitor liable for failure to honour the equitable assignment, provided there is consideration for the direction: [citations omitted].

38 Stream notes that *Van Melle* relates to a solicitor-client relationship, and that subsequent case law referring to *Van Melle* always occurs under the same circumstances of a solicitor-client relationship. Stream argues that the nature of that relationship distinguishes *Van Melle* from the present circumstances because of the fiduciary nature of the solicitor-client relationship: *Allan Realty of Guelph Ltd., Re* (1979), 24 O.R. (2d) 21, 97 D.L.R. (3d) 95 (Ont. Bktcy.), pp 19-20.

39 *Van Melle* has been relied upon in three subsequent cases. In both *Lucas v. Puthon*, 2013 ONSC 2799 (Ont. S.C.J.) and *Bilek v. Salter Estate*, [2009] O.J. No. 4454, 181 A.C.W.S. (3d) 1032 (Ont. S.C.J.), the circumstances again involved solicitor-client relationships, where the funds arose from an estate or property interest and were directed to be paid to the solicitors. Further, the IDPs in both *Lucas* and *Bilek* refer to the funds being "in trust", unlike the present circumstances. In *Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182 (Ont. S.C.J.), a lawyer, based on an agreement to transfer a file to that lawyer from a previous lawyer, gave a personal undertaking to the previous lawyer that he would pay the previous lawyer's unpaid account. There was no IDP in this case, and no instructions given by the client in that

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

respect. The Court noted at para 69 that:

> 69 Under the law of equitable assignments, if a debtor, to repay a debt, gives his or her creditor an order upon a person who holds a specific fund for the debtor that the fund be used to repay the debt, there is an equitable assignment of the fund. There must be both an agreement to pay out of a specific fund and the intent to create a property interest in that fund: *Burn v. Carvalho* (1839), 4 My. & C. 690 (Eng. Ch. Div.); *Rodick v. Gandell* (1852), 1 De G.M. & G. 763 (Eng. L.C.); *Carey v. Palmer*, [1926] A.C. 703 (Australia P.C.); *Family Trust Corp. v. Morra* (1987), 60 O.R. (2d) 30 (Ont. Div. Ct.); *Rawlings, Sumner, Tilson Electric Ltd. v. Commercial Courts of London Ltd.* (1980), 32 O.R. (2d) 377 (Ont. H.C.); *Bilek v. Salter Estate*, [2009] O.J. No. 4454 (Ont. S.C.J.).

40 Considering the distinguishable relationship central to the circumstances in *Van Melle* and the fact that *Van Melle* is not binding on this court, I agree with Stream and ICC that an IDP does not necessarily create a trust agreement. Therefore, it is necessary to consider the circumstances of this particular IDP and the relevant requirements to establish a trust so as to determine whether a trust arose in these circumstances.

41 In order for a trust to exist, three elements must be present: (1) certainty of intent; (2) certainty of subject matter; and (3) certainty of object: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.) at para 23; *Okanagan Equestrian Society v. North Okanagan (Regional District)*, 2018 BCSC 800 (B.C. S.C.) at para 192. In order to find certainty of intention, there must be an imperative obligation to hold property on trust for the benefit of another: *BA Energy Inc., Re*, 2009 ABQB 647 (Alta. Q.B.) at para 14.

42 For the reasons described below, I decline to find that a trust exists in these circumstances because there was no certainty of intention to create a trust. I rely on three significant reasons to support my decision that the August IDP did not constitute a trust.

43 First, there was no certainty of intention to create a trust in the language of either the August IDP itself or the Standstill Agreement, which outlined Holdings' agreement to issue the August IDP.

44 Stream relies on *Luscar Ltd. v. Pembina Resources Ltd.*, 1994 ABCA 356 (Alta. C.A.), leave to appeal to SCC refused 24496 (17 April 1995) [[1995] 3 S.C.R. vii (S.C.C.)] to show that the August IDP did not create a trust. In *Luscar* at para 112, the Court of Appeal noted that, while the words "in trust" or "on trust" are not essential requirements to create a trust, the sophisticated nature of the parties in that case, being oil and gas corporations, should have rendered them aware of the onerous duties of a trustee such that they would have clearly stated if they wanted to impose those obligations. In addition, the fact that the parties used the term "shall be held in trust" in a separate part of the agreement indicated an intention not to create a trust in the provision at issue, where trust language was not used. Specifically, the Court of Appeal stated at paras 111 — 112 that:

> 111 D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), at p. 107 indicated that the language must be imperative:
>
>> For a trust to come into existence, it must have three essential characteristics . . . first, the language of the alleged settlor must be imperative ... This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust.
>
> 112 In this case the parties were informed and capable of fully setting out their intended rights and duties in an agreement. The AMI Clause contained none of the usual indicia of trust. While the words "in trust" or "on trust" are not an iron-clad requirement to finding the existence of a trust, one would have expected them here, and their absence is telling. Their use in cl. 24(g) indicates that the parties understood the use of the trust relationship and employed trust wording when desired. There, it is stated that on the assignment of an interest, it "shall be held in trust" until the obtaining of necessary consents where required. It is anomalous that the parties did not use similar language in regard to cl. 18, if a trust was intended. There are many authorities which refer to the onerous duties that trustees bear, and a party should not be saddled with trust obligations where that intention is not clearly expressed. As sophisticated parties, they

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> would have been aware of a trustee's onerous duties, and if they intended to impose those obligations, they would have so stated. [emphasis added].

45 While not a determinative factor, there is no language to indicate that the parties intended to create a trust. Neither the language in the Standstill Agreement nor the August IDP express an intention to create a trust relationship, whether explicitly or implicitly. Holdings simply directed BP Canada to provide funds directly to TEC, without any imposition of specific duties or creating a requirement to hold funds for TEC's benefit. These are sophisticated parties capable of rendering a clear agreement to hold funds in trust, yet there is was no indication of any intention to create a relationship beyond the simple payment arrangement contemplated in the Standstill Agreement and August IDP.

46 Second, I find the circumstances that surround the creation of the August IDP do not indicate an intention to create a trust.

47 Accel relies on *Alberta Treasury Branches v. Samco Holdings Ltd.*, 2003 ABQB 963 (Alta. Q.B.) for the premise that a simple direction to pay does not create a trust with the object of the trust being the proceeds. Accel says that the August IDP functions to direct that Holdings' production proceeds be paid to TEC rather than directly to Holdings, but does not indicate that those funds belong to TEC upon execution of the document.

48 In *Samco* at paras 46, 49 — 53, the Court found that a simple direction to pay, albeit not necessarily in the precise form of an IDP, did not constitute a trust agreement. The Court at paras 51 — 53 provided some guidance on arrangements to pay proceeds from one party to another:

> 51 Suppose, for example, the direction was to pay ATB's mortgage on the property (which was in fact the case for part of the proceeds but not this part) and the mortgage was to be discharged before ATB actually received payment. It would be important that the proceeds be held for ATB's benefit in those circumstances as its security would disappear before it had actually received payment.
>
> 52 That approach is sometimes used in commercial transactions. In such circumstances, the protection given the creditor for giving up its security before it has received payment is the acknowledgment from the debtor that the funds to be received will on receipt be held in trust for the benefit of the creditor. Property held by a bankrupt for the benefit of another under a trust is not divisible among bankruptcy creditors. See s. 67(1)(a) of the *BIA*.
>
> 53 That kind of arrangement was not put in place in this case. The parties, through their Counsel, simply agreed that the proceeds held by Mr. Sparling would be paid to ATB rather than the Slezaks.

49 The nature of the arrangement by the parties in this case similarly does not indicate an intention to create a trust in order to secure payment owed to TEC. The arrangement did not arise in order to provide security to TEC in lieu of giving up security directly against Holdings. Rather, TEC simply agreed not to enforce any debt owed to it by Holdings as long as it received regular payments as effected by Holdings' promise to provide an IDP to its "customers, marketers and production settlement payors", which lead to the August IDP.

50 The Standstill Agreement specifically contemplates that payment might not be made, or might not be made to TEC's satisfaction, despite the IDPs, in which case TEC would be entitled to enforce its rights to the funds directly against Holdings. Any payments that were made to TEC by BP Canada would be applied against the debt owed by Holdings to TEC, and any payments that weren't made would be enforceable against Holdings. The fact that the Standstill Agreement contemplates that the IDPs might not be paid, and directs enforcement rights against Holdings, rather than BP, is not akin to a trust relationship: *Van Melle* at para 36. If the August IDP constituted a trust arrangement and BP Canada failed to pay TEC, then TEC would gain the unfair advantage of having recourse against both BP Canada as trustee and Holdings as debtor for the same funds.

51 For these reasons, both the Standstill Agreement and August IDP clearly underscore that there was not an intention to hold BP Canada responsible to hold and provide funds in the form of a trust to TEC.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

52 Finally, in addition to a lack of clear language or evidence in the circumstances of an intention to create a trust arrangement, there is no indication that BP Canada was acting, or intended to act, in the role of a trustee.

53 In *Van Melle*, the Court noted that if "an individual takes dominion and control of the trust property, *and knows of the trust relationship*, and acts inconsistently with the trust terms, he will be liable to the beneficiary of the trust" [emphasis added]: at para 35. The importance of clearly establishing a trust arrangement, rather than a simple relationship of agency is further explained in Donovan WM Water, Mark R Gillen & Lionel D Smith, ed, *Waters' Law of Trusts in Canada*, 4th ed (Toronto, Ontario: Thomson Reuters Canada, 2012), ch 3 at s 3.III:

> However, it is essential if the agent is to be an express trustee, or to be made by law a constructive trustee, that there be property which the agent was required to keep separate from his own assets. If the agent, who is collecting moneys from third parties for the principal, or is required to pay over the principal's money to a third party, is to be considered a trustee of any kind, it strengthens the case if it is shown the agent was required, contractually or otherwise, to keep those moneys identifiable from other assets. Otherwise, the agent may be a debtor only.

54 The present circumstances do not indicate that BP Canada knew it was in the position of a trustee or that the parties directed it to act as a trustee. Rather, the August IDP was the creature of an arrangement, by way of the Standstill Agreement, that did not involve BP Canada. BP Canada simply received a direction to pay to TEC the funds that it would otherwise pay directly to Holdings. There is no evidence at all from BP Canada of an intention to take on the arguably onerous duties of a trustee; BP Canada was not a signatory of the Standstill Agreement or the August IDP and is not a party in this application. It is not clear that BP Canada took on the role of a trustee or intended to act as a trustee.

55 Overall, there was no indication that the parties intended to create a trust relationship. Rather, the August IDP created a simple commercial agreement. Considering the circumstances of this case and the necessary requirements to create a trust, I decline to find that a trust exists in these circumstances.

Were the Agreements entered into in order for Energy to continue in business?

56 Given my finding that the August IDP did not create a trust, TEC's submission that there was no preference because TEC actually weakened its interest against Accel no longer applies. Rather, the effect of the transaction is that it gave TEC a security interest in preference to other creditors, as explicitly stated in the Term Sheet. The Term Sheet states that Energy shall provide TEC with a "[p]erfected first priority security interest in all assets of the Borrower including all tangible and intangible assets now owned or hereafter acquired".

57 Since I have found that the transaction resulted in a preference, section 95(2) of the *BIA* applies.

58 Section 95(2) states that if a transaction within the meaning of section 95(1)(a) has the effect of giving the creditor a preference, it is presumed to have been done with a view to giving the creditor that preference, absent any evidence to the contrary.

59 The onus is on the creditor to prove on a balance of probabilities that the dominant intention of the debtor was not to prefer the creditor. It is the intention of the insolvent debtor which governs, and not the motivation of the creditor: *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.*, 2013 ABCA 330 (Alta. C.A.) at para 10. The dominant intent of the debtor is an objective test: *St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55 (N.B. C.A.) at para 6.

60 TEC submits that any presumption of an intent to prefer is rebutted because the transaction was entered into with the *bona fide* expectation that it would enable the debtor to continue in business.

61 In order to show that a payment would help the debtor continue in business, there must be evidence to show that "the payment is tied to the continuation of the business or a reasonably held hope or expectation of continuance": *Principal Group Ltd. (Trustee of) v. Anderson* (1994), 164 A.R. 81 (Alta. Q.B.) at paras 55, (1994), 29 C.B.R. (3d) 216 (Alta. Q.B.), aff'd on other grounds (1997), 200 A.R. 169, [1997] A.J. No. 500 (Alta. C.A.). When that test is applied to the facts of this case, the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

question is whether Energy reasonably held a belief that the security it granted to TEC in exchange for the payroll funding would allow Energy to continue in business.

62 Accel states that it was experiencing "extreme financial difficulties" throughout 2019. By March 1, 2019, Holdings had informed TEC that it was unable to make the required payments to TEC as they became due under the relevant credit agreements between the parties. Subsequently, and with the representation by Holdings that it was working on refinancing its debt, TEC entered into the Standstill Agreement with Holdings. In July of 2019, TEC was advised that both Holdings and Energy needed funding because they were both faced with lawsuits from vendors.

63 While Accel states that it hoped to improve its financial circumstances through the Regent/Stream Agreement, Accel's financial circumstances continued to deteriorate to the point that on September 11, 2019, Accel could not meet its payroll obligations, which were due two days later on September 13, 2019. Accel states that failure to meet its payroll obligations would risk losing employees and thereby lead to a high probability of Accel assets being left untended, resulting in a risk of theft, liability, and potential environmental issues.

64 On October 21, 2019, Accel filed its Notice of Intention.

65 The Monitor suggests that the parties could not have reasonably believed that a Payroll Advance of only $800,000 would preserve Energy's business beyond that single payroll period and points out that Energy's financial circumstances were dire, such that it filed a Notice of Intention just one month after the Agreements were executed.

66 I must consider whether Energy's dominant intent was to enter into the transaction for the purpose of continuing in business. There are several key features that I consider significant in the circumstances.

67 At the time that Energy entered into the Agreements, it had been experiencing significant financial difficulties for an extended period of time. Despite attempts to pursue alternate financing and remain afloat, Energy was aware of its precarious financial circumstances, including potential lawsuits against Accel, Accel's failure to meet its obligations as they became due, including those owing to TEC, and the likely inevitability of a restructuring. It is also telling that Energy filed its Notice of Intention within approximately one month of entering into the Agreements.

68 Despite all that knowledge, Energy effectively took on more than $12 million of secured debt in exchange for the relatively minimal amount of $800,000, which would only provide funding for one additional pay period to Accel. Further, in between execution of the Term Sheet and the Debenture, Stream exercised its Put Option, thereby triggering Regent's obligation to pay $90 million to Stream as well as Energy's guarantee to Stream for that obligation. Even considering TEC's assertion that it was told by Accel that the $800,000 would be enough to keep them afloat because of a possible future cash injection, the significant and ongoing "dire financial circumstances" of Energy does not support a finding that the Energy could have reasonably believed the transaction would have allowed it to continue in business.

69 Considering all of the foregoing, I find that TEC has failed to rebut the presumption of an intention to prefer a creditor under section 95(1) of the *BIA*. In this case, I find that the dominant intent of Energy in creating the preference was to provide immediate funding to its employees, likely to protect its assets in the short term from the harm that would likely result if funds were not provided, and not for the purpose of continuing on business.

70 Accordingly, I find that the Agreements created a preference of TEC over other creditors and are therefore voidable under section 95(1) of the *BIA*.

IV. Is it a transfer at undervalue?

71 Although my finding that the transaction created a preference is sufficient to find the Agreements void as requested by the Monitor, Stream, ICC and Accel, I will nonetheless also consider whether the transaction constituted a transfer at undervalue.

72 A transfer at undervalue is defined in section 2 of the *BIA* as a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

than the fair market value of the consideration given by the debtor.

73 Section 96(1)(a) of the *BIA* allows a court to declare a transfer at undervalue void if:

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; . . .

74 TEC submits that the only relevant factors in these circumstances are whether the debtor intended to defraud, defeat, or delay a creditor and whether Energy received sufficient consideration.

75 TEC relies on the same arguments as addressed with the analysis of section 95 of the *BIA* to show that Energy did not intend to defraud, defeat, or delay a creditor. As I have already discussed, the transaction clearly caused a preference, and the circumstances as a whole show an objective intention by Energy to defeat or delay a creditor, particularly because Energy agreed to provide a new, first priority security interest to TEC to the detriment of other creditors while Energy was insolvent.

76 The Monitor further submits that proof of an intention under section 96(1)(a)(iii) of the *BIA* is usually based on circumstantial evidence and is established through "badges of fraud", citing *Rehman, Re*, 2015 ONSC 188 (Ont. S.C.J. [Commercial List]) at para 52. I would note that the use of badges of fraud to show intent is generally relevant to conveyances under provincial fraudulent conveyance legislation or the *Statute of Fraudulent Conveyances*, 1571, 12 Eliz 1, c 5 ["*Statute of Elizabeth*"], although it has also been accepted as one means of showing intent under section 96 of the *BIA* in Ontario case law: *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 (Ont. C.A.) at para 52. While I have already found an objective intent within section 96(1)(a)(iii) in the circumstances, I would nonetheless further agree with the Monitor that certain badges of fraud do appear to be evident in this case. For example, in the present circumstances, the consideration was grossly inadequate as discussed below, the transfer was accomplished quickly, and the transfer was of a general nature such that it included virtually all assets of the transferor: *Builders' Floor Centre Ltd. v. Thiessen*, 2013 ABQB 23 (Alta. Q.B.) at para 43.

77 Accordingly, I find that Energy intended to defeat or delay a creditor within the meaning of section 96(1)(a)(iii) of the *BIA*.

78 In order to fall within the meaning of a transfer at undervalue, it is also necessary to determine whether there was adequate consideration in the circumstances.

79 The Monitor, Stream, Accel, and ICC all submit that there was not adequate consideration advanced by TEC in these circumstances.

80 TEC argues that there was adequate consideration in this case and that it is permissible for consideration to be for the benefit of a third party, such as Regent. TEC submits that its consideration was more than adequate, especially considering the increased risk to TEC in advancing the funds despite Holdings' past defaults and given TEC's willingness to accept a lower priority security interest rather than enforce the alleged misappropriation of trust funds held by Holdings for TEC. Specifically, TEC states that it provided adequate consideration through the following means:

a) TEC did not take action directly against Energy and Regent to recover misappropriated trust property that was taken from Holdings;

b) TEC did not take action to enforce Energy and Regent's promises to replenish the diverted trust funds at the direct request of Accel;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

c) Energy received $800,000 on an emergency basis, without which TEC says would have caused Energy's entire business to fail; and

d) TEC did not take action to enforce Holdings' defaults under the Standstill Agreement, including failure to pay TEC $4 million in August 2019 and the diversion of trust funds to Energy in August 2019.

81 This Court recently discussed how a court should determine whether a transaction under section 96 of the *BIA* is "conspicuously less than fair market value" in *Hofer (Re)*, 2019 ABQB 405 (Alta. Q.B.) at para 31. Justice Woolley noted that the Court must identify the fair market value and whether the consideration that was paid falls conspicuously below that value based on the evidence before it, yet noted that "weighing the adequacy of consideration is not an exercise in precision but one of judgement": *Hofer* at para 31, citing *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406 (Ont. C.A.) at para 53.

82 Weighing the adequacy of the considerations in the present circumstances leads me to find that this transaction was undertaken for consideration "conspicuously less than market value". I reach this determination by considering the transaction as a whole, and in particular on the basis that:

a) There is an obvious and significant disparity between the $800,000 advance by TEC in exchange for more than $12 million of security provided against all the assets of Energy, not to mention the potential additional obligations possibly in an amount of over $300 million as described in the Term Sheet, and especially considering that Energy did not previously owe any security obligations to TEC;

b) TEC did not provide consideration to Energy by refraining from enforcing its rights under the Standstill Agreement. The Agreements do not reference any agreement by TEC to forbear from enforcing rights under the Standstill Agreement.

Further, Energy was not a party to the Standstill Agreement. To that end, Stream submits that Energy and Holdings, while related companies, are separate corporations with separate operations, structures, lenders, and assets, such that any forbearance is not to the benefit of Energy at all. While the present proceedings do not involve a full assessment as to the interrelatedness of Energy and Holdings, I would note that TEC itself treated Energy and Holdings as at least distinct enough entities to initially operate only as the senior secured lender of Holdings and then to warrant seeking separate security from Energy.

In any event, TEC had already agreed, by virtue of the Standstill Agreement itself, to forbear from asserting any rights against Holdings until September 30, 2019, such that consideration was not provided in that respect; and

c) As previously discussed, TEC was not in a trust relationship with Holdings such that it had a right to take action against Energy to recover trust funds that TEC alleges were misappropriated by Holdings, a portion of which was then transferred to Energy, and then used by Energy. Since there was no trust, and accordingly no ability to trace those funds as advanced by TEC, TEC did not have any right against Energy in that respect and therefore could not provide consideration through forbearance.

83 Overall, it is clear that this was a transfer at undervalue that was intended to prefer TEC over the interests of other creditors while Energy was insolvent. For these reasons, I conclude that the transaction contemplated by the Agreements constituted a transfer at undervalue within the meaning of section 96 of the *BIA*.

What is the appropriate remedy in the circumstances?

84 The transaction arising from the Agreements is therefore a voidable transaction under either section 95 or section 96 of the *BIA*.

85 Section 95(1)(a) of the *BIA* provides that a payment determined to be a preference is void as against the trustee.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Section 96(1) states that a court "may" declare a transfer at undervalue as void against the trustee or "order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor".

86 In arguments provided to this Court with respect to a subsequent application in these proceedings, the parties disagree as to whether this Court has ability to void a transaction other than as of the date of judgment.

87 The Alberta Court of Appeal stated in *Principal Group* at para 11:

> 11 The *Act* does more than forbid preferences and allow a suit to recover them. It makes such payments fraudulent and void: s. 95(1). If they are void, then no property passed, and the payees are in possession of some of the bankrupt's property. The duty of the trustee to collect the property of the bankrupt is elementary.

88 The Saskatchewan Court of Queen's Bench recently elaborated on that statement of the law. In *HXP Debenture Trust v. Guillaume*, 2015 SKQB 225 (Sask. Q.B.), the Court states at para 16 that:

> It is clear that the law is not as one dimensional as the quote from Principal Group might suggest. It is well established a transaction that is found to be a fraudulent preference is "voidable", and not "void ab initio" (See *Bernard Motors Ltd., Re*, [1960] S.C.R. 385 (S.C.C.)). Further, s. 3 of *The Queen's Bench Act*, 1998, SS 1998, c Q-1.01 confirms that this Court is a superior court of record. As such, it has the inherent jurisdiction to craft a remedy that does justice between the parties. As Baynton J. noted in *PCL Industrial Constructors Inc. v. CLR Construction Labour Relations Assn. of Saskatchewan Inc*. (1999), 178 Sask. R. 161 (Sask. Q.B.):
>
> > **86** The inherent jurisdiction of this court includes the jurisdiction to provide an injured party with an effective and appropriate remedy. In situations in which no specific remedy is provided by the statute law, the court is required to be innovative and craft a remedy that appropriately redresses the plaintiff for the wrong that has been suffered. Obviously such a remedy must not contravene any lawful statutory provision.

89 Although *HXP* involved a transfer of real and personal property, rather than a security interest, the comments of the Court are useful in determining the appropriate remedy to grant under section 95 of the *BIA*. *HXP* indicates that a preference is not *necessarily* void *ab initio*, but rather is voidable: at para 16. Further, any remedy must be crafted in light of the overarching objectives of the *BIA* and with consideration to the discretion of the court: *HXP* at para 16.

90 As discussed above, I must also keep in mind the objectives underlying the *CCAA*, including appropriateness, good faith, and maintaining the *status quo* in order to be fair to all stakeholders: *Century Services* at paras 70, 77.

91 Of note, the $800,000 payroll advance that initiated this transaction has already been repaid within these proceedings, presumably to the satisfaction of the Monitor, who directed the repayment, and to any stakeholders, as there are none seeking to overturn that payment at this time.

92 In reaching my decision as to an appropriate remedy, I have considered the relevant statutory provisions, objectives, and the present circumstances. Accordingly, given my findings that the transactions should be set aside and in light of the aforementioned considerations, I order that the Agreements be set aside as void as of the date that repayment was made by Energy to TEC of the $800,000 loan, that being November 22, 2019. The Term Sheet and Debenture are set aside, with the result that TEC does not have a valid and enforceable claim against Energy arising from the Agreements.

93 I find that I am able to exercise my authority to provide that remedy under section 95 of the *BIA*, or alternatively as a means of providing for repayment to the estate under section 96 of the *BIA*, and further as an exercise of my discretion to provide a fit and appropriate remedy in light of the provisions and objectives of the *CCAA*.

Is the subordination valid?

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

94 TEC argued in oral submissions that it is open to this Court to find the subordination agreement valid even if the transactions are found to be void. TEC relies on section 96 of the *BIA*, which provides a court with discretion in determining the remedy to address a transfer at undervalue. TEC suggests that, for example, I could find the trust claim valid such that TEC's forbearance from enforcing such a claim could remain as valid consideration, even if declaring other aspects of the transaction void. In that case, TEC suggests, the subordination agreement would remain in place.

95 Based on my determination that TEC does not have a valid and enforceable claim against Energy, and in light of the fact that TEC did not have a trust interest arising out of the August IDP, there are no remaining Agreements or interests against which TEC could seek to subordinate the interests of either Regent or Stream.

Conclusion

96 As previously stated, the further relief sought by TEC in this application need not be addressed given my finding with respect to the provisions of the *BIA* and *CCAA*.

97 TEC's application is denied. TEC does not have a valid and enforceable claim against Energy with respect to the Agreements. The transaction is void as of the date of re-payment of the $800,000 from Energy to TEC, and no outstanding interests of TEC against Energy that otherwise would have arisen out of the Agreements remain.

98 Should the parties wish to address costs of these applications, their respective right to do so is reserved.

Application dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 4

1991 CarswellSask 43
Saskatchewan Court of Queen's Bench, In Bankruptcy

Springridge Farms Ltd. (Trustee of) v. Spence

1991 CarswellSask 43, 7 C.B.R. (3d) 228, 95 Sask. R. 193

Re SPRINGRIDGE FARMS LTD.; PEAT MARWICK THORNE INC. (Trustee in Bankruptcy of Springridge Farms Ltd.) v. RICHARD JAMES SPENCE and STEPHEN RICHARD SPENCE

MacPherson C.J.Q.B.

Judgment: September 19, 1991
Docket: Doc. Q.B. J.C.S. 5062

Counsel: *W.J. Matkowski*, for applicant.
D.F. Woloshyn, for respondents.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.3 Settlements of property
XI.3.a What constituting settlement

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.3 Settlements of property
XI.3.c Defence of good faith and valuable consideration

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.9 Practice and procedure
XI.9.a Summary procedure under Act

Headnote

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Settlements of property — What constituting settlement

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Settlements of property — Defence of good faith and valuable consideration

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Practice and procedure — Summary procedure under Act

Settlements — Bankrupt company selling its assets to directors/shareholders for less than fair value within 1 year of bankruptcy — Sales constituting "settlements" under s. 91(1) of Bankruptcy Act and not excluded from operation of s. 91(1) by virtue of s. 91(3)(b) of Bankruptcy Act as not made in good faith.

Practice and procedure — Decision as to whether sales constituted "settlements" under s. 91(1) of Bankruptcy Act may be

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

made in summary manner.

The trustee in bankruptcy of a farming company sought an order pursuant to s.91(1) of the *Bankruptcy Act* that certain agreements made between the bankrupt and its directors/shareholders, whereby the assets of the bankrupt were sold to the directors/shareholders for less than fair value, were void as against the trustee as they constituted "settlements."

Held:

The application was allowed.

A "settlement" occurs when a disposition of property reduces the bankrupt estate available to the trustee for distribution to creditors. The dispositions in question significantly reduced the bankrupt estate available for distribution to the creditor, and thus constituted settlements within the meaning of s. 91(1) of the *Bankruptcy Act*.

The settlements were not excluded from the operation of s. 91(1) by virtue of s. 91(3)(*b*) of the *Bankruptcy Act* as they were not made in good faith. In the absence of good faith, there was no need to make a finding as to whether there was "valuable consideration."

It was appropriate to make a decision under s. 91(1) in a summary manner.

Table of Authorities

Cases considered:

Betty Shop Ltd. (Trustee of) v. Hanen Investments Ltd., 63 C.B.R. (N.S.) 176, 49 Alta. L.R. (2d) 237, [1987] 2 W.W.R. 610, 76 A.R. 129 — *referred to*

Camgoz (Trustee of) v. Sun Life Assurance Co. of Canada (1988), 70 C.B.R. (N.S.) 131, (sub nom. *Re Camgoz)* 70 Sask. R. 70, 35 C.C.L.I. 256 (Q.B.), affirmed (1988), 72 C.B.R. (N.S.) 319 (Sask. C.A.) — *referred to*

Central Estates (Belgravia) Ltd. v. Woolgar, [1972] 1 Q.B. 48, [1971] 3 All E.R. 647 (C.A.) — *referred to*

Fancy, Re (1984), 51 C.B.R. (N.S.) 29, 46 O.R. (2d) 153, 8 D.L.R. (4th) 418 (S.C.) — *referred to*

Handman & Wilcox's Contract, Re, [1902] 1 Ch. 599 (C.A.) — *referred to*

Levine, Re (Liberty Cloak Co.'s Case) (1921), 1 C.B.R. 479, 50 O.L.R. 316, 61 D.L.R. 219 (S.C.) — *referred to*

Maitland, Re (1986), (sub nom. *Maitland (Trustee of) v. Mills)* 60 C.B.R. (N.S.) 256, 27 D.L.R. (4th) 313 (B.C. C.A.) — *referred to*

Shickele, Re (1978), 25 C.B.R. (N.S.) 67 (B.C. S.C.) — *referred to*

Springridge Farms Ltd., Re (1991), 5 C.B.R. (3d) 286, 79 D.L.R. (4th) 88, 92 Sask. R. 287 (C.A.) — *applied*

Sutherland (Dowager Duchess) v. Sutherland (Duke), [1893] 3 Ch. 169 — *referred to*

Wilson v. Doane Raymond Ltd., 69 C.B.R. (N.S.) 156, 60 Alta. L.R. (2d) 264, [1988] 5 W.W.R. 572, 51 D.L.R. (4th) 632, (sub nom. *Re Wilson (Bankrupt))* 88 A.R. 205 (C.A.) — *referred to*

Wychreschuk v. Sellors (Trustee of) (1989), 73 C.B.R. (N.S.) 267, 57 Man. R. (2d) 100 (C.A.) — *referred to*

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

s. 43(10)

s. 69(1)

s. 71(1)

s. 91(1)

s. 91(3)(b)

s. 98

Fraudulent Preferences Act, The, R.S.S. 1978, c. F-21.

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 45

Saskatchewan Farm Security Act, The, S.S. 1988-89, c. S-17.1 —

s. 9(1)(d)

s. 11

[Statute on fraudulent conveyances], 1571 (U.K.), 13 Eliz. 1, c. 5.

Rules considered:

Bankruptcy Rules, C.R.C. 1978, c. 368 —

R. 89

R. 89(a)

R. 89(c)

R. 89(d)

Words and phrases considered:

GOOD FAITH

In some instances "good faith" is described as being the opposite of "bad faith." Others indicate that there can be an absence of good faith which does not amount to bad faith. In any event, I conclude that the phrase "in good faith" [in s. 91(3)(b) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3] quite simply means to act honestly; whether failure to act honestly constitutes bad faith, is a question I need not answer.

SETTLEMENT

The word "settlement" was at one time, but is no longer, defined in the *Bankruptcy Act* [R.S.C. 1985, c. B-3]. I have reviewed the many cases cited by both counsel on this question and have also considered the provisions of s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, and I am of the view that the interpretation placed on the words [sic] by the Alberta Court of Appeal in *Wilson v. Doane Raymond Ltd.* . . . [1988] 5 W.W.R. 572 . . . *(sub nom. Re Wilson (Bankrupt))* 88 A.R. 205, is apposite. Further, I am of the view that the Alberta appeal court's interpretation is substantially in accord with the decision of this court in *Camgoz (Trustee of) v. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131, *(sub nom. Re Camgoz)* 70 Sask. R. 70 . . . (Q.B.), confirmed (1988), 72 C.B.R. (N.S.) 319 (Sask. C.A.). In *Wilson*, supra, with facts not dissimilar to ours, we find the following [p. 159, 69 C.B.R.]:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

A settlement within the scheme of the statute occurs when a disposition of property reduces the bankrupt estate available to the trustee for distribution to creditors. I adopt this interpretation and agree with the reasons of the Alberta Court of Appeal for so holding.

Application by trustee in bankruptcy for order pursuant to s.91(1) of *Bankruptcy Act*.

Tariffs considered:
Saskatchewan, The Queen's Bench Rules —

Tariff of Costs,

Schedule I "B," column 4

***MacPherson C.J.Q.B.*:**

1 The applicant, Peat Marwick Thorne Inc., trustee of the estate in bankruptcy of Springridge Farms Ltd. (the "trustee"), seeks an order against Richard James Spence and Stephen Richard Spence (hereafter referred to as "R.J. Spence" and "S.R. Spence," or collectively the "Spences") pursuant to s. 91(1) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, declaring that certain agreements made between the bankrupt ("Springridge") and the Spences, or either of them, are void against the trustee by reason of such agreements constituting "settlements." In addition, the trustee seeks subsidiary or alternative relief under Bankruptcy Rule 89, *The Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, and the *Statute of Elizabeth I*, 1571 (U.K.), 13 Eliz. 1, c. 5 [Statute on fraudulent conveyances], and for declarations pursuant to s. 98 of the Bankruptcy Act, in respect of the said agreements, and an accounting as to dispositions made by the Spences of portions of the property they received under the agreements.

Facts

2 Immediately prior to the incorporation of Springridge in 1982, R.J. Spence owned N 1/2 of 18-47-20 W3 (the "north half"), the SE 1/4 of 18-47-20 W3 (the "southeast quarter"), and the SW 17-47-20 W3 (the "southwest quarter"). Following the incorporation, R.J. Spence transferred to Springridge the north half and the southeast quarter, but retained the southwest quarter in his own name. These facts, and some others I will refer to, appear in the report of Farm Land Security Board dated May 8, 1990, which was exhibited to one of the affidavits filed, (to which no exception was taken), as well as in filed affidavits. R.J. Spence owns 52 per cent of the shares of Springridge, and his wife and their son, S.R. Spence, each owns 24 per cent. Springridge "was incorporated to facilitate the eventual transfer of the farm" to the son, S.R. Spence, who farmed with his father. Since 1984, S.R. Spence has lived on the southwest quarter, but no claim is now made that this land is his homestead.

3 The following is a chronology of significant events and actions which occurred subsequent to the incorporation of Springridge:

June 28, 1984

4 Springridge and R.J. Spence mortgaged the north half and southwest quarter to the Royal Bank for $300,000, repayable with interest over 20 years by payments of $22,502.74 on the first day of February and August in each year, commencing in February 1985. In addition, there were certain secured loan agreements, including an operating loan agreement from Springridge to the bank.

May 1, 1989

5 At this stage, Springridge was approximately $45,000 in arrears in payments to the bank; it was "absolutely without

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

cash," and unable to pay these arrears (see para. 2 of R.J. Spence affidavit, sworn July 2, 1991). Also on this date, the following agreements were entered into:

(a) Springridge sells to the Spences 119 head of cattle and their calves, constituting all of Springridge's cattle, for $150,850, with $50 payable at the time of the agreement and the balance to be paid at $7,890 per year over 20 years, with no interest.

(b) Springridge sells to the Spences all of Springridge's farm machinery for $225,000 with $500 to be paid at the time of the agreement and the balance at $11,225 per year over 20 years, with no interest.

(c) Springridge sells to R.J. Spence the southeast quarter for $33,800, payable $1,000 at the time of the agreement and the balance at $1,640 per year over 20 years, with no interest. This land is subject to a mortgage to Farm Credit Corporation on which there is approximately $13,600 owing, meaning that Springridge had an equity of about $30,000 at the sale date.

(d) R.J. Spence sells to his son S.R. Spence the southwest quarter for $100,000, with $1,000 payable at time of the agreement and the remainder at the rate of $5,000 per year over a period of 20 years, with no interest. As I will explain later, this transaction is not relevant to the application.

(e) Springridge leases to the Spences the north half for 20 years at an annual rental of $4,800 per year.

6 The material filed indicated that for each of the agreements (a) to (d) above, the market value of the property sold, presumably assuming a cash sale, is approximately the same as the consideration set forth in each agreement. As to the lease of the north half, the material indicates the market value, again presumably for a cash sale, is $185,000 for both the north half and the southeast quarter. The property conveyed or leased by Springridge in paras. (a) to (e) above constituted all of the assets of Springridge. The Royal Bank was not informed of the intention to enter into, or of the existence, of any of the above agreements until some time subsequent to their execution.

August 31, 1989, and February 1990

7 The Royal Bank of Canada (the "bank") demanded from Springridge all amounts of money due and owing pursuant to the aforesaid mortgage and operating loan in favour of the bank. No payments have been made pursuant to the demand.

March 23, 1990

8 The bank petitioned to have Springridge adjudged bankrupt, and for a receiving order to be made in respect of the property of Springridge. The bank claimed a total indebtedness from Springridge of $441,303.57 plus interest thereafter. This petition was dismissed by the chambers judge, and the order of dismissal was appealed to the Court of Appeal of Saskatchewan which, as noted below, delivered its judgment granting the petition on March 27, 1991.

May 8, 1990

9 The Farm Land Security Board, pursuant to *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, issued its report referred to above.

October 2, 1990

10 The bank served "Notice of Intention" pursuant to *The Saskatchewan Farm Security Act* stating its intention to apply for an order under s. 11 of that Act that cl. 9(1)(*d*) of that Act does not apply to the aforesaid mortgage from Springridge to the bank.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

March 27, 1991

11 The Saskatchewan Court of Appeal delivers its judgment on the bank's appeal from this court's decision refusing the bank's petition to have Springridge adjudged bankrupt. The Court of Appeal ruled that the petition be granted, and its findings resulting in that decision, in my view, are crucial to the decision I must make in the application before me.

May 9, 1991

12

(a) Pursuant to s. 69(1) of the *Bankruptcy Act*, Grotsky J. granted an order giving leave to the bank to commence and [to] continue its action against Springridge based on the mortgage from Springridge to the bank.

(b) Grotsky J. orders, pursuant to s. 11 of *The Saskatchewan Farm Security Act*, that cl. 9(1)(*d*) of that Act does not apply to the said mortgage from Springridge and R.J. Spence to the bank.

May 21, 1991

13 R.J. Spence appeals to the Court of Appeal from the aforesaid order of May 9, 1991, by Grotsky J. under *The Saskatchewan Farm Security Act*. This appeal has not been heard.

June 6 and June 19, 1991

14 The trustee launches the notices of motion which are now before me.

June 26, 1991

15 Hrabinsky J. orders that the Spences "shall not dispose of any cattle, farm machinery and equipment or grains."

16 It must first be noted that pursuant to s. 71(1) of the *Bankruptcy Act*, a bankruptcy is deemed to relate back, and to have commenced, at the time of the filing of the petition, and that date was March 23, 1990. Consequently, all of the agreements entered into by Springridge on May 1, 1989, as set out above, were entered into within 1 year prior to the bankruptcy of Springridge. These agreements, therefore, fall within ss. 91(1) and (3)(*b*) of the *Bankruptcy Act*, the relevant portions of which read:

> 91.(1) Any settlement of property, if the settlor becomes bankrupt within one year after the date of the settlement, is void against the trustee.
>
> . . . . .
>
> (3) This section does not extend to any settlement made ...
>
> (*b*) in favour of a purchaser or incumbrancer in good faith and for valuable consideration; or ... .

Also relevant to this application is R. 89 of the *Bankruptcy Rules* [C.R.C. 1978, c. 368]:

> 89. Where a trustee or any other person applies to the court to set aside or avoid any settlement, conveyance, charge, obligation, proceeding, transfer, security or payment, or for a declaration for or against the title of the trustee to any property, the court may
>
> (*a*) proceed in a summary manner to try the question or issue in the case; ...

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(*c*) direct or settle any question or issue to be tried;

(*d*) give directions for the preparation and filing of pleadings and for the trial of the question or issue; or ... .

Questions to Consider

(1) Do the first three agreements set forth above constitute a "settlement" within the meaning of s. 91(1) of the Bankruptcy Act?

17 The word "settlement" was at one time, but is no longer, defined in the *Bankruptcy Act*. I have reviewed the many cases cited by both counsel on this question and have also considered the provisions of s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, and I am of the view that the interpretation placed on the words by the Alberta Court of Appeal in *Wilson v. Doane Raymond Ltd.*, 69 C.B.R. (N.S.) 156, 60 Alta L.R. (2d) 264, [1988] 5 W.W.R. 572, 51 D.L.R. (4th) 632, (sub nom. *Re Wilson (Bankrupt)*) 88 A.R. 205, is apposite. Further, I am of the view that the Alberta appeal court's interpretation is substantially in accord with the decision of this court in *Camgoz (Trustee of) v. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131, (sub nom. *Re Camgoz)* 70 Sask. R. 70, 35 C.C.L.I. 256 (Q.B.), confirmed (1988), 72 C.B.R. (N.S.) 319 (Sask. C.A.). In *Wilson*, supra, with facts not dissimilar to ours, we find the following [p. 159, 69 C.B.R.]:

> A settlement within the scheme of the statute occurs when a disposition of property reduces the bankrupt estate available to the trustee for distribution to creditors.

I adopt this interpretation and agree with the reasons of the Alberta Court of Appeal for so holding. It is clear to me that the dispositions made of the properties covered by the three agreements significantly reduced the bankrupt estate available for distribution to the creditor. It cannot be gainsaid that the sale of those properties by the trustee would fetch a much higher price absent those agreements than would be the case with the agreements in place, due to the ridiculously generous terms granted to the purchasers in those agreements. I call attention, in this context, to the judgment of our appeal court, particularly the portions quoted hereunder.

18 Consequently, I hold that the aforesaid three agreements constitute a settlement within the meaning of s. 91(1) of the *Bankruptcy Act*. I make no similar finding in respect of the lease, since neither of the trustee's notices of motion seek relief under this subsection in respect of the said lease.

(2) If the aforesaid three agreements constitute a "settlement," are they excluded from the operation of s. 91(1) by reason of s. 91(3)(b) as being settlements made "in good faith and for valuable consideration"?

19 It is to be noted that a settlement is excluded only if it was made both in good faith *and* for valuable consideration. I will deal firstly with the meaning of "good faith," and I have found the following definitions or references to these words:

> (a) Webster's Third New International Dictionary (Unabridged):
>
> Good faith — a state of mind indicating honesty and lawfulness of purpose ... belief that one's conduct is not unconscionable or that known circumstances do not require further investigation.
>
> (b) *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979):
>
> Good faith ... encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. ... Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. ... In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose ... .
>
> (c) *Central Estates (Belgravia) Ltd. v. Woolgar*, [1972] 1 Q.B. 48, [1971] 3 All E.R. 647 (C.A.). Lord Denning, at p. 649 [All E.R.]:

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> To my mind under this Act (*Leasehold Reform Act, 1967*) a claim is made 'in good faith' when it is made honestly and with no ulterior motive.

> (d) *Sutherland (Dowager Duchess) v. Sutherland (Duke)*, [1893] 3 Ch. 169, at p. 191:

> in considering whether leases have been granted in good faith and for the benefit of the estate, it may be, and in the present case is, of importance to see what were the circumstances under which the leases were made, and what were the objects and effect of the leases, and what was done under them during the grantor's life.

> (e) *Re Handman & Wilcox's Contract*, [1902] 1 Ch. 599 (C.A.), at p. 608:

> In my opinion, therefore, the lessee did not reserve the best rent that could be obtained, and the lessee did not act in good faith within the meaning of s. 54 ... .

20 In some instances "good faith" is described as being the opposite of "bad faith." Others indicate that there can be an absence of good faith which does not amount to bad faith. In any event, I conclude that the phrase "in good faith" quite simply means to act honestly; whether failure to act honestly constitutes bad faith, is a question I need not answer.

21 I turn now to the decision of our Court of Appeal, *Re Springridge Farms Ltd.* (1991), 5 C.B.R. (3d) 286, 79 D.L.R. (4th) 88, 92 Sask. R. 287, wherein it allowed the appeal and granted the bankruptcy petition against Springridge. Gerwing J.A. delivered the judgment of the court based on material in many respects identical to the material before me. I am bound by the findings of the Court of Appeal, and in my view, its entire judgment is relevant to the question before me relating to good faith. The Court of Appeal did not specifically find that the Spences had acted fraudulently in respect to the agreements, but it did find that there were "special circumstances" warranting the issuance of the bankruptcy petition, and in the course of its judgment stated:

22 — At p. 93 [D.L.R.]:

> there are unequivocally such special circumstances here that ... the petition should have been given effect to.

23 — At p. 94:

> Fraud may be a special circumstance but other special circumstances may also exist. It is accordingly not necessary that fraud, as such, be shown ... .
>
> . . . . .
>
> The transfer of virtually all assets, worth over $400,000, to the directors in the context of the circumstances existing here, the reasons alleged for it and the contracts themselves constitute, in my view, such special circumstances.
>
> . . . . .
>
> The terms of the agreement clearly speak to the substitution of empty assets for actual assets at a time when the respondent was in default of its obligations in a substantial way to the petitioner.

24 — At p. 95:

> In the context of the admission to intent, the substantial default to the bank at the time of the transfer, and the low initial consideration, deferred payment schedule, and no interest, it appears unequivocally to be what the bank suggest, that is, special circumstances.

25 I cannot look at the above specific findings, together with the other contents of the Court of Appeal judgment, without

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

concluding that the "special circumstances" found by the Court of Appeal constitute a clear absence of good faith on the part of the Spences, and I so find.

26 I am, of course, aware that I had before me the affidavit of R.J. Spence sworn on July 2, 1991, which was not before the Court of Appeal. This affidavit expanded to some extent on what R.J. Spence said in his affidavit which was before that court.

27 In para. 2 of the newer affidavit, R.J. Spence sets forth the rationale for Springridge having entered into the agreements and the lease, and that these steps were "in the interests of" his son and himself, and that he was advised by his solicitor and believes that following these steps, the bank's security would remain "in place" and be enforceable by the bank under Saskatchewan law. He went on to state that each of his wife, his son and himself had given the bank personal guarantees for the full amount owing to the bank, and that his wife and he "still have substantial personal assets ..." He then stated in that paragraph:

> If it is alleged that Stephen Richard Spence and myself have obtained any financial advantage from the transactions referred to, then to that extent we are better able to honour the guarantees in favour of the Royal Bank of Canada that we have signed. If it is alleged that some of the purchased assets are exempt from seizure, it should be noted that Stephen Richard Spence and myself would be prevented from selling or hypothecating any of them and would sooner or later have to account for the proceeds of any sale to the secured creditor or to the Sheriff were a Writ of Execution in place.

28 It is noteworthy that while he states that the bank's security remains "in place," he does not, and obviously could not, state that there is no reduction in the value of the bank's security resulting from the agreements and lease. Nor does he suggest that the "personal assets" referred to are sufficient to meet any claim made by the bank under the personal guarantees.

29 As to the "exemptions" referred to in the above-quoted paragraph, he further states in para. 10 of the newer affidavit:

> As it was necessary in any event that farming operations be carried on by Stephen Richard Spence and myself, I did consider that the policy of governments generally is that farm assistance programs are of greater assistance to individuals than to corporations, and furthermore that if in the future our farming operation had difficulty in meeting its obligations, I would have more protection as an individual farmer than would Springridge Farms Ltd. have as a corporate farmer.

In view of the size of the debt and the terms of the agreements and lease, I find these words to be a tacit admission that should the agreements continue, the exemption factor would result in a marked reduction in the value of the bank's security from what that value would be absent the agreements and lease. In this general context, I refer again to appeal court's comment as to "the substitution of empty assets for actual assets."

30 In paras. 4, 5 and 6 of the newer affidavit, R.J. Spence states, in effect, that the purchase price in each agreement is "fair market value." While these purchase prices, on the basis of the material before me, likely do constitute fair market value for a cash sale, to sug gest that any vendor, in arm's-length transactions, would sell at those prices *and* with the extended payment and interest-free terms contained in the agreements, is simply unacceptable and unbelievable.

31 In short, I hold that the newer affidavit does not give reason to alter the findings of the appeal court. I would add that the cases make it clear that the onus of establishing good faith is on the beneficiary of the settlement, and in my view, they have not met that onus (*Betty Shop Ltd. (Trustee of) v. Hanen Investments Ltd.*, 63 C.B.R. (N.S.) 176, 49 Alta. L.R. (2d) 237, [1987] 2 W.W.R. 610, 76 A.R. 129 (Q.B.), at p. 183 [C.B.R.]).

(3) Should a decision under s. 91(1) be made in a summary manner?

32 Counsel for the Spences argued, both in his written brief and verbally before me, that the questions I have answered above should not be dealt with in the summary manner which I have followed and which is provided for in Bankruptcy Rule 89(*a*), but rather I should direct an issue to be tried under R. 89(*c*).

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

33 In considering this argument, I must first observe that at no time was it suggested by counsel that if an issue should be ordered and tried, would any evidence be forthcoming from the Spences which would alter, supplement or add to the evidence in the two affidavits of R.J. Spence. Together with the findings of our appeal court, it is the contents of those affidavits and the undisputed terms of the agreements and lease that have satisfied me of the absence of good faith on the part of the Spences. As in *Re Levine (Liberty Cloak Co.'s Case)* (1921), 1 C.B.R. 479, 50 O.L.R. 316, 61 D.L.R. 219 (S.C.), at p. 317 [O.L.R.], "[t]he conclusion is irresistible," and as further stated at p. 318:

> Where, as here, the evidence is all before the Court, nothing would be gained by directing an issue to try the question ... to direct an issue would merely add unnecessary costs.

34 This quotation is almost identical to the commentary respecting R. 89 found in the text *The Annotated Bankruptcy Act 1990*, L.W. Houlden and C.H. Morawetz (Toronto: Carswell, 1990), at p. 327, and in those authors' larger work, *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), vol. 2, at p. 8-40.

35 In *Re Maitland* (1986), (sub nom. *Maitland (Trustee of) v. Mills)* 60 C.B.R. (N.S.) 256, (sub nom. *Re Maitland)* 27 D.L.R. (4th) 313 (B.C. C.A.), at p. 259 [C.B.R.], it was held that "no useful purpose can be served by having the application ... referred to the general trial list," and in my view, the same situation pertains in the case before me. See also *Wychreschuk v. Sellors (Trustee of)* (1989), 73 C.B.R. (N.S.) 267, 57 Man. R. (2d) 100 (C.A.) , where it was held at p. 268 [C.B.R.]:

> One of the purposes of bankruptcy legislation is to obviate the expense of litigation which serves no significant monetary purpose.

36 Under s. 91(3)(*b*), only absence of good faith, and not fraud, is required to remove the exclusionary effect; if fraud had been specified in the subsection, then, on the material before me, there may have been merit in directing an issue. I am, therefore, satisfied that it is appropriate to proceed in a summary manner (as did our Court of Appeal notwithstanding s. 43(10) of the *Bankruptcy Act*) in the circumstances of this case.

37 Under these circumstances, and with the s. 91(3)(*b*) reading as it does, there is no need for me to deal with those portions of the notices of motion requesting orders based on either *The Fraudulent Preferences Act* or the *Statute of Elizabeth I*. Further, having found absence of good faith, there is no need to determine whether fraud was present.

38 Having found as I have as to the absence of good faith, there is also no need to make a finding as to whether there was "valuable consideration" for the agreements and the lease. However I note that in *Re Fancy* (1984), 51 C.B.R. (N.S.) 29, 46 O.R. (2d) 153, 8 D.L.R. (4th) 418 (S.C.), it was held at p. 35 [C.B.R.]:

> I find that the payment of nominal consideration by the bankrupt's wife in the circumstances does not make her 'a purchaser. .. for valuable consideration.'

See also *Re Shickele* (1978), 25 C.B.R. (N.S.) 67 (B.C. S.C.), at p. 73.

39 I therefore ORDER AND DECLARE the following settlements to be void pursuant to s. 91(1) of the *Bankruptcy Act*:

> (1) Agreement dated May 1, 1989, between Springridge Farms Ltd. as vendor and Richard James Spence and Stephen Richard Spence as purchasers whereby the vendor agreed to sell to the purchasers certain cattle as described in Schedule A to the said agreement at a price of $157,850, payable $50 on the date of the agreement and the balance at the rate of $7,890 per year over a period of 20 years, with no interest to be charged by the vendor to the purchasers.
>
> (2) Agreement dated May 1, 1989, between Springridge Farms Ltd. as vendor and Richard James Spence and Stephen Richard Spence as purchasers wherein the vendor agreed to sell to the purchasers certain farm machinery as described in Schedule A to the said agreement for the sum of $225,000, with $500 to be paid on the date of the agreement and the balance at the rate of $11,225 per year over a period of 20 years, with no interest to be charged by the vendor to the purchasers.
>
> (3) Agreement dated May 1, 1989, between Springridge Farms Ltd. as vendor and Richard James Spence as purchaser

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> wherein the vendor agreed to sell to the purchaser the southeast quarter of Section 18, Township 47, Range 20 west of the third meridian, province of Saskatchewan, for the sum of $33,800, with $1,000 to be paid on the date of said agreement and the balance at the rate of $1,640 per year over a period of 20 years with no interest to be charged by the vendor to the purchaser.

40 The trustee shall have its costs on column 4.

41 I make no finding under s. 91(1) in respect to the aforesaid lease dated May 1, 1989, from Springridge to the Spences, because the trustee's notices of motion do not appear to seek relief as to the lease pursuant to that subsection. Only para. 1 of the notice of motion dated June 6, 1991, seeks relief under s. 91, and that relief is restricted to:

> cattle, farm equipment and farmland valued at $416,650.00.

It is apparent from the material filed that the fair value of the southeast quarter, the farm machinery and the cattle, total the said amount of $416,650. If the aforesaid paragraph of that notice of motion had intended to include the lease as to the north half, then that total value would have been substantially higher because, as stated earlier, the material shows, the parties are in agreement that the value of the north half and the southwest quarter is $185,000. I may say, however, by way of obiter, that I can see no reason to treat the lease any differently than the other three agreements, and that it is open to the trustee to launch a new application seeking relief under s. 91(1) as to the said lease.

42 I should further add that both notices of motion seek relief under s. 98 of the *Bankruptcy Act*, which I have not granted. In view of the orders which I have made, I see no need for any such relief, and in any event, I read s. 98 as speaking for itself and being triggered only when the transaction has been found to be void or voidable, at which time the provisions of that section become operative.

43 Finally, the trustee seeks orders under s. 98 requiring the Spences to account for certain property; I can see nothing in s. 98 authorizing me to order an accounting.

Application allowed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 5

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, 4 Alta. L.R. (6th) 219, 584 A.R. 6, 623 W.A.C. 6, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

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

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

Related Abridgment Classifications

Contracts
IX Performance or breach
  IX.4 Obligation to perform
    IX.4.d Sufficiency of performance
      IX.4.d.i Duty to perform in good faith

Contracts
XIV Remedies for breach
  XIV.5 Damages
    XIV.5.q Miscellaneous

Torts
III Conspiracy
  III.1 Elements
    III.1.d Miscellaneous

Torts
X Interference with contractual relations
  X.1 Elements

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

X.1.b Intention to cause loss

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contracts --- Remedies for breach — Damages — Miscellaneous
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.s enrolment directors — C Corp. outlined its plans to Commission and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge's assessment of damages was varied to $87,000 plus interest — C Corp. was liable for damages calculated on basis of what B's economic position would have been had C Corp. fulfilled its duty — While trial judge did not assess damages on that basis, given different findings in relation to liability, trial judge made findings that permitted current Court to do so — These findings permitted damages to be assessed on basis that if C Corp. had performed contract honestly, B would have been able to retain value of his business rather than see it, in effect, expropriated and turned over to H — It was clear from findings of trial judge and from record that value of business around time of non renewal was $87,000.

Torts --- Inducing breach of contract — Elements of tort
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Torts --- Conspiracy — Nature and elements of tort — Miscellaneous
C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi
Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Contrats --- Réparation du défaut — Dommages-intérêts — Divers
Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial, chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt — Société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation — Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire — Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H — Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

Délits civils --- Incitation à violer un contrat — Éléments constitutifs du délit
Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Délits civils --- complot — Nature et éléments constitutifs du délit — Divers
Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

— Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

C Corp. was in the business of selling education savings plans to investors, through contracts with enrolment directors. B and H were enrolment directors, and were competitors. An enrolment director's agreement governed the relationship between C Corp. and B. C Corp. appointed H as the provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors. C Corp. outlined its plans to the Commission, and they included B working for H's agency. When B refused to allow H to audit his records, C Corp. threatened to terminate the agreement. C Corp. gave notice of non renewal under the agreement. At the expiry of the contract term, B lost value in his business in his assembled workforce. The majority of B's sales agents were successfully solicited by H's agency.

B's action against C Corp. and H was allowed. The trial judge found C Corp. was in breach of the implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed B's action. B appealed.

Held: The appeal was allowed in part.

Per Cromwell J. (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring): The appeal with respect to C Corp. was allowed, and the appeal with respect to H was dismissed. The trial judge's assessment of damages was varied to $87,000 plus interest. The objection to C Corp.'s conduct did not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith, namely a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

The trial judge did not make a reversible error by adjudicating the issue of good faith. C Corp. breached the agreement when it failed to act honestly with B in exercising the non renewal clause. The trial judge's findings amply supported the conclusion that C Corp. acted dishonestly with B throughout the period leading up to its exercise of the non renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The caims against H were rightly dismissed. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

C Corp. was liable for damages calculated on the basis of what B's economic position would have been had C Corp. fulfilled its duty. While the trial judge did not assess damages on that basis, given the different findings in relation to liability, the trial judge made findings that permitted the current Court to do so. These findings permitted damages to be assessed on the basis that if C Corp. had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It was clear from the findings of the trial judge and from the record that the value of the business around the time of non renewal was $87,000.

La société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions. B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre. La relation entre la société C et B était régie par une entente relative au directeur des souscriptions. La société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C. La société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H. Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente. La société C a donné à B un préavis de non-renouvellement conformément à l'entente. À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise. La majorité de ses représentants des ventes ont été recrutés par l'agence de H.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

L'action déposée par B à l'encontre de la société C et H a été accueillie. La juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil. La Cour d'appel a accueilli l'appel et a rejeté l'action de B. B a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Le pourvoi relatif à la société C a été accueilli, le pourvoi relatif à H a été rejeté. L'appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt. Le reproche à l'égard de la conduite de la société C ne cadrait dans aucune des situations ou des relations à l'égard desquelles les obligations de bonne foi ont trouvé application. Il convient de reconnaître une nouvelle obligation en common law qui s'applique à tous les contrats en tant que manifestation du principe directeur général de bonne foi, soit une obligation d'exécution honnête qui oblige les parties à faire preuve d'honnêteté l'une envers l'autre dans le cadre de l'exécution de leurs obligations contractuelles. En vertu de cette nouvelle obligation générale d'honnêteté applicable à l'exécution des contrats, les parties ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat.

La juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi. La société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement. Les motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP. Les demandes contre H ont été à juste titre rejetées. La Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

La société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation. Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire. Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H. Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

Table of Authorities

Cases considered by *Cromwell J.*:

Agribrands Purina Canada Inc. v. Kasamekas (2011), 2011 ONCA 460, 86 C.C.L.T. (3d) 179, 278 O.A.C. 363, 87 B.L.R. (4th) 1, 2011 CarswellOnt 5034, 334 D.L.R. (4th) 714, 106 O.R. (3d) 427 (Ont. C.A.) — referred to

Aleyn v. Belchier (1758), 28 E.R. 634, 1 Eden 132 (Eng. Ch.) — considered

Andrusiw v. Aetna Life Insurance Co. of Canada (2001), 289 A.R. 1, 2001 CarswellAlta 1506, 33 C.C.L.I. (3d) 238, [2002] I.L.R. I-4062, 33 C.C.L.I. (2d) 238 (Alta. Q.B.) — referred to

Atlantic Richfield Co. v. Razumic (1978), 390 A.2d 736, 480 Pa. 366 (U.S. Pa. S.C.) — referred to

Bank of America Canada v. Mutual Trust Co. (2002), 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, [2002] 2 S.C.R. 601, 2002 CSC 43 (S.C.C.) — referred to

Banque canadienne nationale c. Soucisse (1981), 1981 CarswellQue 110, [1981] 2 S.C.R. 339, 43 N.R. 283, 1981 CarswellQue 110F (S.C.C.) — referred to

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Banque de Montréal c. Ng (1989), 62 D.L.R. (4th) 1, [1989] 2 S.C.R. 429, 100 N.R. 203, 26 Q.A.C. 20, 1989 CarswellQue 126, 28 C.C.E.L. 1, 1989 CarswellQue 1818 (S.C.C.) — referred to

Banque nationale du Canada c. Houle (1990), 1990 CarswellQue 37, [1990] R.R.A. 883, 1990 CarswellQue 123, (sub nom. *Houle v. Canadian National Bank)* 74 D.L.R. (4th) 577, [1990] 3 S.C.R. 122, 35 Q.A.C. 161, 114 N.R. 161, 5 C.B.R. (3d) 1 (S.C.C.) — referred to

Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp. (2013), 365 D.L.R. (4th) 15, 2013 ONCA 494, 4 C.B.R. (6th) 214, 17 B.L.R. (5th) 171, 2013 CarswellOnt 11271, (sub nom. *Barclays Bank plc v. Metcalfe & Mansfield Alternative Investments VII Corp.)* 308 O.A.C. 17 (Ont. C.A.) — referred to

Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 221 N.R. 1, 1997 CarswellNfld 207, 1997 CarswellNfld 208, 153 D.L.R. (4th) 385, 490 A.P.R. 269, [1997] 3 S.C.R. 1210, 48 C.C.L.I. (2d) 1, 37 B.L.R. (2d) 1, 158 Nfld. & P.E.I.R. 269, 40 C.C.L.T. (2d) 235, 1999 A.M.C. 108 (S.C.C.) — considered

Bram Enterprises Ltd. v. A.I. Enterprises Ltd. (2014), 2014 CarswellNB 17, 2014 CarswellNB 18, 2014 SCC 12, (sub nom. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.)* [2014] 1 S.C.R. 177, 2014 CSC 12, 48 C.P.C. (7th) 227, 453 N.R. 273, 1079 A.P.R. 1, 416 N.B.R. (2d) 1, 366 D.L.R. (4th) 573, 7 C.C.L.T. (4th) 1, 21 B.L.R. (5th) 173 (S.C.C.) — referred to

British Columbia v. Imperial Tobacco Canada Ltd. (2005), 45 B.C.L.R. (4th) 1, [2005] 2 S.C.R. 473, 134 C.R.R. (2d) 46, 2005 SCC 49, 2005 CarswellBC 2207, 2005 CarswellBC 2208, 257 D.L.R. (4th) 193, [2006] 1 W.W.R. 201, 218 B.C.A.C. 1, 359 W.A.C. 1, 134 C.R.R. (2d) 47, 339 N.R. 129, 27 C.P.C. (6th) 13 (S.C.C.) — referred to

Burger King Corp. v. Hungry Jacks 's Pty Ltd. (2001), [2001] NSWCA 187 (New South Wales C.A.) — referred to

Carter v. Boehm (1766), 97 E.R. 1162, [1558-1774] All E.R. Rep. 183, 3 Burr. 1905 (Eng. K.B.) — considered

CivicLife.com Inc. v. Canada (Attorney General) (2006), 2006 CarswellOnt 3769, 215 O.A.C. 43 (Ont. C.A.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 642, 2014 CarswellOnt 643, 2014 SCC 8, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* [2014] 1 S.C.R. 126, 27 C.L.R. (4th) 65, 37 R.P.R. (5th) 63, 2014 CSC 8, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 453 N.R. 101, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 314 O.A.C. 49, 12 C.C.E.L. (4th) 63, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 366 D.L.R. (4th) 671, 47 C.P.C. (7th) 1, 21 B.L.R. (5th) 311 (S.C.C.) — referred to

Crawford v. New Brunswick (Agricultural Development Board) (1997), 1997 CarswellNB 356, 13 R.P.R. (3d) 215, (sub nom. *Crawford v. Agricultural Development Board (N.B.))* 192 N.B.R. (2d) 68, (sub nom. *Crawford v. Agricultural Development Board (N.B.))* 489 A.P.R. 68 (N.B. C.A.) — referred to

Dynamic Transport Ltd. v. O.K. Detailing Ltd. (1978), 85 D.L.R. (3d) 19, [1978] 2 S.C.R. 1072, 20 N.R. 500, 6 Alta. L.R. (2d) 156, 9 A.R. 308, 4 R.P.R. 208, 1978 CarswellAlta 62, 1978 CarswellAlta 298 (S.C.C.) — considered

Fidler v. Sun Life Assurance Co. of Canada (2006), 2006 SCC 30, 2006 CarswellBC 1596, 2006 CarswellBC 1597, (sub nom. *Sun Life Assurance Co. of Canada v. Fidler)* [2006] I.L.R. 1-4521, [2006] 2 S.C.R. 3, 350 N.R. 40, 227 B.C.A.C. 39, 374 W.A.C. 39, 39 C.C.L.I. (4th) 1, (sub nom. *Sun Life Assurance Company of Canada v. Fidler)* 2007 C.L.L.C. 210-015, [2006] 8 W.W.R. 1, 2006 C.E.B. & P.G.R. 8202, 57 B.C.L.R. (4th) 1, 53 C.C.E.L. (3d) 1, (sub nom. *Sun Life Assurance Co. of Canada v. Fidler)* 271 D.L.R. (4th) 1, [2006] R.R.A. 525 (S.C.C.) — considered

Freedman v. Mason (1958), (sub nom. *Mason v. Freedman)* [1958] S.C.R. 483, (sub nom. *Mason v. Freedman)* 14 D.L.R. (2d) 529, 1958 CarswellOnt 73 (S.C.C.) — considered

Gateway Realty Ltd. v. Arton Holdings Ltd. (1991), 106 N.S.R. (2d) 180, 288 A.P.R. 180, 1991 CarswellNS 320 (N.S. T.D.) — considered

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Gateway Realty Ltd. v. Arton Holdings Ltd. (1992), (sub nom. *Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3))* 112 N.S.R. (2d) 180, (sub nom. *Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3))* 307 A.P.R. 180, 1992 CarswellNS 518 (N.S. C.A.) — referred to

GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd. (2003), [2003] FCA 50 (Australia C.A.) — referred to

Grant v. Torstar Corp. (2009), 204 C.R.R. (2d) 1, [2009] 3 S.C.R. 640, 397 N.R. 1, 102 O.R. (3d) 607 (note), 258 O.A.C. 285, 72 C.C.L.T. (3d) 1, 314 D.L.R. (4th) 1, 2009 CarswellOnt 7956, 2009 CarswellOnt 7957, 2009 SCC 61, 79 C.P.R. (4th) 407 (S.C.C.) — referred to

Greenberg v. Meffert (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548, (sub nom. *Greenberg v. Montreal Trust Co.)* 9 O.A.C. 69, 7 C.C.E.L. 152, 37 R.P.R. 74, 1985 CarswellOnt 727 (Ont. C.A.) — referred to

Herbert v. Mercantile Fire Insurance Co. (1878), 43 U.C.Q.B. 384, 1878 CarswellOnt 200 (Ont. Q.B.) — referred to

Hill v. Church of Scientology of Toronto (1995), 25 C.C.L.T. (2d) 89, 184 N.R. 1, (sub nom. *Manning v. Hill)* 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130, 1995 CarswellOnt 396, 1995 CarswellOnt 534, (sub nom. *Hill v. Church of Scientology)* 30 C.R.R. (2d) 189, 24 O.R. (3d) 865 (S.C.C.) — referred to

Interfoto Library Ltd. v. Stiletto Visual Programmes Ltd. (1987), [1987] EWCA Civ 6, [1989] 1 Q.B. 433 (Eng. C.A.) — considered

J.H. Westerbeke Corp. v. Onan Corp. (1984), 580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass.) — referred to

Keays v. Honda Canada Inc. (2008), 2008 SCC 39, (sub nom. *Honda Canada Inc. v. Keays)* 2008 C.L.L.C. 230-025, 376 N.R. 196, 294 D.L.R. (4th) 577, (sub nom. *Honda Canada Inc. v. Keays)* [2008] 2 S.C.R. 362, 92 O.R. (3d) 479 (note), (sub nom. *Honda Canada Inc. v. Keays)* 63 C.H.R.R. D/247, 66 C.C.E.L. (3d) 159, 2008 CarswellOnt 3743, 2008 CarswellOnt 3744, 239 O.A.C. 299 (S.C.C.) — considered

Kirke La Shelle Co. v. Armstrong Co. (1933), 263 N.Y. 79 (U.S. N.Y. Ct. App.) — referred to

L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. (1973), [1973] 2 All E.R. 39, (sub nom. *Wickman Machine Tool Sales Ltd. v. L.Schuler A.G.)* [1974] A.C. 235 (U.K. H.L.) — considered

LeMesurier v. Andrus (1986), 38 R.P.R. 183, 54 O.R. (2d) 1, 25 D.L.R. (4th) 424, 12 O.A.C. 299, 1986 CarswellOnt 670 (Ont. C.A.) — considered

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, (sub nom. *London Drugs Ltd. v. Brassart)* 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, (sub nom. *London Drugs Ltd. v. Brassart)* 18 B.C.A.C. 1, (sub nom. *London Drugs Ltd. v. Brassart)* 31 W.A.C. 1, 97 D.L.R. (4th) 261, 1992 CarswellBC 913, 1992 CarswellBC 315 (S.C.C.) — referred to

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd. (1999), 170 D.L.R. (4th) 577, 49 B.L.R. (2d) 1, 237 N.R. 334, 44 C.L.R. (2d) 163, [1999] 1 S.C.R. 619, 232 A.R. 360, 195 W.A.C. 360, 1999 CarswellAlta 301, 1999 CarswellAlta 302, 2 T.C.L.R. 235, 69 Alta. L.R. (3d) 341, [1999] 7 W.W.R. 681, 3 M.P.L.R. (3d) 165 (S.C.C.) — referred to

Machtinger v. HOJ Industries Ltd. (1992), 40 C.C.E.L. 1, (sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, (sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 136 N.R. 40, 92 C.L.L.C. 14,022, [1992] 1 S.C.R. 986, 1992 CarswellOnt 892, 7 O.R. (3d) 480 (note), 7 O.R. (3d) 480, 1992 CarswellOnt 989 (S.C.C.) — referred to

Maracle v. Travelers Indemnity Co. of Canada (1991), [1991] I.L.R. 1-2728, 125 N.R. 294, 80 D.L.R. (4th) 652, 47 O.A.C. 333, (sub nom. *Travellers Indemnity Co. of Canada v. Maracle)* [1991] 2 S.C.R. 50, 50 C.P.C. (2d) 213, 3 C.C.L.I. (2d) 186, 3 O.R. (3d) 510, 1991 CarswellOnt 450, 3 O.R. (3d) 510 (note), 1991 CarswellOnt 1019 (S.C.C.) —

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

referred to

Martel Building Ltd. v. R. (2000), 2000 SCC 60, (sub nom. *Martel Building Ltd. v. Canada)* [2000] 2 S.C.R. 860, 36 R.P.R. (3d) 175, (sub nom. *Martel Building Ltd. v. Canada)* 193 D.L.R. (4th) 1, 2000 CarswellNat 2678, 2000 CarswellNat 2679, 2000 CSC 60, 3 C.C.L.T. (3d) 1, 5 C.L.R. (3d) 161, (sub nom. *Martel Building Ltd. v. Canada)* 262 N.R. 285, 186 F.T.R. 231 (note) (S.C.C.) — referred to

McDonald's Restaurants of Canada Ltd. v. British Columbia (1997), 7 R.P.R. (3d) 202, 1997 CarswellBC 481, 29 B.C.L.R. (3d) 303, 88 B.C.A.C. 33, 144 W.A.C. 33, [1997] 4 W.W.R. 229 (B.C. C.A.) — referred to

Mellish v. Motteux (1792), 170 E.R. 113, Peake 156 (Eng. K.B.) — referred to

Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd. (1994), 19 Alta. L.R. (3d) 38, 149 A.R. 187, 63 W.A.C. 187, 13 B.L.R. (2d) 310, 1994 CarswellAlta 89 (Alta. C.A.) — considered

Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd. (2013), [2013] EWCA Civ 200 (Eng. C.A.) — considered

Mills v. Mills (1938), 60 C.L.R. 150, 11 A.L.J. 527 (Australia H.C.) — considered

Mitsui & Co. (Canada) Ltd. v. Royal Bank (1995), 32 C.B.R. (3d) 1, 1995 CarswellNS 59, 1995 CarswellNS 84, 180 N.R. 161, 123 D.L.R. (4th) 449, [1995] 2 S.C.R. 187, 142 N.S.R. (2d) 1, 407 A.P.R. 1 (S.C.C.) — considered

Parna v. G. & S. Properties Ltd. (1970), [1971] S.C.R. 306, 1970 CarswellOnt 208, 1970 CarswellOnt 208F, 15 D.L.R. (3d) 336 (S.C.C.) — referred to

Peel (Regional Municipality) v. Canada (1992), (sub nom. *Peel (Regional Municipality) v. Ontario)* 144 N.R. 1, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 659 (S.C.C.) — followed

Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558 (2002), (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.)* 2002 SCC 8, 2002 CarswellSask 22, 2002 CarswellSask 23, 217 Sask. R. 22, 265 W.A.C. 22, (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.)* [2002] 1 S.C.R. 156, 2002 C.L.L.C. 220-008, 280 N.R. 333, [2002] 4 W.W.R. 205, 208 D.L.R. (4th) 385, (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.)* 90 C.R.R. (2d) 189, 78 C.L.R.B.R. (2d) 161, 2002 CSC 8 (S.C.C.) — referred to

Pitney-Bowes Inc. v. Mestre (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla.) — referred to

Pitney-Bowes Inc. v. Mestre (1983), 464 U.S. 893 (U.S. Sup. Ct.) — referred to

Québec (Commission hydroélectrique) c. Banque de Montréal (1992), 3 C.L.R. (2d) 1, 1992 CarswellQue 117, 1992 CarswellQue 2073, (sub nom. *Bank of Montreal v. Bail Ltée)* 93 D.L.R. (4th) 490, (sub nom. *Bank of Montreal v. Bail Ltée)* [1992] 2 S.C.R. 554, (sub nom. *Bank of Montreal v. Bail Ltée)* [1992] R.R.A. 673, (sub nom. *Banque de Montréal c. Hydro-Québec)* 138 N.R. 185, (sub nom. *Bank of Montreal v. Bail Ltée)* 48 Q.A.C. 241 (S.C.C.) — referred to

R. v. Hart (2014), 375 D.L.R. (4th) 1, 312 C.C.C. (3d) 250, 461 N.R. 1, 12 C.R. (7th) 221, 2014 SCC 52, 2014 CSC 52, 2014 CarswellNfld 215, 2014 CarswellNfld 216 (S.C.C.) — referred to

R. v. Jones (1994), 30 C.R. (4th) 1, 166 N.R. 321, 43 B.C.A.C. 241, 69 W.A.C. 241, 89 C.C.C. (3d) 353, [1994] 2 S.C.R. 229, 114 D.L.R. (4th) 645, 21 C.R.R. (2d) 286, 1994 CarswellBC 580, 1994 CarswellBC 1240 (S.C.C.) — referred to

R. v. Salituro (1991), 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654, 131 N.R. 161, 68 C.C.C. (3d) 289, 1991 CarswellOnt 1031, 1991 CarswellOnt 124 (S.C.C.) — considered

Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works) (1992), 26 N.S.W.L.R. 234 (New South

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Wales C.A.) — considered

Ryan v. Moore (2005), 254 D.L.R. (4th) 1, 334 N.R. 355, [2005] 2 S.C.R. 53, 2005 CSC 38, 2005 SCC 38, 2005 CarswellNfld 157, 2005 CarswellNfld 158, 247 Nfld. & P.E.I.R. 286, 735 A.P.R. 286, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, [2005] R.R.A. 694, 18 E.T.R. (3d) 163 (S.C.C.) — referred to

Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533, 172 O.A.C. 78, 226 D.L.R. (4th) 577, 38 B.L.R. (3d) 42, 2003 CarswellOnt 2038 (Ont. C.A.) — referred to

Shell Oil Co. v. Marinello (1972), 294 A.2d 253 (U.S. N.J. Sup. Ct.) — referred to

Shell Oil Co. v. Marinello (1973), 307 A.2d 598, 63 N.J. 402 (U.S. N.J. Sup. Ct.) — referred to

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 397 N.R. 331, [2010] 1 S.C.R. 69, 281 B.C.A.C. 245, 475 W.A.C. 245, 315 D.L.R. (4th) 385, 2010 CarswellBC 296, 2010 CarswellBC 297, 2010 SCC 4, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, [2010] 3 W.W.R. 387, 100 B.C.L.R. (4th) 201 (S.C.C.) — referred to

Transamerica Life Canada Inc. v. ING Canada Inc. (2003), [2004] I.L.R. I-4258, 68 O.R. (3d) 457, 2003 CarswellOnt 4834, 41 B.L.R. (3d) 1, 234 D.L.R. (4th) 367 (Ont. C.A.) — referred to

United Roasters Inc. v. Colgate-Palmolive Co. (1981), 649 F.2d 985 (U.S. C.A. 4th Cir.) — distinguished

Wallace v. United Grain Growers Ltd. (1997), 123 Man. R. (2d) 1, 159 W.A.C. 1, 152 D.L.R. (4th) 1, 1997 CarswellMan 455, 1997 CarswellMan 456, 219 N.R. 161, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1997] L.V.I. 2889-1, 97 C.L.L.C. 210-029 (S.C.C.) — considered

Watkins v. Olafson (1989), 50 C.C.L.T. 101, 1989 CarswellMan 333, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 61 D.L.R. (4th) 577, 100 N.R. 161, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 1989 CarswellMan 1 (S.C.C.) — referred to

Whiten v. Pilot Insurance Co. (2002), 156 O.A.C. 201, 35 C.C.L.I. (3d) 1, [2002] 1 S.C.R. 595, 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, 283 N.R. 1, 20 B.L.R. (3d) 165, [2002] I.L.R. I-4048, 209 D.L.R. (4th) 257, 58 O.R. (3d) 480 (note), 2002 CSC 18 (S.C.C.) — considered

Yam Seng Pte Ltd. v. International Trade Corp Ltd. (2013), [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.) — considered

702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England (2000), 2000 CarswellOnt 904, 107 O.T.C. 396, (sub nom. *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's, London*) 130 O.A.C. 373, (sub nom. *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters*) 184 D.L.R. (4th) 687, (sub nom. *702535 Ontario Inc. v. Lloyd's London Non-Marine Underwriters*) [2000] I.L.R. I-3826 (Ont. C.A.) — referred to

Statutes considered:

Code civil du Bas-Canada, S. Prov. C. 1865, c. 41
en général — referred to

Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

art. 6 — referred to

art. 7 — referred to

art. 1375 — referred to

Franchises Act, R.S.A. 2000, c. F-23

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

s. 7 — referred to

Uniform Commercial Code, 2012
Generally — referred to

Aricle 1-201(b)(20) "Good faith" — considered

Aricle 1-302(b) — considered

Article 1-304 — considered

APPEAL by plaintiff from judgment reported at *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), allowing appeal from decision by trial judge allowing plaintiff's action for damages.

POURVOI formé par la partie demanderesse à l'encontre d'un jugement publié à *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), ayant accueilli l'appel interjeté à l'encontre de la décision de la juge de première instance d'accueillir l'action en dommages-intérêts de la partie demanderesse.

Cromwell J. **(McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

II. Facts and Judicial History

Overview and Issues

2 The appellant, Mr. Bhasin, through his business Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. ("Can-Am") beginning in 1989. The relationship between Mr. Bhasin and Can-Am soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him. The litigation leading to this appeal ensued.

3 Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 544 A.R. 28 (Alta. Q.B.), at paras. 51, 238 and 474.

4 An enrollment director's agreement that took effect in 1998 governed the relationship between Can-Am and Mr. Bhasin. (That Agreement replaced a previous agreement of an indefinite term that had governed their relationship since the outset in 1989.) The Agreement was a commercial dealership agreement, not a franchise agreement. There was no franchise fee and it was not covered by the statutory duty of fair dealing such as that provided for in s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

5 That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr. Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

6 The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 — the provision at the centre of this case — provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

7 Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them: trial reasons, at para. 461. The trial judge found, in effect, that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

8 When Mr. Hrynew moved his agency to Can-Am from one of its competitors many years before the events in question, Can-Am promised him that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am: trial reasons, at para. 238. He was in a strong position with Can-Am because he had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission which regulated Can-Am's business: para. 284.

9 Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business: trial reasons, at para. 303. Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions: para. 238. He also actively encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place: para. 282; see also paras. 251 and 287. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew: para. 240. Mr. Bhasin steadfastly refused to participate in such a merger: para. 247.

10 The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-196.

11 Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: trial reasons, at para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

12 In fact, Can-Am repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as PTO, was under an obligation to treat the information confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true: trial reasons at para. 195. It also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal": para. 247. When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement: paras. 207-11.

13 At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was obliged to take less remunerative work with one of Can-Am's competitors.

14 Mr. Bhasin sued Can-Am and Mr. Hrynew. Moen J. in the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The court held

WestlawNext© CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

that the corporate respondent was in breach of the implied term of good faith, Mr. Hrynew had intentionally induced breach of contract, and the respondents were liable for civil conspiracy.

15 The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

16 The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: *Bhasin v. Hrynew*, 2013 ABCA 98, 84 Alta. L.R. (5th) 68 (Alta. C.A.).

17 The appeal raises four issues:

(a) Did Mr. Bhasin properly plead breach of the duty of good faith?

(b) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

(c) Are the respondents liable for the torts of inducing breach of contract or civil conspiracy?

(d) If there was a breach, what is the appropriate measure of damages?

III. Analysis

A. Did Mr. Bhasin Properly Plead Breach of the Duty of Good Faith?

18 The Court of Appeal held that Mr. Bhasin had not properly pleaded the good faith issue and that the trial judge had therefore erred in considering it. Mr. Bhasin contests this conclusion, while the respondents support it. I agree with Mr. Bhasin.

19 The allegations in the statement of claim clearly put the questions of improper purpose and dishonesty in issue. These facts are sufficient to put Can-Am's good faith in issue. The question of whether this conduct amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately. The defendants did not move to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim. Good faith was a live issue that was fully canvassed in a lengthy trial: A.F., at paras. 92-94. Written submissions by both parties at trial referred to the good faith issue and even in his opening at trial, Mr. Bhasin's counsel raised the issue of good faith.

20 The trial judge held that any deficiency in the pleadings did not cause prejudice to the respondents: paras. 23 and 48. This is an assessment she was uniquely positioned to make and her conclusion ought to be treated with deference on appeal. The good faith issue was fully argued in and addressed by the Court of Appeal and has been fully argued on the merits in this Court.

21 In my view, the trial judge did not make a reversible error by adjudicating the issue of good faith and we should address the merits of that issue.

B. Did Can-Am Owe Mr. Bhasin a Duty of Good Faith?

(1) Decisions and Positions of the Parties

(a) Decisions

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

22 The trial judge accepted Mr. Bhasin's position that there was a duty of good faith in this case and that it had been breached. In brief, her reasoning was as follows.

23 First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

24 Second and in the alternative, the trial judge held that a term of good faith performance should be implied based on the intentions of the parties in order to give business efficacy to the agreement. She concluded that "[w]hen one considers the whole of the relationship ... it is clear that the parties had to operate in good faith and there was a requirement of fairness between them. In other words, good faith was necessary to give business efficacy to the whole 1998 Agreement": para. 101.

25 The 1998 Agreement contained an "entire agreement clause" stating that there were no "agreements, express, implied or statutory, other than expressly set out" in it: cl. 11.2. The trial judge held, however, that this clause did not preclude the implication of a duty of good faith. The parties, she reasoned, cannot rely on exclusion clauses to avoid contractual obligations where there is an imbalance of power and that courts refuse to let parties shelter under entire agreement clauses where it would be unjust or inequitable to do so: paras. 116-18.

26 Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

27 The Court of Appeal reversed and held that there had been no breach of contract. The duty of good faith in employment contracts could not be extended by analogy to other types of contract. In any event, the duty of good faith in the employment context is limited to the manner of termination and does not include reasons for non-renewal: C.A. reasons, at paras. 27 and 31. Nor was this a circumstance in which a term could be implied because it was so obvious it was not thought necessary to mention or was necessary to make the contract work: para. 32. Even if there were an implied duty of good faith in this case, the impugned conduct concerned the non-renewal of a contract, which occurs on expiry, unlike a termination clause: para. 31.

28 Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

(b) Positions of the Parties

29 Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used its non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

30 Mr. Bhasin's second position, emphasized in oral argument, is that the Court should at least recognize a duty of honest performance of contractual obligations: transcript, at pp. 8, 10 and 24. Mr. Bhasin relies on the trial judge's findings that Can-Am acted dishonestly towards Mr. Bhasin throughout the period leading up to the non-renewal. It repeatedly lied to him about the nature of the organizational changes required by the Alberta Securities Commission, the nature of the audits that were to be carried out by Mr. Hrynew, and was dishonest about its intention to force him out: trial reasons, at paras. 195, 221, 246-47 and 267.

31 Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this case could not be said to be discretionary, because it provided simply that on six months notice either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

(2) Analysis

(a) Overview

32 The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

34 In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) Good Faith as a General Organizing Principle

(i) Background

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

35 The doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634 (Eng. Ch.), at p. 138, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (Australia H.C.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113 (Eng. K.B.), "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith": p. 157. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (Eng. K.B.), at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts: see also *Herbert v. Mercantile Fire Insurance Co.* (1878), 43 U.C.Q.B. 384 (Ont. Q.B.); R. Powell, "Good Faith in Contracts" (1956), 9 Curr. Legal Probs. 16.

36 However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), at para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commerical Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

37 This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

38 Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (N.S. T.D.), aff'd on narrower grounds (1992), 112 N.S.R. (2d) 180 (N.S. C.A.); *McDonald's Restaurants of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303 (B.C. C.A.), at para. 99; *Crawford v. New Brunswick (Agricultural Development Board)* (1997), 192 N.B.R. (2d) 68 (N.B. C.A.), at paras. 7-8. They see a broad role for good faith as an implied term in all contracts that establishes minimum standards of acceptable commercial behaviour. As Kelly J. put it in *Gateway Realty*, at para. 38:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" — a conduct that is contrary to community standards of honesty, reasonableness or fairness.

39 Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.), at para. 54; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (Alta. C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15 (Ont. C.A.), at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

40 This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 85; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.); *British Columbia v. Imperial*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tobacco Canada Ltd., 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), at para. 46. This is even more appropriate where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.

41 As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

(ii) Survey of the Current State of the Common Law

42 Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev.* 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Library Ltd. v. Stiletto Visual Programmes Ltd.* (1987), [1989] 1 Q.B. 433 (Eng. C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

43 Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 J.C.L. 55.

44 Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at p. 457, *per* McLachlin J.; see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), *per* McLachlin J., concurring. The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

45 Considerations of good faith are also apparent in contract interpretation: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134 to 8.146.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

46 Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev.* 70, at p. 71.

47 There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar. Rev.* 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 Va. L. Rev. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (Ont. C.A.), at paras. 49-50).

48 While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith. They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

> Although the line between the two types of implication is difficult to draw, it may be realistic to assume that implied duties of good faith are likely, on occasion at least, to slide into the category of legal incidents rather than mere presumed intentions. Certainly, it would be difficult to defend the implication of terms on each of the cases considered here on the basis of the traditional business efficiency or officious bystander test. In the control of contractual discretion cases, for example, it may be more realistic to suggest that the implied limitation on the exercise of the discretion is intended to give effect to the "reasonable expectations of the parties." [pp. 865-66]

49 The first type of situation (contracts requiring the cooperation of the parties to achieve the objects of the contract) is reflected in the jurisprudence of this Court. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.), the parties to a real estate transaction failed to specify in the purchase-sale agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. By law, the vendor was the only party capable of obtaining such permission. The Court held that the vendor was under an obligation to use reasonable efforts to secure the permission, or as Dickson J. put it, "[t]he vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale": p. 1084. It is not completely clear whether this duty was imposed as a matter of law or was implied based on the parties' intentions: see p. 1083; see also *Gateway Realty* and *CivicLife.com*.

50 *Mitsui & Co. (Canada) Ltd. v. Royal Bank*, [1995] 2 S.C.R. 187 (S.C.C.), is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

51 This Court's decision in *Freedman v. Mason*, [1958] S.C.R. 483 (S.C.C.), falls in the third type of situation in which a duty of good faith arises (where a contractual power is used to evade a contractual duty). In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

52 The jurisprudence is not always very clear about the source of the good faith obligations found in these cases. The categories of terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation sometimes are blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle.

53 Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

54 For example, this court confirmed that there is a duty of good faith in the employment context in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.). Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

55 This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at para. 63, citing *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29. The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy (para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Alta. Q.B.), at paras. 84-85, *per* Murray J.).

56 This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

57 Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional ... hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied according to the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract'" (2014), 77 *Mod. L. Rev.* 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (Eng. C.A.) (BAILII), where it confirmed that good faith was not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

58 Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Law of Contract, (9th Australian ed. 2008), at 10.43 to 10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works)* (1992), 26 N.S.W.L.R. 234 (New South Wales C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corp. v. Hungry Jacks 's Pty Ltd.*, [2001] NSWCA 187 (New South Wales C.A.) (AustLII). The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42: 9 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev.* 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

59 This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear: Belobaba; O'Byrne, "Good Faith in Contractual Performance", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev.* 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term — in the law's failings.

60 Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

61 The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law. & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

62 I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

(iv) Towards an Organizing Principle of Good Faith

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

64 As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

67 This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. (as she then was) outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery ....
>
> . . . . .
>
> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

68 The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

69 The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

72 In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

74 There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

75 Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

76 It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance", at p. 95; Farnsworth, at 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

77 That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

78 Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (Australia C.A.) (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance", at p. 96.

79 Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge, Clark, and Peden, "When Common Law Triumphs Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

80 Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

81 Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

82 Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

83 The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Banque de Montréal c. Ng*, [1989] 2 S.C.R. 429 (S.C.C.), at p. 436.

84 In the United States, § 1-304 of the U.C.C. provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." The U.C.C. has been enacted by legislation in all 50 states. While the provisions of the U.C.C. apply only to commercial contracts, § 205 of the *Restatement (Second) of Contracts* (1981) provides for a general duty of good faith in all contracts. This provision of the *Restatement* has been followed by courts in the vast majority of states. The notion of "good faith" in the *Restatement* substantially followed the definition proposed by Robert Summers in an influential article, where he proposed that "good faith" is best understood as an "excluder" of various categories of bad faith conduct: p. 206; see § 205, comment a. The general definition of "good faith" in the U.C.C. is also quite broad, encompassing honesty and adherence to "reasonable commercial standards": § 1-201(b)(20).

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

This definition was originally limited to "honesty in fact", that is, a duty of honesty in performance, and was only later expanded: A. D. Miller and R. Perry, "Good Faith Performance" (2013), 98 *Iowa L. Rev.* 689, at pp. 719-20. Honesty in performance is also a key component of "good faith" under the *Restatement*: § 205, comments a and d.

85 Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.* (1933), 263 N.Y. 79 (U.S. N.Y. Ct. App. 1933). Similarly, though there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 (S.C.C.); *Banque nationale du Canada c. Houle*, [1990] 3 S.C.R. 122 (S.C.C.); *Québec (Commission hydroélectrique) c. Banque de Montréal*, [1992] 2 S.C.R. 554 (S.C.C.). The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

86 The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

87 This distinction explains the result reached by the court in *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981). The terminating party had decided in advance of the required notice period that it was going to terminate the contract. The court held that no disclosure of this intention was required other than what was stipulated in the notice requirement. The court stated:

> ... there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. [pp. 989-90]

United Roasters makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

88 The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.), at para. 5; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.), cited with approval in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 19.

89 Mr. Bhasin, supported b many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason, at p. 487*; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at p. 7. In other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

90 It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

91 I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (U.S. N.J. Sup. Ct. 1972), aff'd, 07 A.2d 598 (U.S. N.J. Sup. Ct. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (U.S. Pa. S.C. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass. 1984), at p. 1184; *Pitney-Bowes Inc. v. Mestre* (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla. 1981), cert. denied, 464 U.S. 893 (U.S. Sup. Ct. 1983).

92 I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

93 A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

(3) Application

94 The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

95 The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

any renewed term:

> 3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

96 The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

97 The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

98 The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

99 By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

100 In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did not tell him the truth that from Can-Am's perspective this was a "done deal". The trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

101 When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

102 Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. Bhasin's agency as if it were required to do so

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

by the Commission even though it had arranged to have one of its employees conduct the audit of Mr. Hrynew's agency: trial reasons, at para. 198.

103 As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

C. Liability for Civil Conspiracy and Inducing Breach of Contract

104 In light of this conclusion, I agree with the Court of Appeal's rejection of Mr. Bhasin's claims based on the torts of inducing breach of contract and unlawful means conspiracy.

105 The trial judge specifically found that Mr. Hrynew did not encourage Can-Am to act dishonestly in its dealings with Mr. Bhasin and that Can-Am's dishonest conduct was not fairly attributable to Mr. Hrynew: paras. 271 and 287. It follows that Mr. Hrynew did not induce Can-Am's breach of its contractual duty of honest performance.

106 The trial judge dismissed the claim for conspiracy to injure and there is no basis to interfere with that finding. However, the trial judge held the respondents liable for unlawful means conspiracy, with the unlawful means being the breach of contract and inducing breach of contract: para. 326. Because, in light of my conclusions, the only relevant breach of contract in this case is the breach of the duty of honest performance and there was no inducement of breach of contract, the only relevant unlawful means pertained to Can-Am alone and not Mr. Hrynew. Accordingly, there can be no liability for civil conspiracy: see *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 (Ont. C.A.), at para. 43.

107 I therefore agree with the result reached by the Court of Appeal that there could be no liability for inducing breach of contract or unlawful means conspiracy: para. 36. It follows that the claims against Mr. Hrynew were rightly dismissed.

D. What Is the Appropriate Measure of Damages?

108 I have concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. It is therefore liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. While the trial judge did not assess damages on that basis given her different findings in relation to liability, she made findings that permit this Court to do so.

109 The trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency": paras. 258-59. In reaching this conclusion, the trial judge was well aware of the difficulties that Mr. Bhasin would have in selling his business given the "almost absolute controls" that Can-Am had on enrollment directors and that it owned the "book of business": para. 402. She also heard evidence and made findings about what the value of the business was, taking these limitations into account. These findings, in my view, permit us to assess damages on the basis that if Can-Am had performed the contract honestly, Mr. Bhasin would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew.

110 It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. The defendant's expert at trial valued Mr. Bhasin's business as of 2001 (the time of non-renewal) as approximately $87,000. While there is some confusion in the record about the date of evaluation and the relevance of discount rates, I am persuaded that the trial judge found that the business was worth $87,000 at the time that the Agreement expired and that she made this finding fully alive to the difficulties standing in the way of a sale of the business given the contractual arrangements between Can-Am and its enrollment directors: see, e.g., para. 451. In addition, we have had no suggestion in argument that this figure should be reassessed. In fact, the defendants, as appellants before the Court of Appeal, submitted to that court that if damages were payable, they should be assessed at the value of the business at the time of the expiry of the Agreement and noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

111 I conclude therefore that Mr. Bhasin is entitled to damages in the amount of $87,000.

IV. Disposition

112 I would allow the appeal with respect to Can-Am and dismiss the appeal with respect to Mr. Hrynew. I would vary the trial judge's assessment of damages to $87,000 plus interest. Mr. Bhasin should have his costs throughout as against Can-Am. There should be no costs at any level in favour of or against Mr. Hrynew.

Appeal allowed in part.
Pourvoi accueilli en partie.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 6

Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(e) the taking of proceedings for the recovery of a personal judgment,

unless the lienholder agrees in writing that such an action is to have that effect.

(2) If a promissory note or bill of exchange issued in respect of the claim of a lienholder has been negotiated, the lienholder does not by that negotiation lose the lienholder's lien if the lienholder is the holder of the promissory note or bill of exchange

(a) at the time of beginning proceedings to enforce the lien, or

(b) at the time of proving the lienholder's claim in proceedings, when those proceedings are brought by another lienholder.

RSA 1980 cB-12 s22

Proving claim

32 If the period of credit in respect of a claim has not expired or if there has been an extension of time for payment of the claim then, if proceedings are commenced by any other person to enforce a lien against the same property, the lienholder may, nevertheless, prove and obtain payment of the lienholder's claim in those proceedings as if the period of credit or the extended time had expired.

RSA 1980 cB-12 s23

Right to Information

Inspection of contract, etc.

33(1) A lienholder, by notice in writing, may at any reasonable time demand,

(a) of the owner or the owner's agent, the production for inspection of the contract with the contractor,

(b) of the contractor, the production for inspection of

(i) the contract with the owner, and

(ii) the contract with the subcontractor through whom the lienholder's claim is derived,

and

(c) of the subcontractor through whom the lienholder's claim is derived, the production for inspection of the contract with the contractor,

and the production for inspection of a statement of the state of accounts between the owner and contractor or contractor and subcontractor, as the case may be.

(2) If, at the time of the demand or within 6 days after it, the owner or the owner's agent, the contractor or the subcontractor, as the case may be,

(a) does not produce the written contract and statement of accounts, or

(b) if the contract is not in writing,

(i) does not, in writing, inform the person making the demand of the terms of the contract and the amount due and unpaid on the contract, or

(ii) knowingly and falsely states the terms of the contract or the amount due or unpaid on it,

then, if the lienholder sustains loss by reason of the refusal or neglect or false statement, the owner, contractor or subcontractor, as the case may be, is liable to the lienholder in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of the lienholder's lien.

(3) A lienholder, by notice in writing, may at any reasonable time demand of a mortgagee or the mortgagee's agent or unpaid vendor or the unpaid vendor's agent

(a) the terms of any mortgage on the land or any agreement for sale of the land in respect of which the work is or is to be done or in respect of which materials have been or are to be furnished, and

(b) a statement showing the amount advanced and the amount currently due and owing on the mortgage or the amount owing on the agreement, as the case may be.

(4) If the mortgagee or vendor or the mortgagee's or vendor's agent fails to inform the lienholder within 6 days after the date of the demand

(a) of the terms of the mortgage or agreement, and

(b) of the amount owing on it,

then, if the lienholder sustains loss by reason of the failure or by reason of any misstatement by the mortgagee or vendor of the terms or amount owing, the mortgagee or vendor is liable to the lienholder in an action for the amount of the loss, or in proceedings taken under this Act for the enforcement of the lienholder's lien.

(5) The court may on application at any time before or after proceedings are commenced for the enforcement of the lien make an order requiring

(a) the owner or the owner's agent,

(b) the contractor,

(c) a subcontractor,

(d) the mortgagee or the mortgagee's agent, or

(e) the unpaid vendor or the unpaid vendor's agent,

as the case may be, to produce and allow a lienholder to inspect any contract, agreement, mortgage, agreement for sale, statement of the amount advanced or statement of the amount due and owing, on any terms as to costs that the court considers just.

RSA 2000 cB-7 s33;2009 c53 s28

Registration of Lien

Registration of lien

34(1) A lien may be registered in the land titles office by filing with the Registrar a statement of lien in the prescribed form.

(2) The statement of lien shall set out

(a) the name and residence of

(i) the lienholder,

(ii) the owner or alleged owner, and

(iii) the person for whom the work was or is being done or the materials were or are being furnished,

(b) the date when the work was completed or the last materials were furnished, or if the statement of lien is filed before the completion of the contract or subcontract, as the case may be, a statement that the work is not yet completed or the materials have not yet all been furnished,