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COURT FILE NUMBER	2001-05482
COURT	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.

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF JMB CRUSHING SYSTEMS INC., 2161889 ALBERTA LTD., MANTLE MATERIALS GROUP, LTD. and 2324159 ALBERTA INC. UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended, AND THE *BUSINESS CORPORATIONS ACT*, SBC 2002, c 57, as amended

DOCUMENT

BENCH BRIEF OF JMB CRUSHING SYSTEMS INC., 2161889 ALBERTA LTD., MANTLE MATERIALS GROUP, LTD. and 2324159 ALBERTA INC.

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File No.: A163514

TABLE OF CONTENTS

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I. INTRODUCTION

1. The Applicants JMB Crushing Systems Inc. ("**JMB**") and 2161889 Alberta Ltd. ("**216**", and with JMB, the "**CCAA Applicants**") obtained protection from their creditors pursuant to the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") by order of Justice K.M. Eidsvik granted on May 1, 2020, and amended and restated on May 11, 2020 (as amended and restated, the "**Initial Order**", and the proceedings commenced thereby, the "**CCAA Proceedings**"). Pursuant to the Initial Order, FTI Consulting Canada Inc. was appointed as monitor of the Applicants (the "**Monitor**"), a sale and investment solicitation process (the "**SISP**") was approved, and Sequeira Partners was appointed as sale advisor for the SISP (the "**Sale Advisor**").

2. Mantle Materials Group, Ltd. ("**Mantle**", and with JMB and 216, the "**Transaction Parties**") submitted a bid in the SISP to acquire the business and core assets of JMB and 216. The bid was the only viable going concern bid and therefore the Monitor, on behalf of JMB and 216, negotiated with Mantle to settle the terms of the definitive documents in respect of the acquisition transaction (the "**Original Transaction**"). The principal definitive agreement governing the Original Transaction was the amended and restated asset purchase agreement dated September 28, 2020 (as amended, the "**Original Purchase Agreement**") between JMB and 216 as vendors and Mantle as purchaser. The Original Purchase Agreement was approved by this Honourable Court on October 1, 2020 and on October 16, 2020 this Honourable Court granted a sale approval and vesting order (the "**Original SAVO**"), a reverse vesting order (the "**Original RVO**"), an assignment order (the "**Original Assignment Order**") and a plan sanction order (the "**Original Sanction Order**", and with the Original SAVO, the Original RVO and the Original Assignment Order, the "**Original Orders**"). The Original Sanction Order sanctioned a joint plan of arrangement of Mantle and JMB (the "**Original Plan**") under the CCAA and the British Columbia *Business Corporations Act*, SBC 2002, c 57, as amended (the "**BC BCA**").

3. Under the Original Transaction, Mantle was to acquire the core gravel and aggregate pits belonging to JMB and 216. Because this required obtaining a number of approvals from Alberta Environment and Parks (the "**AEP**"), the completion of the Original Transaction was conditional on receiving these approvals. The Transaction Parties had intended to

close the Original Transaction as soon as possible following October 16, 2020. However, in the 158 days that have elapsed since the granting of the Original Orders, the AEP neither granted nor formally denied the applications for approval, nor shown any substantive flexibility with respect to their approach to the applications. Given such passage of time without progress, and the critical need to re-start the business being acquired by Mantle, the Transaction Parties determined that the Original Transaction had to be restructured to eliminate the need for obtaining the approval of the AEP. The results of those efforts are before the Court in this Application.

4. Pursuant to an amended and restated purchase agreement dated as of March 3, 2021 (the "**Amended Purchase Agreement**" and the transaction contemplated thereby, the "**Amended Transaction**") between JMB, 216 and Mantle, the Original Purchase Agreement was amended and restated. The principal elements of the Amended Transaction which distinguish it from the Original Transaction are as follows:

(a) both JMB and 216 would emerge as from the CCAA Proceedings as solvent corporations, rather than just JMB;

(b) all leases of Crown land, regulatory permits, inventory and equipment held or owned by JMB or 216 would be retained by them and would not be vested in Mantle or excluded from the Amended Transaction;

(c) assets excluded from the Amended Transaction and liabilities that are not being assumed or retained would be vested in 2324159 Alberta Ltd. ("**ResidualCo**"), a newly created subsidiary of JMB, which would continue in the CCAA Proceedings;

(d) since JMB and 216 would retain all of the Crown land leases and regulatory permits in respect of gravel and aggregate pits, and continue to be responsible for performing all reclamation obligations with respect thereto, it was unnecessary to obtain the approval of the AEP;

(e) upon closing, Mantle and JMB will be direct subsidiaries, and 216 will be an indirect subsidiary, of RLF Canada Holdings Limited ("**RLF Holdings**").

5. While there are no longer assignments and transfers in the Amended Transaction that require the approval of the AEP, subsequent to the last hearing on March 5, 2021, the AEP has issued a series of environmental protection orders (each, an "**EPO**") and an enforcement order (an "**Enforcement Order**", and with the EPOs, the "**AEP Orders**"). The EPOs and EO, together with certain other elements of the Amended Transaction, require relief pursuant to section 11.1 of the CCAA to prevent certain actions by the AEP that would render the Amended Transaction and the continuation of the emergent business unviable. This Bench Brief sets out the applicable law and argument being made by the Transaction Parties in support of that Order and relies upon the Brief of Mantle and JMB filed on October 2, 2020 and the Brief filed by the Monitor on October 14, 2020 in support of the Original Orders.

6. In this Application, the Transaction Parties are seeking the following Orders (collectively, the "**Orders**"):

   (a) an Order amending and restating the Original SAVO (the "**Amended SAVO**") to approve the Amended Transaction and vest the right, title and interest of JMB and 216 in certain assets (the "**Acquired Assets**") in Mantle, free and clear of any charges, security, liens, encumbrances, claims or liabilities ("**Encumbrances**") other than certain permitted Encumbrances ("**Permitted Encumbrances**");

   (b) an Order amending and restating the Original RVO (the "**Amended RVO**"), pursuant to which:

      (i) JMB and 216 will retain certain assets free and clear of all Encumbrances other than Permitted Encumbrances;

      (ii) Excluded ResidualCo Assets and Excluded Liabilities (as such terms are defined in the Amended RVO) will be transferred to and vested in ResidualCo subject to all Encumbrances attaching thereto;

      (iii) ResidualCo will be deemed to have assumed the Excluded Liabilities, which will cease to be debts and liabilities of JMB and 216;

(iv) Unpaid rents, royalties and payable to the AEP under 216's dispositions that accrued prior to the Filing Date (as defined the Amended RVO, the "**AEP Payment Arrears**") are declared to be claims under section 19(1) of the CCAA and the AEP and other regulatory bodies are declared under section 11.1(3) of the CCAA to be acting as creditors for the purposes thereof;

(v) An environmental reclamation protocol (the "**Protocol**"), attached as Schedule "B" to the Amended RVO, is declared to be binding;

(vi) If after closing there is a dispute between the AEP and the Transaction Parties with respect to reclamation plans (each, a "**Reclamation Plan**") and updated activity plans (each, an "**Updated Activity Plan**") that could reasonably be expected to render the Amended Transaction unviable, the Transaction Parties are permitted to apply to this Honourable Court for relief under section 11.1 of the CCAA to resolve such dispute in a manner not contrary to the public interest;

(vii) The AEP and other regulatory bodies are stayed from enforcing certain powers in respect of the AEP Payment Arrears, against the current directors of JMB and 216, and in respect of the CCAA proceedings and steps taken by JMB and 216 therein;

(viii) Mantle, JMB, 216, their respective officers and directors as at the Plan Implementation Date, the Monitor, the chief restructuring advisor of JMB and 216, and counsel for these parties will be provided with releases; and

(ix) ResidualCo will be added as an applicant in the CCAA Proceedings;

(c) an Order amending and restating the Original Assignment Order (the "**Amended Assignment Order**") pursuant to section 11.3 of the CCAA;

(d) an Order amending and restating the Original Sanction Order (the "**Amended Sanction Order**") to sanction the amended and restated plan of arrangement of Mantle, JMB and 216 (the "**Amended Plan**") under section 6 of the CCAA and

section 288 of the BC BCA, pursuant to which: (i) Mantle assumes a portion of the secured indebtedness owed by JMB and 216 to ATB Financial ("**ATB**") and to Fiera Private Debt Fund VI LP and Fiera Private Debt Fund V LP (collectively, "**Fiera**"); (ii) JMB and 216 remain liable to ATB and Fiera for such portion; (iii) the shares of Canadian Aggregate Resources Corporation ("**CARC**") are transferred to RLF Holdings and all other shares in JMB are redeemed and cancelled without consideration, such that JMB becomes a wholly owned subsidiary of RLF Holdings; (iv) all shares in 216, other than those held by JMB, are acquired without consideration and cancelled; and (v) JMB and 216 emerge from the CCAA Proceedings; and

(e) such further and other relief as counsel may request and this Honourable Court may deem just.

II. FACTS

A. GENERAL BACKGROUND

7. The facts are set out in the Affidavits of Byron Levkulich sworn September 30, 2020 (the "**September Affidavit**"), March 4, 2021 (the "**March 4th Affidavit**") and March 23, 2021 (the "**March 23rd Affidavit**"), the Confidential Affidavit of Byron Levkulich sworn March 4, 2021 (the "**Confidential Affidavit**"), and the Affidavit of Tyler Pell sworn March 22, 2021 (the "**Pell Affidavit**"). All capitalized terms used herein and not otherwise defined are as defined in the Amended Purchase Agreement attached as Exhibit "L" to the March 4th Affidavit.

8. JMB and its corporate predecessors by amalgamation and continuance have carried on the gravel and aggregate extraction and processing business in Alberta for over three decades. Since November 21, 2018, CARC has held the majority of JMB's shares. CARC is a wholly owned subsidiary of Resource Land Fund V, LP ("**RLF**"). Jeff Buck, whose family had formed JMB and who remained the President of JMB until his resignation in June of 2020, retained a minority interest through J Buck and Sons Inc. ("**JBAS**").

Affidavit of Byron Levkulich sworn March 4, 2021 (the "**March 4th Affidavit**"), para 9

9. There are currently 51,513 Class A Common Shares issued and outstanding in favour of CARC and 2,926 Class B Common Shares issued and outstanding in favour of JBAS. Each such share has one vote, and therefore CARC has approximately 95% voting control of JMB.

March 4th Affidavit, para 11

10. JMB owns all of the shares in 216, Eastside Rock Products Inc. ("**Eastside**") and ResidualCo. 216 and ResidualCo are incorporated under the laws of Alberta and Eastside is incorporated under the laws of the State of Washington.

March 4th Affidavit, para 12

11. The secured creditors of JMB and 216 consist of the following:

    (a) ATB, with prior ranking security over inventory, accounts receivable and a parcel of real property;

    (b) equipment lessors and holders of purchase money security interests in certain specific vehicles and equipment of JMB (the "**PMSI Holders**"); and

    (c) Fiera, which holds prior ranking security in all other assets of JMB and 216.

March 4th Affidavit, para 13

12. As previously set out in the September Affidavit, JMB's business suffered as a result of the severe downturn in the oil and gas industry, which when combined with the economic fallout of the COVID-19 health measures, rendered JMB's financial situation unsustainable.

March 4th Affidavit, para 14

13. JMB and 216 commenced the CCAA Proceedings in May 2020 in order to permit time to either sell or restructure their business and assets under the SISP. Pursuant to the Initial Order, the SISP was under the supervision and control of the Monitor and was run by the Sale Advisor.

March 4th Affidavit, para 15

14. Since granting the Initial Order, this Honourable Court has made multiple Orders extending the stay of proceedings to provide sufficient time for the SISP and various transactions to be completed and to resolve a multitude of issues that have arisen between stakeholders in these CCAA Proceedings. The last extension was pursuant to the Conditional Stay Extension Order granted on March 5, 2021, which extended the stay to April 2, 2021, provided that the Monitor confirmed that funding in place for that period. The Monitor provided such confirmation in a certificate filed March 11, 2021.

Affidavit of Byron Levkulich sworn March 22, 2021 ("**March 23rd Affidavit**"), paras 8-9

B. ORIGINAL TRANSACTION

15. Mantle submitted a bid in the SISP in July 2020 for the business and core assets of JMB and 216. Mantle's bid was the only viable, going concern bid and provided for the best potential for recovery for Fiera, ATB and other stakeholders. The outcome of the SISP indicated that the value of the business and assets was insufficient to repay the secured indebtedness owing to ATB and Fiera, and therefore no recovery was anticipated for unsecured creditors.

Seventh Report of the Monitor dated September 30, 2020 (the "**Seventh Report**"), paras 30, 49

16. The Original Purchase Agreement was entered into on September 28, 2020 and involved the following principal elements:

(a) RLF Holdings would acquire the Class A Common Shares of CARC in JMB and thereby preserve the valuable paid-up capital associated with those shares (the "**PUC**");

(b) Mantle would acquire the core assets of JMB and 216, including the equipment over which Fiera has first ranking security, Crown leases and aggregate royalty agreements for the viable aggregate pits of JMB and 216, and the inventory of JMB and 216 located thereon;

(c) the assets excluded from the transaction, including Crown leases and aggregate royalty agreements for uneconomic aggregate pits, would be vested in 216;

(d) all liabilities not assumed by Mantle would be vested in and assumed by 216;

(e) JMB would emerge as a solvent subsidiary of RLF Holdings; and

(f) ATB and Fiera would finance the purchase price in part through the assumption by Mantle of a portion of JMB and 216's indebtedness to ATB and Fiera.

March 4th Affidavit, paras 19-20

17. The Original Transaction could not be implemented solely through an approval and vesting order because acquiring the PUC in the JMB shares held by CARC is fundamental to the economic viability of the business. In order to acquire the PUC, JMB's corporate existence had to be preserved and its solvency restored. Generally, this is accomplished in CCAA proceedings through a plan of compromise and arrangement with all of the secured and unsecured creditors. However, since the senior secured creditors were only recovering a portion of their secured indebtedness, and then only if Mantle was able to make the business successful, a plan of compromise and arrangement providing even nominal recoveries for the unsecured creditors was entirely unrealistic.

Seventh Report, paras 43-44, 53

18. In order to restore JMB's solvency, a recent innovation referred to as a "reverse vesting" was employed, pursuant to which all excluded assets and liabilities of JMB were vested in 216, and JMB was released from those liabilities. Because JBAS was not participating in the transaction, but had a minority shareholder interest in JMB, its shares had to be redeemed for no consideration and then cancelled. This was accomplished through a "mini-plan" of arrangement, which also provided for an assumption by Mantle of a portion of the secured indebtedness owed by JMB to ATB and Fiera, and for the transfer of CARC's shares in JMB to RLF Holdings.

March 4th Affidavit, para 20

19. In applications heard by this Honourable Court on October 1, 2020, the Monitor sought the Original SAVO and Original RVO, and JMB and 216 sought the Original Assignment Order and the Original Sanction Order. The AEP requested an adjournment in order to give it time to consider the Original SAVO and Original RVO. The Monitor, JMB and 216

consented to that adjournment request, but since the AEP did not object to the approval of the Original Purchase Agreement, Justice Eidsvik granted an Order on October 1, 2020 approving that agreement and adjourned the balance of the applications to October 16, 2020. Ultimately, counsel for the AEP, the Monitor, the CCAA Applicants and Mantle were able to agree upon the form of the Original SAVO and Original RVO.

March 4th Affidavit, para 22

20. On October 16, 2020, Justice Eidsvik granted the Original Orders.

March 4th Affidavit, para 23

C. BUSINESS AND ASSETS OF JMB AND 216

21. The extraction and processing of gravel and other aggregates are provincially regulated by activities in Alberta. The regulator is the AEP.

22. The construction, operation and reclamation of aggregate pits on privately owned land is regulated under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, the *Conservation and Reclamation Regulation*, AR 115/93, the *Activities Designation Regulation*, AR 276/2003, the *Approvals and Registrations Procedure Regulation*, AR113/93, the *Code of Practice for Pits*, and certain other regulations and instruments issued thereunder (collectively, the "**EPEA**"). Under the EPEA, an operator of an aggregate pit on private land is required to obtain a registration from the AEP (an "**EPEA Registration**").

March 4th Affidavit, para 25

23. JMB accesses lands owned by third parties through aggregate royalty agreements (each, a "**Royalty Agreement**") listed in Parts 3 and 4 of Schedule A to the Amended RVO, and holds EPEA Registrations in respect of six of these Royalty Agreements.

24. Aggregate pits located on lands leased from the provincial Crown are regulated under the *Public Lands Act*, RSA 2000, c P-4 and *Public Lands Administration Regulation*, AR 187/2001 (collectively, the "**PLA**"), which also provides for leases and licences to access such lands. The provincial Crown grants dispositions ("**Dispositions**") to parties wishing to access or occupy such lands. The Dispositions, the PLA and certain plans filed with the

AEP thereunder regulate the construction, operation and reclamation of aggregate pits on these lands. The Dispositions held by JMB and 216 consist of surface material leases ("**SMLs**"), departmental licences of occupation ("**DLOs**"), surface material exploration dispositions ("**SMEs**") and commercial/industrial miscellaneous leases ("**DMLs**"), and are listed in Parts 1 and 2 of Schedule "B" to the Amended RVO.

March 4th Affidavit, para 24

25. Security for abandonment, reclamation and remediation obligations ("**Reclamation Obligations**") must be provided to the AEP by the holder of an EPEA Registration pursuant to the EPEA and by the holder of a Disposition under the PLA. The security is in the form of letters of credit, bonds, certificates of deposit, cash or environmental trusts. JMB and 216 have provided the following security to the AEP:

(a) 216 provided eleven (11) letters of credit issued by Canadian Western Bank (the "**CWB LCs**") in respect of its Dispositions in the aggregate amount of $541,150, securing reclamation liabilities in the aggregate amount of $330,158;

(b) JMB provided seven performance bonds (the "**Northbridge Bonds**") issued by Northbridge General Insurance Corporation ("**Northbridge**") in the aggregate amount of $504,328, securing reclamation obligations of approximately $652,263; and

(c) JMB provided cash security in the amount of $30,332 securing reclamation obligations under its Dispositions of $20,703.

March 4th Affidavit, para 30

26. For reasons that remain unclear, the AEP permitted five of the Northbridge Bonds to expire on March 9, 2020 and one to expire on November 13, 2020 without demanding payment thereunder. The AEP did demand that Northbridge make payment under a Northbridge Bond in the amount of amount of $50,442 (the "**Buksa Bond**"). The Buksa Bond was provided in respect of the EPEA Registration relating to the Buksa Royalty Agreement (as defined in the March 4th Affidavit), but Northbridge has not accepted liability. Until

payment is made under the Buksa Bond, the aggregate remaining security of $598,016 secures estimated Reclamation Obligations of $1,033,827, leaving a $435,810 deficiency.

March 4th Affidavit, paras 30(b), 31

27. Under the Original Transaction, Mantle was to assume responsibility for Reclamation Obligations in the amount of $608,863 and replace the security for the three Royalty Agreements it was purchasing, leaving security in the amount of $51,406 for Reclamation Obligations in the amount of $288,759.

March 4th Affidavit, para 34

D. DISCUSSIONS WITH THE AEP

28. The transfer of the EPEA Registrations and the assignment of the Dispositions required the approval of the AEP. Although the Original Transaction contemplated that certain Dispositions and EPEA Registrations would remain with or be assigned and transferred to 216, leaving the AEP with a security deficiency of $288,759, the Transaction Parties believed that there was a reasonable chance that the AEP would approve the assignments and transfers on the basis that:

(a) the security deficiency resulted from the AEP's failure to make demand under six out of seven of the Northbridge Bonds and was therefore avoidable;

(b) there was no alternative going concern transaction that would provide a better result to the AEP;

(c) if the Original Transaction did not close, there would be no alternative to a liquidation of JMB and 216's assets, resulting in a significantly greater security deficiency of $435,810; and

(d) the Original Transaction provided the only option for the survival of the business and the preservation of employment and the resulting economic activity in rural Alberta, which was badly needed as a result of the economic downturn.

March 4th Affidavit, para 35

29. After the Original Orders were granted on October 16, 2020, Mantle and JMB began discussions with the AEP to obtain its approval for the assignments and transfers. During the discussions and in correspondence from the AEP, the AEP stated that it would not consider the applications to approve transfers and assignments unless all compliance issues under the EPEA, PLA and Dispositions were resolved. The principal compliance issues consist of the following (collectively, the "**Compliance Issues**"):

(a) the expiry of the six Northbridge Bonds in the amount of $453,810;

(b) until payment was made under the Buksa Bond, the AEP required replacement security;

(c) certain pits subject to Dispositions and EPEA Registrations have long standing disturbances outside the activity plans, which pre-date acquisition by CARC of its interest in JMB, and therefore updated activity plans were required;

(d) certain pits have small bodies of water, but permits for these bodies of water have not been obtained under the *Water Act*, RSA 2000, c W-3;

(e) certain pits had not been reclaimed in the ordinary course during operations; and

(f) 216 failed to pay the AEP Payment Arrears accruing prior to the Filing Date, which consist of rents to the AEP for access under its SMLs and royalties due thereunder on the sale of aggregate, which totals $250,292.

March 4th Affidavit, para 36

30. Mantle made numerous proposals to the AEP between October 2020 and the beginning of February 2021, including:

(a) to provide for the reclamation of the lands subject to the JMB Dispositions and two 216 Dispositions that had been Excluded Assets (as defined in the Original Purchase Agreement);

(b) to share the burden of the expired security for Reclamation Obligations on the privately owned lands that had been included in the Excluded Assets under the

Original Purchase Agreement between Mantle, ATB, Fiera and the AEP (the expired security on privately owned lands included in the Original Transaction was to be funded by Mantle in any event); and

(c) later, to share the entire burden of the expired security on the privately owned lands included in the Excluded Assets between Mantle, ATB and Fiera, and not with the AEP.

Affidavit of Tyler Pell sworn March 22, 2021 (the "**Pell Affidavit**"), paras 17, 19, 21

31. None of these proposals was accepted by the AEP.

Pell Affidavit, paras 19, 21

32. In order to cure the Compliance Issues and to change the Original Transaction as described above, a significant injection of capital was required from not only Mantle, but also from ATB and Fiera. Without a commitment from AEP that if those steps were taken, the AEP would approve the transfers and assignments of the EPEA Registrations and Dispositions, neither Mantle, ATB and Fiera would advance that capital and the Original Transaction would fail. Hence, Mantle, ATB and Fiera concluded that the completion of the Original Transaction was not possible without substantial revisions.

March 4th Affidavit, paras 46, 47

33. During this period, JMB and 216 submitted activity and/or reclamation plans to the AEP in order to rectify each of the outstanding Compliance Issues and proposed timelines:

(a) On February 24, 2021, JMB sent a letter to the AEP setting out a written plan for rectifying Compliance Issues and the relevant timelines for the lands subject to the Buksa Royalty Agreement, the Havener Royalty Agreement, the Kucy Royalty Agreement, the MacDonald Royalty Agreement, the Megley Royalty Agreement and the O'Kane Royalty Agreement (as such terms are defined in the March 23rd Affidavit);

(b) On February 24, 2021, JMB sent a letter to the AEP setting out a written plan for rectifying non-compliances and the relevant timelines for the Shankowski Pit (as defined in the March 23rd Affidavit);

(c) On February 26, 2021, 216 sent a written plan for rectifying non-compliances and the relevant timelines for the lands subject to SML 060060; and

(d) On February 26, 2021, JMB sent a letter to the AEP setting out a written plan for rectifying non-compliances and the relevant timelines for the lands subject to SML 930040, SML 980116 and SML 120027.

March 4th Affidavit, para 44

Pell Affidavit, paras 26-28

34. The AEP responded by issuing the following AEP Orders:

(a) ten separate EPOs against the CCAA Applicants, their current directors and a former directors in respect of the lands subject to the Buksa Royalty Agreement, the Havener Royalty Agreement, the Kucy Royalty Agreement, the MacDonald Royalty Agreement, the Megley Royalty Agreement and the O'Kane Royalty Agreement, and the Dispositions identified as SML 060060, SML 120027, SML 930040 and SML 980116 requiring that: (i) work be immediately suspended; (ii) stockpiled materials not be removed; (iii) the name of a consultant authorized to practice reclamation be submitted to the AEP; and (iv) comprehensive written reclamation and remedial plans ("**Reclamation Plans**") for such lands be submitted to the AEP, which Reclamation Plans are to provide for completion of the performance of the Reclamation Obligations and closure of the appropriate pits by the completion dates set out in the chart below:

Royalty Agreement / Disposition	Date for Submission of Reclamation Plan	Required date of Completion
All Royalty Agreements	May 20, 2021	
MacDonald Royalty Agreement		September 20, 2022
All other Royalty Agreements		October 29, 2022
All Dispositions	May 31, 2021	

Royalty Agreement / Disposition	Date for Submission of Reclamation Plan	Required date of Completion
SML 120027		June 30, 2022
SML 930040		September 20, 2022
SML 980116 and SML 060060		September 30, 2022

(b) an Enforcement Order (the "**060 EO**") issued pursuant to the *Water Act* against the CCAA Applicants, their current directors, a former director and others in respect of the lands subject to SML 060060, requiring that: (i) work be immediately suspended; (ii) stockpiled materials not be removed; (iii) the name of a consultant authorized to practice reclamation be submitted to the AEP; (iv) a Reclamation Plan for managing groundwater for such lands be submitted to the AEP by March 31, 2021 with a completion date by October 1, 2021.

Pell Affidavit, paras 30, 32, 34, 37, 41-42,
Exhibits K, M, N. R

35. The Original Orders were granted 158 days ago, and yet since March 2, 2021, the AEP has served ten EPOs and one Enforcement Order. Of the Compliance Issues identified, the majority either pre-existed the acquisition by CARC of its shares in JMB in November of 2018, or resulted from the AEP permitting the Reclamation Security to expire.

Pell Affidavit, para 50

36. The Compliance Issues identified in the EPOs have numerous inaccuracies, including:

(a) MacDonald Royalty Agreement – the Reclamation Obligations on the disturbed land have been performed, which was noted in the applicable Updated Activities Plan submitted in respect thereof;

(b) Megley Royalty Agreement – some reclamation has been completed on disturbed land that was included inside the current registered boundary and some disturbed area reclaimed outside the registered boundary;

(c) Kucy Royalty Agreement – the mining sequence was followed and there was not a contravention for not following the mining sequence;

(d) Buksa Royalty Agreement – the applicable EPEA Registration covers all of the current disturbances and there is no current contravention for failing to comply with the approved EPEA Registration boundary; and

(e) O'Kane Royalty Agreement – some reclamation has been completed on disturbed land that was included inside the current registered boundary and some disturbed are reclaimed outside the registered boundary.

Pell Affidavit, para 48

E. AMENDED TRANSACTION

37. In order to prevent the failure of the Original Transaction and the liquidation and losses to all parties that would inevitably follow, Mantle and the principal stakeholders substantially revised the Original Purchase Agreement. Under the Amended Purchase Agreement: (a) JMB and 216 will retain all of their Dispositions and EPEA Registrations; (b) Mantle will cause JMB and 216 to reclaim all of the lands that were no longer required for active pit operations; (c) both JMB and 216 will emerge from the CCAA Proceedings as solvent affiliates of Mantle; and (d) ResidualCo will be left with the assets and liabilities that are excluded from the Amended Transaction. The approval of the AEP is not required because no Dispositions or EPEA Registrations are being assigned or transferred.

March 4th Affidavit, paras 46, 47, 48

38. Under the Amended Transaction, aggregate pits will be divided into two broad categories: (a) those that are economically viable and will be operated in the future (the "**Active Pits**", the applicable Dispositions being the "**Active Dispositions**" and the applicable royalty agreements being the "**Active Royalty Agreements**"); and (b) those that are not economically viable, will not be operated and will be reclaimed by JMB or 216 (the "**Inactive Pits**", the applicable Dispositions being the "**Inactive Dispositions**" and the applicable royalty agreements being the "**Inactive Royalty Agreements**"). The Active Pits and Inactive Pits are listed in Exhibit "A" to the Pell Affidavit.

March 4th Affidavit, para 48(l), Exhibit K

39. Paragraphs 14 to 19 of the Amended RVO adopt the Protocol and affect the AEP and other regulatory bodies in a number of ways that must be based on section 11.1 of the CCAA. In particular, the Amended RVO:

    (a) confirms in paragraph 14(a) that the AEP Payment Arrears are claims for the purposes of section 19(1) of the CCAA, and in paragraph 14(b) declares them to be Excluded Liabilities, in respect of which the AEP and other regulatory bodies are creditors, and that upon being vested in ResidualCo, they cease to be liabilities of 216 to the AEP or other regulatory bodies;

    (b) declares the Protocol to be binding in paragraph 14(c);

    (c) prevents the AEP or other regulatory bodies from exercising remedies, or denying regulatory applications, on the basis of the non-payment of the AEP Payment Arrears under paragraph 16(a) and 16(c)(vi);

    (d) prevents the AEP or other regulatory bodies from exercising remedies against Byron Levkulich and Aaron Patsch, as the current directors of JMB and former directors of 216, for any Reclamation Obligations that existed as of the Filing Date under paragraph 16(b); and

    (e) prevents the AEP or any other regulatory body from exercising remedies against Transaction Parties or their Dispositions or EPEA Registrations as a result of: (i) events occurring prior to closing but not continuing after; (ii) JMB or 216 having commenced the CCAA Proceedings; (iii) the financial condition or insolvency of JMB or 216; (iv) the completion of the Amended Transaction; or (v) the vesting of the AEP Payment Arrears in ResidualCo pursuant to paragraph 16(c).

40. The Protocol protects the public interest by providing for the maintenance of Reclamation Security in respect of the Active Pits and Inactive Pits subject to Dispositions and the Active Pits subject to the Active Royalty Agreements by creating a trust fund (the "**Trust Fund**") for Reclamation Obligations in respect of the Inactive Pits subject to the Inactive Royalty Agreements:

05.22a-2148

(a) under section 3.1 of the Protocol, 216 is required to maintain the Reclamation Security in respect of the Dispositions;

(b) under section 3.2(a), JMB is required to deposit Reclamation Security with the AEP pursuant to the applicable Updated Activity Plans relating to the Active Royalty Agreements; and

(c) under section 3.2(b), counsel for the Transaction Parties will hold cash in trust in the Trust Fund in respect of the Reclamation Obligations in respect of the lands subject to the Inactive Royalty Agreements, which will be released as and when the Reclamation Obligations are performed to pay the costs thereof.

41. The AEP has confirmed that Reclamation Security is not required in respect of the Inactive Royalty Agreements where the Reclamation Obligations are being performed. However, because Mantle, ATB and Fiera are contributing to the fund for performing those Reclamation Obligations, the funds will be held in the Trust Fund by the Transaction Parties' counsel in order to protect the interests of those parties and the broader group of stakeholders having an interest in the performance of Reclamation Obligations relating to those lands. These include the AEP and the landowners who are counterparties to the Inactive Royalty Agreements.

Pell Affidavit, para 23

42. Sections 4.1 and 4.2 of the Protocol require JMB and 216 to comply with the Reclamation Obligations in respect of the Inactive Pits. However, this highlights a serious risk to the viability of the Amended Transaction:

(a) As described in paragraph 34 of this Brief, the Reclamation Plans to be prepared by JMB and 216 are to be submitted by May 20, 2021 and May 31, 2021, which the Transaction Parties anticipate will be after the completion of the Amended Transactions;

(b) With respect to the Active Pits, section 4.3 of the Protocol requires 216 to comply with its obligations under its Dispositions and the PLA, and requires JMB to comply with its obligations under the Updated Activity Reports and the EPEA;

05.22a-2149

(c) Although JMB has submitted to the AEP an Updated Activity Report in respect of the Active Pit governed by the Shankowski Royalty Agreement, it has not yet been approved by the AEP, and JMB is still preparing an Updated Activity Report in respect of the Inactive Pit governed by the Havener Royalty Agreement.

Pell Affidavit, paras 11, 33

43. It is not yet known whether or not there will be disputes between the AEP and the Transaction Parties as to the scope of or time frame within which the Reclamation Obligations are to be performed under the Reclamation Plans or the Compliance Issues are to be resolved under the Updated Activity Reports, or in respect of the quantum of Reclamation Security required in respect of the Active Pits or any Inactive Pits governed by Dispositions. Such a dispute, if left unresolved, could render the Amended Transaction unviable. Therefore, paragraph 15 of the Amended RVO permits the Transaction Parties to seek a remedy from this Honourable Court in such circumstances where such remedy would not be contrary to the public interest.

44. Accordingly, paragraphs 14 to 19 of the Amended RVO and the provisions of the Protocol seek to protect the public interest by ensuring that the Reclamation Obligations associated with the Inactive Pits are performed and the Compliance Issues associated with the Active Pits are resolved within a reasonable period of time following the completion of the Amended Transaction.

45. Section 4.4 of the Protocol permits JMB and 216 to sell aggregate inventory located at the Inactive Pits, the net proceeds of which will be applied first to any unfunded Reclamation Obligations, second to contributions by Mantle, ATB and Fiera to the Trust Fund, and thereafter to ATB, which has first ranking security in such inventory. Thus, such sales further reduce the risk posed by Reclamation Obligations in respect of Inactive Pits.

46. Under the Amended RVO, although JMB retains the EPEA Registrations for the Inactive Pits subject to the Inactive Royalty Agreements, the Inactive Royalty Agreements themselves are vested in ResidualCo. However, under paragraph 10 of the Amended RVO, a right of access to such Inactive Pits is declared in favour of JMB to perform its Reclamation Obligations and to sell any of its aggregate located on those sites. The right

of access is secured by a first ranking charge created by paragraph 10 which is declared to survive any subsequent bankruptcy or insolvency of ResidualCo. Such a charge is necessary because without it, the right of access would simply be an unsecured obligation of ResidualCo, which upon the completion of the Amended Transaction will be insolvent.

47. The Protocol and the provisions of the Amended RVO described in paragraph 39 above are designed to ensure that Reclamation Obligations in respect of Inactive Pits are satisfied within the time periods specified in the AEP Orders, Compliance Issues with respect to the Inactive Pits are resolved, the regulatory discretion of the AEP is not impacted beyond what is absolutely required under section 11.1 of the CCAA, and the business of the Transaction Parties is protected from the exercise by the AEP of an array of powers to collect the unsecured AEP Payment Arrears or otherwise render the Amended Transaction unviable.

F. REGULATORY ACTIONS THREATENING MANTLE, JMB AND 216 AFTER CLOSING

48. As described above, the AEP treats the AEP Payment Arrears as Compliance Issues and requires that they be paid in full. The AEP Payment Arrears, representing rent, royalties and interest under some of 216's Dispositions, are unsecured obligations that arose prior to the Filing Date. No such unsecured obligations are being paid under the Amended Transaction. Further, neither Mantle, ATB nor Fiera are willing to fund the payment of such obligations.

March 4th Affidavit, para 61

49. Notwithstanding that the AEP Payment Arrears are unsecured, however, the Dispositions, the PLA and the EPEA empower or mandate the AEP to exercise multiple powers and remedies against JMB and 216 as a result of non-payment that would render the emergent business economically unviable.

March 4th Affidavit, para 61

50. For example, under the PLA, the AEP is empowered to do the following on the basis of the non-payment of the AEP Payment Arrears:

(a) under section 15(3), the Director (as defined in the PLA) may amend any disposition held by Mantle, JMB or 216 to include a condition for such director's consent to any mortgage, assignment, transfer or sublet of public land under a Disposition;

(b) under section 15.1(a), the Director may refuse to issue, mortgage, assign, transfer, sublet or renew a Disposition;

(c) under section 26(1), the Director may cancel, suspend or amend a Disposition;

(d) under section 43, the AEP may refuse to consent to the mortgage, assignment, transfer or subletting of land contained in a Disposition; and

(e) under section 114(3), the Director may refuse to register an assignment (as defined in section 113 of the PLA).

Public Lands Act, RSA 2000, c P-4, ss 15, 15.1, 26, 43, 113, 114 **[Tab 1]**

05.22a-2407

51. Similarly, under the EPEA, the AEP is empowered to do, *inter alia*, the following:

(a) under section 65, the Director (as defined in the EPEA) may refuse to issue an approval or registration where the applicant is indebted to the Government of Alberta; and

(b) under section 70, the Director may amend, add or delete a term or condition from an approval, or cancel or suspend an approval or registration if the holder is indebted to the Crown.

Environmental Protection and Enhancement Act, RSA 2000, c E-12 ("**EPEA**"), ss 65, 70 **[Tab 2]**

05.22a-2417

52. Hence, non-payment of the AEP Payment Arrears permits the AEP or the Director to cancel Dispositions and EPEA Registrations, or to deny future transfers, approvals, consents and the like to the Transaction Parties. If the AEP were to rely upon the non-payment of the AEP Payment Arrears to cancel or deny future transfers, approvals and consents with respect to Dispositions and EPEA Registrations, this would represent a serious impediment

to the CCAA Applicants' ability to maintain a viable business after exiting these CCAA proceedings.

53. The AEP Orders also seek personal remedies against Byron Levkulich and Aaron Patsch in their capacities as directors of JMB and as former directors of 216. It would be unlikely that any individual would be willing to serve as a director where the AEP reserves its ability to seek personal remedies against directors, in circumstances where all of the Reclamation Obligations are to be addressed pursuant to the Reclamation Plans. Despite a viable going concern transaction in hand which addresses reclamation and regulatory obligations, the personal risk is not and will not be attractive to potential directors.

March 23rd Affidavit, paras 32-33

54. In order to preserve and protect the business and future viability of Mantle, JMB and 216 following their emergence from the CCAA Proceedings, the Amended Transaction is conditional upon the Amended RVO being obtained.

March 4th Affidavit, para 50(b)

III. LAW AND ARGUMENT

55. The Transaction Parties repeat and rely upon the law and argument set out in the Bench Brief of JMB and 216 filed October 2, 2020, and in the Monitor's Bench Brief filed October 14, 2020.

A. SECTION 11.1 RELIEF

Section 11.1 of the CCAA

56. Under subsections 11.1(3) and (4) of the CCAA, this Honourable Court has jurisdiction to determine whether a stay of proceedings should apply to actions taken by a regulatory body where such actions amount to enforcing a monetary obligation. Crucially, these subsections permit the stay to apply, in appropriate circumstances, to actions enforcing non-monetary obligations.

Meaning of regulatory body

11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed. [emphasis added]

Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended ("**CCAA**"), s. 11.1

[Tab 3]

05.22a-2420

57. After discussing whether the AEP is a regulatory body for the purposes of section 11.1 of the CCAA, this Brief will examine whether the AEP Payment Arrears are monetary obligations for the purposes of 11.1(4), and then the extent to which the other relief contemplated by paragraphs 14 to 19 of the Amended RVO are appropriate and within the contemplation of section 11.1.

AEP is a Regulatory Body

58. The first question in the analysis is whether the AEP is a regulatory body pursuant to section 11.1(1). The AEP "has powers, duties or functions relating to the enforcement or administration" of the EPEA and the PLA, among others, and therefore qualifies as a regulatory body. In addition, any official with the ability or capacity under the EPEA or the PLA to exercise or enforce any right or remedy against the Transaction Parties is also a regulatory body for the purposes of section 11.1.

The AEP Payment Arrears are Claims for the Purposes of the CCAA

59. The second question is whether the obligations stayed are monetary in nature. This was a central issue in the recent decision of the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd.* The majority of the Supreme Court clarified the line between when a regulator is asserting provable claims in the insolvency context and when it is acting *qua* regulator. After acknowledging the importance of the collective proceeding model in the context of insolvency, the majority held that in that case, the regulator was "acting in a *bona fide* regulatory capacity and does not stand to benefit financially."

Orphan Well Association v Grant Thornton Ltd.,
2019 SCC 5 at para 128 **[Tab 4]**
05.22a-2438

60. The Alberta Energy Regulator had ordered the bankrupt estate to remedy any environmental condition or damage that had arisen as a result of the use of oil and gas assets that had been disclaimed by the trustee in bankruptcy and receiver. The majority of the Court held that the end-of-life obligations were not claims provable in the bankruptcy, as the ultimate goal was to "have the environmental work actually performed, for the benefit of third-party landowners, and the public at large." The regulator was not attempting to recover a debt.

Orphan Well Association v Grant Thornton Ltd.,
supra at para 128 **[Tab 4]**
05.22a-2438

61. The majority went on to quote from the trial level decision of Gascon J., as he then was, in *Re AbitibiBowater inc.*, to draw the distinction between true regulatory obligations and provable claims.

> ... the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.
>
> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.
>
> From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator. [emphasis added]

Orphan Well Association v Grant Thornton Ltd., *supra* at para 128, citing *Re AbitibiBowater inc.*, 2010 QCCS 1261 at paras 173-176 **[Tab 4]**

05.22a-2438

62. The majority also adopted some academic commentary that had urged the Court to make this distinction.

> … [T]here remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing the law" … Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" … [citations omitted]

Orphan Well Association v Grant Thornton Ltd., *supra* at para 133 **[Tab 4]**

05.22a-2438

63. In the result, the majority held that the end-of-life obligations being enforced were public duties that were owed to the public at large and that would not benefit the regulator or the Province financially as a result of their enforcement. In addition, the liability management rating program, under which a licensee was required to post security with the regulator of abandonment and reclamation obligations, although monetary in form, amounted to security ensuring that those end-of-life regulatory obligations are fulfilled. As such, they were directly related to the enforcement of regulatory obligations for the benefit of the

environment, and by extension the public good, and were therefore not true monetary obligations.

Orphan Well Association v Grant Thornton Ltd., *supra* at paras 155 to 157 **[Tab 4]**

05.22a-2438

64. This is in distinct contrast to the AEP Payment Arrears, which are payable to the AEP as amounts owing for various fees and royalties for the use of public lands. There is no connection between the AEP Payment Arrears and the regulatory obligations to be discharged by the CCAA Applicants. They do not secure the performance of environmental remediation obligations and are not held by the AEP as security for such. Rather, they consist of rent, defined in the PLA as including "royalties, dues, fees, rates, charges or other money payable by any person to the Crown in right of Alberta under and by virtue of any disposition", along with accruing interest.

PLA, *supra*, s 1 [**Tab 2]**

05.22a-2407

65. The AEP Payment Arrears fall entirely within the definition of rent and royalties, all of which accrued prior to the Filing Date. There are no amounts included in the AEP Payment Arrears that relate to true regulatory obligations, such as reclamation or remediation obligations, or as security for such regulatory obligations. The rents included in the AEP Payment Arrears represent the compensation payable to the Crown for the use of the lands subject to the Dispositions. The royalties are payable to compensate the Crown for the sale of aggregate that, before extraction by the operator, is owned by the Crown. The collection of the AEP Payment Arrears benefits the Crown financially, and therefore any exercise of remedies under the legislation to enforce payment are the acts of a creditor enforcing a debt. They are not the acts of a regulator enforcing compliance with the law for the public benefit.

Orphan Well Association v Grant Thornton Ltd., *supra* at paras 128 and 133 **[Tab 4]**

05.22a-2438

66. Under section 19(1) of the CCAA, claims which can be dealt with by a compromise or arrangement include debts and liabilities, present or future, to which a debtor company is

subject as of the commencement of the CCAA proceedings. Based on the foregoing, the AEP Payment Arrears are clearly claims within the contemplation of section 19(1).

CCAA, section 19(1) **[Tab 3]**

05.22a-2420

Non-Monetary Impacts of the Amended RVO on Regulatory Bodies

67. While paragraphs 14 to 19 of the Amended RVO affect the AEP and other regulatory bodies beyond the AEP Payment Arrears, the Transaction Parties respectfully submit that the effect has been limited to what is absolutely necessary to preserve the viability of the Amended Transaction without unduly impacting the AEP's regulatory mandate under the EPEA and PLA.

68. While the Protocol is declared to be binding upon both the Transaction Parties and the AEP under paragraph 14(c) of the Amended RVO, the Protocol does not substantively or unduly affect the discretion of the AEP.

(a) With respect to the approval of the Reclamation Plans or Updated Activity Plans, the discretion of the AEP is preserved;

(b) Once the Reclamation Plans and Updated Activity Plans, once are approved by the AEP, are binding upon JMB and 216;

(c) The Protocol requires JMB and 216 to provide and maintain all required Reclamation Security;

(d) The AEP determines the quantum and nature of the Reclamation Security; and

(e) The Protocol exceeds the requirements of the AEP by providing for the Trust Fund securing Reclamation Obligations in respect of the Inactive Pits subject to the Inactive Royalty Agreements.

69. Because the AEP will determine the matters described above after the closing of the Amended Transaction, and disputes between the AEP and the Transaction Parties could arise which threaten to render the Amended Transaction unviable, paragraph 15 of the Amended RVO reserves the discretion of this Court to intervene, but only to the extent that

the test contemplated by paragraphs 11.1(3)(a) and (b) is satisfied; that is, where a viable compromise or arrangement could not be made absent an Order under section 11.1 and such an Order is not contrary to the public interest.

70. The stay contemplated by paragraph 16 of the Amended RVO is limited in effect to what has already occurred, including the non-payment of the AEP Payment Arrears, any enforcement rights the AEP may have against Byron Levkulich and Aaron Patsch in their capacities as directors of JMB and former directors of 216, events that occurred prior to closing that do not continue after, and the insolvency and CCAA proceedings of JMB and 216.

71. Crucially, the stay contemplated by paragraph 16 of the Amended RVO does not stay the AEP from addressing any failures by the Transaction Parties or their current directors to comply with their respective obligations under the Dispositions, the PLA, the Updated Activity Plans, the EPEA and the Protocol that occur after the completion of the Amended Transaction.

72. Further, the Amended RVO does not dilute JMB's and 216's ongoing responsibility for the Reclamation Obligations associated with the Active Pits and Inactive Pits, or JMB's and 216's non-monetary obligations under the Dispositions, the PLA, the Reclamation Plans and the Updated Activity Plans, unless after closing a dispute threatens the viability of the Amended Transaction, and then only to the extent that relief is not contrary to the public interest.

73. The Reclamation Plans are to address all Reclamation Obligations identified in the AEP Orders, and the Updated Activity Plans will address all remaining Compliance Issues. The alternative, where none of this relief is provided, is that the deficiency in the Reclamation Security will continue to exist, and the AEP will be required to address all of the Reclamation Obligations and Compliance Issues. Hence, the Transaction Parties respectfully submit that the public interest that the AEP is mandated under the PLA and EPEA to protect can only be fully protected in these circumstances pursuant to the Amended Transaction.

05.22a-2159

The Facts Supporting an Order under Section 11.1 of the CCAA

74. As set out above, this Honourable Court may Order under section 11.1(3) that subsection 11.02 of the CCAA applies to stay any and all actions, suits or proceedings taken by the AEP and other regulatory bodies provided that the Court is satisfied that:

(a) a viable compromise or arrangement cannot be made in respect of the CCAA Applicants if the AEP's actions, suits and proceedings were not so stayed; and

(b) it is not contrary to the public interest that the AEP be affected by the stay order.

Whether a Viable Compromise or Arrangement can be made if there is no Stay

75. With respect to the first factor, the Transaction Parties respectfully submit that there is no other viable compromise or arrangement that can be made. This Honourable Court is already familiar with the SISP and its results. The market was thoroughly canvassed by the Sale Advisor, and few offers resulted. There were no other offers that would permit the Business (as defined in the Initial Order) to continue or that would see the stakeholders obtain a better result than through a receivership or bankruptcy.

Seventh Report, paras 18, 20-21, 23

76. On October 16, 2020, this Honourable Court approved the Original Purchase Agreement and the Original Transaction. In support of that application, the following facts were before the Court:

(a) The current economic climate only permits RLF Holdings to provide a limited amount of capital to fund Mantle's acquisition and post-closing working capital requirements;

(b) Fiera and ATB are financing a portion of the purchase price by permitting Mantle to assume a portion of the indebtedness owed to Fiera and a portion of the indebtedness owed to ATB;

(c) In the current economic climate, it is not realistic to expect that institutional lenders will provide fresh capital; and

(d) There were no other viable going concern offers made during the SISP or thereafter.

Affidavit of Byron Levkulich sworn September 30, 2020, paras 21, 25

77. In addition:

(a) Mantle, JMB and 216 will be re-launching the business from almost a full stop, as the pipeline of contracts to supply aggregate is extremely limited, and therefore the viability of the Amended Transaction is dependent upon conserving cash so that there is sufficient working capital to allow the business to survive, which means that the funds available are extremely limited;

March 23rd Affidavit, para 29

(b) Subject to market conditions, the Amended Transaction should create jobs for 30 full time professional employees, and directly or indirectly create jobs for more than 90 seasonal workers;

March 23rd Affidavit, paras 26, 28(c)

(c) Based on current market conditions, Mantle will initially produce approximately one million tonnes of sand, gravel and other aggregates per annum, for total production of approximately two million tonnes per annum, which production equates to approximately $30 million in economic activity, which remains subject to either positive or negative variances depending on market conditions;

March 23rd Affidavit, para 26

(d) 216 will retain ten Dispositions for Active Pits (as defined in the Amended Purchase Agreement) with Reclamation Obligations of approximately $286,000 and will maintain the existing Reclamation Obligations in respect of those Active Pits;

March 23rd Affidavit, para 27(a)

(e) 216 will retain the Disposition and complete the Reclamation Obligations in the amount of $45,000 in respect of one Inactive Pit. The AEP holds Reclamation

Security in the amount of $41,000, which upon the completion of the Reclamation Obligations and closure of the Inactive Pit should be returned to 216;

March 23rd Affidavit, para 27(b)

(f) JMB will retain and operate the two Active Pits subject to the Shankowski Royalty Agreement and Havener Royalty Agreement, in respect of which there are Reclamation Obligations of $253,000 and for which there is no Reclamation Security in place. The Reclamation Security will be provided once the Updated Activity Reports for these two pits are approved by the AEP; and

March 23rd Affidavit, para 27(c)

(g) JMB will retain and operate five Inactive Pits (as defined in the Amended Purchase Agreement) on private lands governed by the Buksa Royalty Agreement, the Kucy Royalty Agreement, the MacDonald Royalty Agreement, the Megley Royalty Agreement and the O'Kane Royalty Agreement, in respect of which there are Reclamation Obligations of $391,000. JMB will perform the Reclamation Obligations for these Inactive Pits and then close them in accordance with Reclamation Plans to be approved by the AEP. The Reclamation Obligations will be funded by the Trust Fund under section 3.3 of the Protocol appended to the Amended RVO

March 23rd Affidavit, para 27(d)

78. The Original Transaction was conditional on receiving AEP approval for the assignments and transfers of the Dispositions and EPEA Registrations. Notwithstanding the 158 days that have elapsed since October 16, 2020, little progress was been made with the AEP. The AEP has not taken a definitive position with respect to either the Original Transaction or the proposed revisions described above. Most critically, the AEP has maintained its position that all Compliance Issues must be resolved before it would consider the applications to assign and transfer Dispositions and EPEA Registrations, which rendered the Original Transaction unachievable. The AEP did not provide any assurance that if all of the Compliance Issues were resolved, the applications would be granted.

79. The timing of the AEP Orders appears significant. The AEP Orders were issued after the last appearance before this Honourable Court on March 5, 2021. By issuing the AEP Orders when it did, the AEP has created a new barrier to completing the Amended Transaction, notwithstanding that the Amended Purchase Agreement, which was filed before that application, contemplates that all Reclamation Obligations and Compliance Issues were to be addressed.

80. Therefore, without the assistance of this Honourable Court under section 11.1 of the CCAA, it will not be possible to complete the Amended Transaction. The only apparent alternative to the Amended Transaction is as follows:

(a) The assets of JMB and 216 being liquidated in a bankruptcy or receivership, as there are no alternative buyers;

(b) Forty-one Active Pits and Inactive Pits, having Reclamation Obligations in excess of $1.0 million, and Reclamation Security of only $598,000, becoming the responsibility of the AEP and therefore the Alberta public;

(c) The loss of thirty full time jobs and in excess of ninety seasonal jobs during a global pandemic; and

(d) The loss of the economic activity provided by JMB and 216 in the areas of rural Alberta where they operate.

March 23rd Affidavit, para 28

Section 11.1(3)(b) and the Public Interest

81. The Transaction Parties respectfully submit that the public interest factor set out in section 11.1(3)(b) of the CCAA has two aspects that must be considered. The first is the public interest in successful compromises and arrangements, and the second is the public interest being upheld by the regulatory body subject to the Order, which in this case is the protection of the environment.

82. The Supreme Court of Canada in *Century Services Inc. v Canada (Attorney General)* noted that the CCAA was enacted in the context of the Great Depression and was intended to

provide an effective mechanism for achieving compromises between insolvent debtors and creditors on the understanding that a liquidation of an insolvent company was harmful for most of those it affected, notably including creditors and employees.

> Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs … Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation. [citations omitted]

Century Services Inc. v Canada (Attorney General), 2010 SCC 60 at para 18 **[Tab 5]**

05.22a-2459

83. More recently, in *9354-9186 Québec inc. v Callidus Capital Corp*, the Supreme Court affirmed these principles:

> Among these objectives, the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" … 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. [emphasis added]

9354-9186 Québec inc. v Callidus Capital Corp., 2020 SCC 10 at paras 40-41 **[Tab 6]**

05.22a-2470

84. The Amended Transaction is consistent with these objectives. It permits the survival of JMB and 216 and their business, provides for the continued employment of many individuals, avoids the loss of economic activity in rural Alberta, avoids the significant losses all stakeholders would suffer as a result of a liquidation, and preserves the value of the Included Pits which would otherwise be rendered valueless in a liquidation.

85. The second aspect of the public interest is, to quote from section 2 of the EPEA, the protection, enhancement and wise use of the environment in order to achieve objectives such as protecting the integrity of ecosystems, human health and the wellbeing of society, providing for Alberta's economic growth and prosperity in an environmentally responsible

manner, and providing for the integration of environmental protection and economic decisions in the earliest stages of planning.

EPEA, *supra*, s 2 **[Tab 2]**
05.22a-2417

86. The Transaction Parties respectfully submit that the public interest in protecting the environment is achieved by the Amended Transaction. With respect to the Active Pits, JMB and 216 remain responsible for resolving all Compliance Issues in the context of continued operations. With respect to the Inactive Pits, JMB and 216 will perform all Reclamation Obligations pursuant to the Reclamation Plans. All security for Reclamation Obligations, including the Northbridge Bonds that the AEP permitted to expire, will be replaced, either by replacement Reclamation Security for the Active Pits subject to the Shankowski Royalty Agreement and Havener Royalty Agreement, or by creating the Trust Fund for the Inactive Pits subject to the Inactive Royalty Agreements. No Reclamation Obligations are being vested in ResidualCo or left to the Alberta public.

87. Since the only realistic alternative to the Amended Transaction is liquidation, it is likely that if the Amended Transaction does not close, the Reclamation Obligations will be left for the AEP to resolve, with such recourse as they may have against other persons for any deficiency. Because the AEP failed to make timely demand under six out of seven Northbridge Bonds, there would likely be a substantial deficiency.

88. Not granting the relief provided for in section 11.1(3) of the CCAA would defeat both the public interest in avoiding the social and economic losses resulting from the liquidation of insolvent companies and the public interest in avoiding environmental liabilities being left for the public to manage.

89. The Transaction Parties respectfully submit that the Amended Transaction is the only viable option available that advances the public interest both in successfully completing compromises and arrangements under the CCAA and in protecting the environment and the Alberta public.

Without the Section 11.1(4) Relief, the AEP Will Retain the Ability to Collect the AEP Payment Arrears

90. The fourth question is whether the AEP or any other regulatory body, in exercising the ability to require payment of the AEP Payment Arrears as a condition of granting applications or to refuse applications, would be impermissibly enforcing its rights as a creditor in relation to the AEP Payment Arrears. The relief sought by the Transaction Parties is intended to prevent the AEP from indirectly requiring the payment of the AEP Payment Arrears by making any future approvals, consents or applications conditional on such payment, notwithstanding that under the Amended RVO, the AEP Payment Arrears are no longer debts or obligations of JMB and 216, but rather are obligations of ResidualCo. The Transaction Parties respectfully submit that permanently staying the AEP's ability to do so is within this Honourable Court's jurisdiction under section 11.1(4) of the CCAA and is appropriate in this case.

91. Analogous questions arose in two cases examined by the Supreme Court of Canada in 2016 under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"): *Alberta (Attorney General) v Moloney* and *407 ETR Concession Co. v Canada (Superintendent of Bankruptcy)*. The Court was required to consider the relationship between the discharge provisions of the BIA and provincial driver's licensing regimes in Alberta and Ontario.

Alberta (Attorney General) v Moloney, 2015 SCC 51 **[Tab 7]**
05.22a-2482

407 ETR Concession Co. v Canada (Superintendent of Bankruptcy), 2015 SCC 52 **[Tab 8]**
05.22a-2498

92. The Court noted that the BIA furthers two purposes: the equitable distribution of the bankrupt's assets among the creditors and the bankrupt's financial rehabilitation. The equitable distribution of assets is achieved through the collective proceeding model, which requires creditors wishing to enforce a provable claim against the bankrupt to participate in one collective proceeding. Generally, creditors rank equally and share rateably in the bankrupt's estate unless the BIA specifically contemplates a different ranking.

Alberta (Attorney General) v Moloney, *supra* at para 33 **[Tab 7]**
05.22a-2482

Century Services Inc. v Canada (Attorney General), *supra* at para 22 **[Tab 8]**
05.22a-2498

93. The collective proceeding model avoids the inefficiency and chaos that would attend an insolvency if each creditor proceeded individually to recover its debts, and places all creditors on an equal footing, all with the goal of maximizing the global recovery for all creditors. For the collective proceeding model to be viable, creditors must pursue their claims through the claims procedures contemplated by the BIA and must be stayed from individually enforcing their claims outside of the collective proceeding.

Alberta (Attorney General) v Moloney, *supra* at para 33 **[Tab 7]**
05.22a-2482

94. In *Alberta (Attorney General) v Moloney*, Moloney caused a motor vehicle accident before his bankruptcy and while he was uninsured. The Province compensated the victim under a statutory regime addressing damage caused by uninsured drivers, and then obtained a judgment against Moloney for the amount of the compensation. Moloney made an assignment in bankruptcy and was later discharged. The Province was entitled under section 102 of its *Traffic Safety Act* ("**TSA**") to suspend the Moloney's driver's licence until he paid the compensation claim, and therefore, notwithstanding that Moloney had been discharged from bankruptcy, and under section 178(2) of the BIA was released from all claims provable in bankruptcy, the Province refused to issue a licence.

Alberta (Attorney General) v Moloney, *supra* at paras 2-3 **[Tab 7]**
05.22a-2482

95. The Court held that Alberta had created an administrative scheme that had the effect of coercing a discharged debtor to pay a debt that has been released. The operative provisions of the BIA precluded creditors from compelling payment of a provable claim through either a civil or administrative process.

Alberta (Attorney General) v Moloney, *supra* at para 68 **[Tab 7]**
05.22a-2482

96. In considering whether the fact that a licence to drive a vehicle is a "privilege" and thus outside of Parliament's powers to legislate under the BIA, the majority of the Court held:

> Finally, Alberta's other assertion, to the effect that Parliament's power over bankruptcy and insolvency matters does not extend to the regulation of driving privileges, does not entail that the province can withhold those privileges on the basis of an unpaid released debt. In my view, the province is conflating the scope of Parliament's authority and the consequences of the conflict between the BIA and the TSA. The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person's driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province's condition conflicts with s. 178(2) of the BIA and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative. [emphasis added]

Alberta (Attorney General) v Moloney, *supra* at para 82 **[Tab 7]**
05.22a-2482

97. The Court held that the Province's use of its administrative powers relating to driving privileges to burden Maloney until he repaid a discharged debt frustrates a purpose of the BIA, being the financial rehabilitation of the bankrupt. The Court also noted that Parliament considered which debts survived a bankrupt's discharge, and the effect of section 102 of the TSA was to create a new class of debts that survived discharge, leaving Maloney with a financial liability that was not contemplated by Parliament.

Alberta (Attorney General) v Moloney, *supra* at paras 77-79, 85-86 **[Tab 7]**
05.22a-2482

98. Similarly, in *407 ETR Concession Co. v Canada (Superintendent of Bankruptcy)*, the Court reviewed the provincial statute that permitted withholding a vehicle license and an individual license to drive on the basis of payment arrears of tolls for use of Highway 407. A bankrupt trucker owed significant pre-bankruptcy tolls and then was later discharged from bankruptcy. The Province would not issue a new licence unless the tolls were paid.

407 ETR Concession Co. v Canada (Superintendent of Bankruptcy), *supra* **[Tab 8]**
05.22a-2498

99. The majority held that the legislation at issue (the "**407 Act**") created, in substance, a "debt enforcement scheme".

407 ETR Concession Co. v Canada (Superintendent of Bankruptcy), supra at paras 17, 19-20 **[Tab 8]**
05.22a-2498

100. Through section 22(4) of the 407 Act, the Province had created a new class of exempt debts that were not listed in section 178(1) of the BIA. The Court also held that the operation of section 22(4) frustrated Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves.

407 ETR Concession Co. v Canada (Superintendent of Bankruptcy), supra at paras 24, 31 **[Tab 8]**
05.22a-2498

101. In discussing the conflict between the BIA and 407 Act, the majority stated:

> In other words, while the provincial scheme has the effect of maintaining the debtor's liability beyond his or her discharge, the federal law expressly releases him or her from that same liability. Both laws cannot "apply concurrently" … or "operate side by side without conflict" … a debtor cannot be found liable under the provincial law after having been released from that same liability under the federal law ... I respectfully disagree with my colleague that this conflict is "indirect" or concerns something that is merely "implicitly" prohibited by s. 178(2) of the *BIA*, or that I am resorting to a broad interpretation of s. 178(2) in order to find that an operational conflict exists. Under the federal law, the debt is not enforceable; under the provincial law, it is. The inconsistency is clear and definite. One law allows what the other precisely prohibits. [citations omitted; emphasis added]

407 ETR Concession Co. v Canada (Superintendent of Bankruptcy), supra at para 25 **[Tab 8]**
05.22a-2498

102. The substance of the provincial regime must be considered:

> A court must look at the substance of the provincial order rather than the form. In my view, if the Minister's argument is accepted it would amount to creating a carve-out for provincial regulatory or licensing schemes to permit debt enforcement after discharge. In my view, the effect of *AbitibiBowater* in the context of this case is to confirm that regulatory bodies with provable claims that can be reduced to a monetary amount are subject to the bankruptcy process.
>
> The effect of the licensing scheme is to alter the scheme of distribution and re-arrange priorities among creditors by taking funds that would otherwise be available to other judgment creditors, because the Minister obtains funds outside the bankruptcy process. As Gonthier J. noted in *Husky Oil*, even if it is not the intent of the *MVA Claims Act* or the HTA

> to re-arrange priorities, there is no room for an incidental or ancillary effect of provincial legislation if it alters the priorities of creditors or affects the scheme of distribution. I also agree that the licensing scheme offends the "fresh start" principle. [emphasis added]

Ontario (Minister of Finance) v Clarke, 2013 ONSC 1920 at paras 52 and 53 **[Tab 9]**
05.22a-2507

103. The Court did not accept the argument that the Minister was withholding the licence in order to promote good driving habits and protect the public because the legislation and administrative practice made clear that the licence was only withheld because a debt was not paid.

Ontario (Minister of Finance) v Clarke, *supra* at para 54 **[Tab 9]**
05.22a-2507

104. True regulatory obligations continue to govern a debtor's regulated activities even after emerging from CCAA proceedings, and therefore continue to be binding and will not be treated as claims subject to section 19 of the CCAA. The Transaction Parties respectfully submit that section 11.1 recognizes this distinction, and that the Amended Transaction, by providing for the performance of the Reclamation Obligations and resolution of the Compliance Issues, upholds this distinction.

Newfoundland and Labrador v AbitibiBowater Inc., 2012 SCC 67 at paras 26 and 73 **[Tab 10]**
05.22a-2512

CCAA, *supra*, s 11.1(2) **[Tab 3]**
05.22a-2420

105. As noted above, however, the AEP Payment Arrears are in substance monetary debts that are provable claims under section 19 of the CCAA, rather than regulatory obligations that must be complied with regardless of the bankruptcy or insolvency. Such claims are subject to the stay provisions of the CCAA.

CCAA, *supra*, ss 2, 11.02 **[Tab 3]**
05.22a-2420

106. In this case, the EPEA and the PLA create an administrative scheme that has the effect of requiring the CCAA Applicants to pay the AEP Payment Arrears as a prerequisite of obtaining approval for transfers and consents. If these powers were exercised for the purpose of collecting the AEP Payment Arrears or to enforce the AEP Orders, the purposes of the CCAA in promoting restructurings and the equitable distribution of assets would be

defeated. Further, this would be contrary to the regulatory purposes of the EPEA and PLA, as it would result in the AEP being left with significant unsecured reclamation obligations.

107. Permitting the AEP to exercise its discretion in providing approvals and transfers and to require payment of the AEP Payment Arrears as a precondition to granting such approvals and transfers falls squarely in the same category as *Moloney* and *407 ETR*. The policy of ensuring equitable treatment of various classes of creditors strongly suggests that the AEP ought not to be able to exercise its authority to provide approvals and transfers so as to ensure payment of the AEP Payment Arrears. Rather than fulfilling a regulatory purpose under the EPEA and PLA, the AEP would be attempting to collect AEP Payment Arrears outside of the parameters of the CCAA proceedings.

108. In coming to this conclusion, this Honourable Court ought to consider the substance of a regulatory action over its form in order to determine its true nature and whether the effect of the regulator's actions is to create in its favour a higher priority than the one conferred under federal insolvency legislation.

> Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process.
>
> I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of the federal legislation, then that claim can be subjected to the insolvency process. ... Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. [emphasis added]

Newfoundland and Labrador v AbitibiBowater Inc., *supra* at paras 18-19 **[Tab 10]**

05.22a-2512

109. There is no statutory basis for the AEP being paid the AEP Payment Arrears, all of which accrued prior to the Filing Date. Permitting the AEP to require such payment as a condition of obtaining approvals and transfers maintains an unsecured claim, is contrary to and

fundamentally frustrates the purposes of the CCAA, and allows the AEP to assert a priority denied to other unsecured creditors.

Releases are Appropriate and Should Be Authorized

110. The Transaction Parties submit that the releases contemplated in the Amended RVO are appropriate, meet the test for third-party releases in CCAA proceedings, and should be granted.

111. The CCAA Court has the jurisdiction to approve a compromise or arrangement that includes third-party releases, provided there is "a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan." Courts will consider whether the releases meet the following criteria:

(a) The parties to be released from claims where necessary and essential to the restructuring of the debtor;

(b) The claims to be released were rationally connected to the purpose of the plan and necessary for it;

(c) The plan could not succeed without the releases;

(d) The parties being released were contributing to the plan;

(e) The release benefited the debtors, as well as the creditors generally;

(f) The creditors voting on the plan had knowledge of the nature and the effect of the releases; and

(g) The releases were fair and reasonable and not overly broad.

Re Target Canada Co., 2016 ONSC 3651 at paras 34-38 **[Tab 11]**
05.22a-2523

112. Both the objectives of the CCAA and the specific circumstances of the case are to be taken into account. No single factor in the list above is determinative.

Re Target Canada Co., *supra* at para 38
[Tab 11]
05.22a-2523

113. The Amended RVO provides that from and after the Effective Time (as defined in the Amended Plan), certain parties will be released from any liability. These parties include JMB, 216, Mantle, the directors and officers of each of JMB, 216 and Mantle as of the Effective Time, the Monitor, the Chief Restructuring Advisor, and their respective legal counsel (collectively defined as the "Released Parties" in the Amended RVO). The Amended Transaction, when viewed globally, is a compromise and arrangement of JMB, 216 and their business.

114. The proposed releases meet the criteria in the case law and should be granted.

(a) The Released Parties have played a necessary and essential role in the restructuring of the Applicants and their business;

(b) The form of the Amended RVO, which contains the release, is a condition precedent of the Amended Transaction and is necessary for its completion;

(c) The Release Parties made significant contributions to the negotiation of the Amended Transaction and will play an instrumental role in ensuring their completion; and

(d) The Monitor recommended approval of the Amended Transaction, including the releases.

115. Further, the releases do not release or discharge the Released Parties from: (i) any obligation under the Amended Plan; (ii) any criminal, fraudulent or other wilful misconduct; (iii) any claim with respect to matters set out in s. 5.1(2) of the CCAA; or (iv) any claim based upon or attributable to the Released Parties gaining a personal profit to which they were not legally entitled.

116. The releases will benefit the CCAA Applicants and ResidualCo by eliminating potential contribution and indemnity claims, which in turn, avoid the depletion of either the CCAA Applicants' or ResidualCo's assets and maximize the proceeds available to creditors and other stakeholders. Courts have recognized this advances the best interests of stakeholders.

As the Court noted in *Target*: "[I]t is not uncommon for CCAA courts to approve third-party releases in favour of persons, such as directors or officers or other third parties, who could assert contribution and indemnity claims against the debtor company."

Re Target Canada Co., *supra* at para 40
[Tab 11]
05.22a-2523

117. It is also critical to the Amended Transaction that the directors and officers of the Transaction Parties as at the Effective Time be released, because the current directors and officers are not prepared to assume litigation risks associated with JMB and 216. These CCAA Proceedings have been extraordinarily contentious, with a myriad of claims advanced against different individuals, which although not legally supportable, have resulted in significant delay and cost. Without the current directors and officers, it will not be possible to complete the Amended Transaction.

118. Accordingly, to ensure that the Amended Transaction is completed to the benefit of a substantial number of JMB and 216's stakeholders, the Transaction Parties respectfully submit that a release is appropriate and should be authorized by this Honourable Court.

Stay of Enforcement against Current Directors

119. With respect to the provisions of the Amended RVO that stay the exercise of certain powers by the AEP and other regulatory bodies against Byron Levkulich and Aaron Patsch, and to stay the exercise of certain other powers, the Transaction Parties respectfully submit that this relief is entirely justified.

120. Section 11.02(2) of the CCAA gives the Court wide jurisdiction to implement a stay on any terms it deems reasonable, provided that the applicant has acted, and is acting, in good faith and with due diligence.

> **11.02(2)** A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

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

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

(3) The court shall not make the order unless

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

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

CCAA, *supra*, s 11.02 **[Tab 3]**
05.22a-2420

121. This provision has been interpreted by the BC Supreme Court as permitting a CCAA court to issue a permanent stay.

It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in *Re Playdium Enterprises Corp.* …

> In interpreting s.11(4) [now 11.02(2)], including the "such terms" clause, the remedial nature of the *CCAA* must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the *CCAA* order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the *CCAA* regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the *CCAA*, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it.

Re Doman Industries Ltd., 2003 BCSC 376 at paras 15-16 **[Tab 12]**
05.22a-2528

122. In that case, Justice Tysoe held that he had the jurisdiction to order a permanent stay preventing secured noteholders from relying on events of default existing before or during the restructuring period to accelerate the repayment of the indebtedness due under the secured notes. Having so determined, His Lordship then considered whether the Court could grant a stay preventing the secured noteholders from exercising their rights and remedies on the occurrence of the anticipated breach of the secured note indenture arising post-plan implementation. In considering this issue, His Lordship reviewed a number of the purposes for which stays are granted under section 11(4) [now section 11.02(2)] of the CCAA. One of those purposes was "to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period".

Re Doman Industries Ltd., supra at para 22
[Tab 12]
05.22a-2528

123. In the CCAA proceedings of AT&T Canada Inc., Justice Farley granted a sanction order that contained permanent injunction provisions precluding creditors from exercising any rights or remedies available to them as a result of the ongoing possible insolvency of any of the new companies created by the restructuring transaction or as a result of any change in control of any of the petitioners arising in connection with the restructuring transaction. Both provisions were drafted so as to be prospective in nature; that is, to cover such events of default arising after plan implementation.

Re AT&T Canada Inc. (25 February 2003), Toronto, Ont CA 02-CL-4715, 03-CL-4874 (order) **[Tab 13]**
05.22a-2534

124. In the case at bar, the provisions of the Amended RVO preclude the AEP and other regulatory bodies from exercising their powers and remedies against the current directors of JMB and 216. This relief is critical to the Amended Transaction for the following reasons:

(a) The AEP Orders name Byron Levkulich and Aaron Patsch, making them jointly responsible to perform all of the obligations of JMB and 216 set out therein;

(b) A significant proportion of the Reclamation Obligations arose well before they ever became directors of JMB or 216, and only a handful of the pits subject to the Dispositions and Royalty Agreements were actually operated during the period since;

Pell Affidavit, para 50

(c) It is patently unfair that the AEP would seek remedies against the very directors who are seeking to ensure that all Reclamation Obligations and Compliance Issues are resolved;

(d) The AEP cites the loss of the Northbridge Bonds as security for the Reclamation Obligations as being the fault of JMB, when in fact the loss of that Reclamation Security resulted from the AEP's unexplained failure to make demand under the Northridge Bonds; and

(e) The AEP Orders were issued after the AEP became aware of the revisions to the Original Transaction provided for in the Amended Transaction that would result in the Reclamation Obligations being satisfied and the Compliance Issues resolved.

125. The Amended RVO also precludes the AEP from exercising powers and remedies as they relate to the AEP Payment Arrears and to the CCAA Proceedings, which is necessary in order to ensure that the implementation of the Amended Transaction is not frustrated by post-closing actions of the AEP against JMB and 216 in respect of these matters.

126. This accords with the overall purpose of the CCAA, as it facilitates the successful completion of the arrangement represented by the Amended Transactions and the continued operation of the JMB and 216 business. It is also in furtherance to the powers of this Honourable Court under section 11.02. Accordingly, the Transaction Parties respectfully submit that the stay in paragraph 16 of the Amended RVO is necessary and appropriate and ought to be granted.

B. EXERCISE OF DISCRETION BY THE CCAA COURT TO GRANT THE RELIEF SOUGHT

127. In *Century Services Inc. v Attorney General of Canada*, the Supreme Court of Canada reviewed the general discretionary authority of a CCAA court as set out in section 11 of

the CCAA, noting that Parliament had "endorsed the broad reading of CCAA authority developed by the jurisprudence." The Court went on to note that the discretionary authority of a CCAA court is centered on three baseline considerations: appropriateness, good faith and due diligence.

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" … However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court. [emphasis added]

Century Services Inc. v Attorney General of Canada, 2010 SCC 60 at paras 68, 70-71
[Tab 5]
05.22a-2459

128. The CCAA is broadly interpreted to allow a CCAA Court to grant innovative solutions to the difficult and complex issues that arise during the court of CCAA proceedings. Section 11 of the CCAA provides those "wide discretionary powers".

Arrangement relatif à Nemaska Lithium inc.,
2020 QCCA 1488 at para 19 **[Tab 14]**
05.22a-2543

129. Whether such discretion should be exercised in any given case is a "circumstance-specific inquiry" to balance the objectives of the CCAA with the remedy sought.

> 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)) …

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. [emphasis in original]

9354-9186 Québec inc. v Callidus Capital Corp., supra at paras 75-76 **[Tab 6]**
05.22a-2470

Appropriateness

130. The first consideration is appropriateness, which is assessed by reference to the policy objectives of the CCAA and how the proposed order advances those objectives. The policy objectives under the CCAA have been articulated as follows:

> The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation. [emphasis added]

Re Canadian Airlines Corp., 2000 ABQB 442 at para 95 **[Tab 15]**
05.22a-2547

131. In this case, the "broader constituency of affected persons" includes both the communities in which the CCAA Applicants do business and the public interest generally, including as it relates to the environment. The Amended Transaction will preserve the business and core assets of JMB and 216, preserve the employment of a significant number of its employees, protect the public from being left with JMB and 216's Reclamation Obligations, preserve

economic activity in rural Alberta, and preserve value for the benefit of the primary secured creditors, ATB and Fiera.

132. The Amended Transaction has been structured to carefully balance the relief sought pursuant to section 11.1 of the CCAA with respect to the AEP to mitigate Mantle's regulatory and litigation risk, against the AEP's need to ensure that the Reclamation Obligations and Compliance Issues are addressed. In structuring the Amended Transaction in this manner, the Transaction Parties respectfully submit that the public interest in the environment is therefore being fully addressed by the Amended Transaction.

133. The Amended Transaction also achieves common ground with as many stakeholders as possible by treating them as advantageously and fairly as the circumstances permit, including by providing for bringing all Compliance Issues into good standing in as timely a manner as possible and providing for the performance of all Reclamation Obligations. The Amended Transaction represents the best opportunity to maximize value of the CCAA Applicants' assets and is the only available going concern transaction. This satisfies a criteria for appropriateness referred to by the Supreme Court of Canada in *Century Services Inc. v Attorney General of Canada*.

Century Services Inc. v Attorney General of Canada, *supra* at para 71 **[Tab 5]**
05.22a-2459

Good Faith

134. The requirement that parties act in good faith and with due diligence pervades both the CCAA and BIA. For instance, in applying for an extension of a stay of proceedings under section 11.02, a debtor must satisfy the court that it has acted and is acting in good faith and with due diligence. Under section 23(2), a monitor is not liable to persons who rely upon its reports as long as it has acted in good faith and takes reasonable care. Under section 26, a monitor is generally required to exercise its powers and perform is duties and functions honestly and in good faith. A Court may authorize a sale to a related party under section 36(4) where the Court is satisfied that good faith efforts have been made to sell the assets to persons who are not related.

CCAA, *supra*, ss 11.02, 23(2), 26 and 36(4)
[Tab 3]
05.22a-2420

05.22a-2180

135. On November 1, 2019, an amendment to the CCAA came into force requiring that any interested person in proceedings under the CCAA act in 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.

CCAA, *supra*, s 18.6 **[Tab 3]**

05.22a-2420

136. While the term "good faith" is not defined in the CCAA, the concept has been examined by courts in other contexts. In *Bhasin v Hrynew*, the Supreme Court of Canada held that good faith is a general organizing principle that underlies contract law and requires contracting parties to have "appropriate regard" for other parties' interests. The question of appropriate regard depends on the context of the relationship. In the context of insolvency proceedings and the policy objectives of the CCAA, the parties are expected to work together towards the objective of reducing the social and economic losses resulting from a company's insolvency. In many ways, good faith is easier to define in its absence: failing to deal honestly, candidly, forthrightly or reasonably with other stakeholders in insolvency proceedings, or acting in a way that undermines the interests of others or of the proceeding itself, or acting contrary to the objectives of the insolvency legislation.

Bhasin v Hrynew, 2014 SCC 71 at para 65 **[Tab 16]**

05.22a-2551

137. Similarly, the law imposes a general obligation on administrative decision-makers to act reasonably and in good faith. While the AEP has certain discretionary decision-making powers pursuant to the applicable legislation, that discretion is not without limitation. Discretionary decisions must be reasonable, and decision-makers must act in good faith, without improper purpose and without reliance upon irrelevant considerations. As the Supreme Court of Canada stated in *Roncarelli v Duplessis*, "'[d]iscretion' necessarily implies good faith in discharging public duty."

Roncarelli v Duplessis, [1959] SCR 121 at paras 40-41 **[Tab 17]**
05.22a-2559

Alberta Health Services v Wang, 2018 ABCA 339 at para 13 **[Tab 18]**
05.22a-2565

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 53 **[Tab 19]**
05.22a-2568

138. The obligation of good faith in the administrative context has been described as follows:

> Good faith in law is not to be measured always by a man's own standard of right, but that which the law has prescribed as the standard for the observance of all men in their dealings with each other. The good faith must be determined by what has been done.

Smith v Vanier (Municipality) (1972), 30 DLR (3d) 386 at 390-91 (Ont HC) **[Tab 20]**
05.22a-2580

139. Thus, in determining whether a party has acted in good faith, especially when that party is purporting to act in the public interest, the Court must look at that party's actions with a view to considering whether the public body is acting honestly and within the limits of its statutory powers, and not in an arbitrary manner.

Congrégations des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village), [2004] 2 SCR 650 at paras 6-7 **[Tab 21]**
05.22a-2583

Roncarelli v Duplessis, *supra* at para 46 **[Tab 17]**
05.22a-2559

140. Section 18.6 expresses the duty of good faith as a positive duty to "act" and therefore seems to contemplate more than simply an obligation to not act dishonestly or in bad faith. While this duty already existed in the CCAA, section 18.6 expressly expanded it to apply to all stakeholders.

141. With its recent enactment, Courts have had only limited opportunity to interpret section 18.6. However, the Supreme Court of Canada recently commented on section 18.6 in *9354-9186 Québec Inc. v Callidus Capital Corp.*

> 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" … 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 …
>
> 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*" … 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* …[citations omitted; emphasis added]

9354-9186 Québec Inc. v Callidus Capital Corp., 2020 SCC 10 at paras 47-50 **[Tab 6]**

05.22a-2470

142. Although the issue in *93454-9186 Quebec Inc. v Callidus Capital Corp.* related to whether a senior secured lender should be permitted to vote on a second plan because it was found to have been acting for an improper purposes, a number of principles underlay the findings of the CCAA Court that were upheld by the Supreme Court of Canada and are of assistance in analysing good faith in the insolvency context.

(a) An improper purpose is one that is not aligned with the purposes of the CCAA and BIA;

(b) Acting for an improper purpose is equivalent to acting contrary to section 18.6 of the CCAA and section 4.2 of the BIA; and

(c) Although creditors and other stakeholders may pursue their personal interest, proper regard is to be given to the rights of all other parties in the proceedings.

Julien Morissette et al, *Being a Good Sport: A Comparative Analysis of Good Faith as a Statutory Obligation in Insolvency Proceedings*, (2020), online: ARIL Society Inc. <https://canlii.ca/t/t1wt> at p 277 **[Tab 22]**
05.22a-2595

143. As noted in *Century Services*,

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

Century Services Inc. v Attorney General of Canada, *supra* at para 77 **[Tab 5**]
05.22a-2459

144. There is a fine line between pursuing personal interest and failing to regard others' rights in the proceedings – in essence, undermining the proceedings. On the one hand, it is appropriate for stakeholders in an insolvency proceeding to take steps to protect their rights. However, if in doing so, a stakeholder fails to have regard for the impact of its position on the overall process and other stakeholders, the Transaction Parties respectfully submit that a court may properly find that the stakeholder has failed to act in good faith.

145. The Transaction Parties respectfully submit that they have acted in good faith throughout these proceedings. This has been amply demonstrated by the efforts they have undertaken to obtain the maximum benefit for the stakeholders of the CCAA Applicants.

146. While the AEP's actions ought not to be characterized as being in bad faith, its actions fall below the standard set out in section 18.6 because the AEP has not taken positive actions in the CCAA Proceedings that have regard to the interests of other stakeholders. In particular:

(a) Section 18.6 requires more from a stakeholder than inaction, especially where that action can result in the failure of the compromise and arrangement being pursued in the proceedings;

(b) For 158 days, the AEP has neither approved nor denied the applications for assignments and transfers, nor provided meaningful feedback with respect to the myriad of proposals submitted by the Transaction Parties;

(c) By requiring that all Compliance Issues be resolved before the AEP would consider applications to assign and transfer the Dispositions and EPEA Registrations, the AEP created an impossible barrier to restructuring JMB and 216. The resolution of those Compliance Issues required funding that would only be available if the Original Transaction closed, and closing could not occur unless Mantle had certainty that if the Compliance Issues were resolved, the applications would be approved; and

(d) In issuing the AEP Orders without providing any other feedback on the Activity Plans, the AEP created a new barrier to completing the Amended Transaction.

147. While the AEP left the proposals of the Transaction Parties largely unanswered, the AEP proceeded to issue the AEP Orders and target the two representatives of RLF Holdings on JMB's board of directors, Byron Levkulich and Aaron Patsch. As discussed above, this was done after the Amended Transaction was put forward, where provision was made for the full resolution of the Compliance Issues and the performance of the Reclamation Obligations relating to the Inactive Pits. This made complicated an already difficult transaction.

148. The actions and inaction discussed above have resulted in the Transaction Parties incurring significant costs. Since the first week of January of 2021, when the trust claims of certain lien claims were resolved by this Honourable Court, the professional and operating costs of the CCAA Applicants, Mantle and the Monitor have amounted to approximately $424,357 on account of operating costs and $691,867 on account of professional fees. In addition, ATB and Fiera have also incurred significant costs.

05.22a-2185

March 23rd Affidavit, para 36

149. The Transaction Parties have demonstrated flexibility in attempting to address the concerns of various stakeholders throughout the process, including the AEP, and have undergone significant additional expense and delay in an effort to find a resolution to the AEP's concerns about the Reclamation Obligations. That resolution is found in the Amended Purchase Agreement, the Amended Transaction and the Amended Plan.

150. The Transaction Parties, ATB and Fiera have acted in good faith in going to great lengths and significant cost to ensure that the business and core assets of JMB and 216 could be acquired and restructured to preserve value for all of the stakeholders and protect the Alberta public from being left to address all of JMB's and 216's reclamation liabilities. The Amended Transaction carefully balances the interests of all stakeholders, including the senior secured creditors, Mantle, the employees, counterparties to contracts, the AEP and the public at large.

Due Diligence

151. In *9354-9186 Québec Inc. v Callidus Capital Corp.*, the Supreme Court went on to discuss the third baseline consideration of due diligence.

> 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 para 51 **[Tab 6]**

05.22a-2470

152. This last consideration includes an assessment of how the stakeholders have negotiated and compromised in an effort to advance the policy objectives of the CCAA. All stakeholders must act in a diligent and timely fashion, because the entire process relies upon the active

participation of those affected towards resolution in an effort to avoid receivership or bankruptcy. The expectation is that stakeholders will work diligently to find common ground so that there can be a reorganization that is fair to all.

153. These principles were set out in a recent article by Ari Y. Sorek and Charlotte Dion:

> Stakeholders are entitled to draw conclusions, organize their affairs or assert positions on the basis of the prevailing *modus vivendi*; failing to follow established predicates and deadlines in insolvency proceedings can be particularly prejudicial.
>
> …
>
> The process of asserting, gathering, assessing and adjudicating claims, whether within or outside a formal claims process, requires transparency, dialogue, cooperation and due diligence. Inherent in these requirements is the recognition that the various actors—the debtor, creditors, the monitor and the court—require foreseeability, reliability and predictability with respect to the various claims and positions that compete with each other in a typical restructuring process.
>
> Given the famously "incremental nature" of CCAA proceedings, and even while accounting for the fast pace and inherently unpredictable nature of restructurings, the parties cannot unduly add to this unpredictability through tactical or negligent withholding of information or positions. If they do, the court's discretionary authority allows it to ensure that delinquent stakeholders not benefit from their own turpitude. [emphasis added]

Ari Y Sorek & Charlotte Dion, *Good Faith in Insolvency and Restructuring: At The Intersection of Civilian and Common Law Paradigms, at a Fork in the Road or in a Merging Lane?* (2020), online: ARIL Society Inc. <https://canlii.ca/t/t1wm> at p 97-98

[Tab 23]

05.22a-2598

154. Although the authors are referring to the claims process in this passage, the same holds true for CCAA proceedings as a whole. Stakeholders are required to be transparent, engage in dialogue with a view to meeting the policy objectives of the CCAA, cooperate, and exercise due diligence. Indeed, as discussed above, the Supreme Court observed in *Century Services Inc. v Canada (Attorney General)* that appropriateness, good faith and due diligence underlie all exercises of discretionary powers under the CCAA.

Century Services Inc. v Canada (Attorney General), *supra*, at para 70 **[Tab 5]**
05.22a-2459

155. The CCAA Applicants have updated this Honourable Court frequently and have been candid about the challenges and the concerns of various stakeholders as those issues have arisen. They have cooperated to the extent possible with their stakeholders and have worked diligently, spending significant time and energy on devising appropriate solutions to balance stakeholder needs. At every stage in the CCAA Proceedings, they have acted diligently to move the CCAA Proceedings forward, even in the face of numerous obstacles.

156. A stakeholder who fails to act diligently should not benefit from its failure to do so. Moreover, where that stakeholder's conduct prejudices other stakeholders, particularly at a critical stage of the proceedings, the CCAA Court has the discretion to find that there has been a failure of due diligence and to rely upon that finding in deciding whether or not to grant relief sought by that stakeholder.

157. The Transaction Parties respectfully submit that the failures of the AEP to make demand under six of the Northbridge Bonds or to meaningfully respond to the Original Transaction, the Amended Transaction and the proposals made during to address its concerns for 158 days, fall below the due diligence standard that stakeholders are expected to satisfy during CCAA proceedings.

C. COOPERATIVE FEDERALISM

158. The issues with the AEP, and the availability of the relief requested in the Amended RVO, can also be examined in terms of cooperative federalism.

159. In its decision in *Orphan Wells Association v Grant Thornton Ltd*., the Supreme Court relied on the principle of cooperative federalism to find that under section 14.06(4) of the BIA, a trustee or receiver was required to perform abandonment and reclamation obligations of the debtor, prior to making any distributions to creditors, notwithstanding that the trustee or receiver had disclaimed the mineral leases which gave the debtor an interest in the property to be abandoned and reclaimed. The Supreme Court based that interpretation, in part, on the principle of cooperative federalism. That principle favours

harmonious interpretations of federal and provincial laws to allow the interplay and overlap between those laws.

Orphan Well Association v Grant Thornton Ltd, 2019 SCC 5, at paras 66, 105, 111 **[Tab 4]**
05.22a-2438

160. In that proceeding, the debtor corporation was being liquidated in a bankruptcy and receivership and therefore the BIA's financial rehabilitation purpose was not relevant.

Orphan Well Association v Grant Thornton Ltd, *supra* at para 67 **[Tab 4]**
05.22a-2438

161. As such, while the decision gave reclamation obligations a type of enhanced priority over all other creditors in a liquidation, it gave regulators no roadmap as to how environmental and other regulatory obligations would be treated in a restructuring.

162. Section 11.1(3) of the CCAA recognizes that Courts may have to balance the public interest underlying regulatory regimes against the public interest in restructuring debtor companies, and that true regulatory obligations, rather than just monetary claims, may be stayed pursuant to section 11.1(3). That section, however, directs the Court to proceed cautiously, only ordering such a stay where a viable compromise or arrangement could not otherwise be made and where such order was not contrary to the public interest.

163. Section 11.1 contemplates the interplay between the federal restructuring regime and regulatory regimes that is an important aspect of the principle of cooperative federalism. In *Marcoux c St-Charles-de-Bellechasse (Municipalité de)*, the Superior Court of Quebec noted that when faced with complex issues, the two orders of government should be able to take a cooperative and coordinated approach to properly discharge their responsibilities in the public interest. In the federal context, "cooperative federalism" means that the integration of federal and provincial legislative schemes must be encouraged, while respecting the constitutional powers of each level of government, to respond to important public interest concerns, particularly in environmental matters.

Marcoux c St-Charles-de-Bellechasse (Municipalité de), 2015 QCCS 4353 **[Tab 24]**, citing *Reference re Securities Act*, 2011 SCC 66 at para 9 and *Quebec (Attorney General) v*
05.22a-2602

Canada (Attorney General), 2015 SCC 14 at para 17

164. While section 11.1 and the decision in *Orphan Well Association v Grant Thornton Ltd.*, invite an interplay between the provincial EPEA and PLA and the federal restructuring regime under the CCAA, that invitation does not appear to have been accepted. Neither the EPEA nor the PLA provide the AEP with any regulatory mechanisms for dealing with or reacting to proceedings under the CCAA, or to what extent it can or should compromise or suspend regulatory powers and entitlements to permit a compromise or arrangement to proceed. It has no criteria for judging whether a compromise or arrangement will benefit the environment or will provide sufficient benefits to stakeholders and the Alberta public that some standards under the regulatory regime can be relaxed or waived.

165. While the absence of such criteria may or may not be appropriate outside the context of CCAA proceedings, the Transaction Parties respectfully submit that such absence hampers the AEP in responding to CCAA proceedings in a reasonable, timely and appropriate manner, serves neither the stakeholders that the CCAA was enacted to protect nor the Alberta public and environment that the EPEA and PLA were enacted to protect, and puts at real risk important goals, such as preserving employment and economic activity and protecting the environment.

166. While the Transaction Parties submit that this dynamic may explain the delays and indecision experienced with the AEP, it also supports the relief sought under section 11.1. The rehabilitative purpose of the CCAA and the environmental protection purpose of the EPEA cannot otherwise be advanced.

D. SECURITY FOR ACCESS TO INACTIVE PRIVATE PITS

167. As set out above, the Amended RVO contemplates that all of the Inactive Royalty Agreements will be vested in ResidualCo. The reason for this is that there are significant arrears some under those Inactive Royalty Agreements, the Inactive Royalty Agreements do not appear to have any positive economic value, and therefore the Inactive Royalty Agreements cannot continue to be held by JMB. However, in order to perform the Reclamation Obligations in respect of the Inactive Royalty Lands, JMB requires continued access to those lands. Because ResidualCo will be rendered immediately insolvent by the

completion of the Amended Transaction, JMB requires a prior ranking charge to secure that access (the "**Access Charge**") and ensure it survives any bankruptcy or other insolvency proceeding in respect of ResidualCo.

168. The Transaction Parties respectfully submit that the access charge can be supported by section 11.4 of the CCAA, which permits the creation of a charge in favour of a "critical supplier", which is a supplier of goods or services to the company critical to the company's continued operations. In this case, if ResidualCo holds the Inactive Royalty Agreements, JMB's access to the Inactive Pits subject thereto to perform Reclamation Obligations is a critical supply that can be secured by a charge created under that section.

CCAA, *supra*, s 11.4 **[Tab 3]**
05.22a-2420

169. The Ontario Superior Court has cited with approval the following as the rationale for the enactment of section 11.4:

> Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

Re iMarketing Solutions Group, 2013 ONSC 2223 at para 27 **[Tab 25]**
05.22a-2606

170. The Access Charge does not impose financial obligations on ResidualCo but does permit the performance of the Reclamation Obligations, which the Transaction Parties submit is critical to the success of the Amended Transaction and is a critical obligation of ResidualCo as the successor to the Inactive Royalty Agreement. Without the Access Charge, the performance of the Reclamation Obligations may be difficult or impossible.

171. Because the Access Charge does not impose financial obligations on ResidualCo, the claims of other Excluded Creditors (as defined in the Amended RVO) are not affected, but the interests of JMB, the AEP, the owners of the lands subject to the Inactive Royalty Agreement and the Alberta public are protected. The scope of the Access Charge is

appropriate in the circumstances and reasonably balances the respective rights of the stakeholders.

172. Although there is no authority directly on point, the Transaction Parties respectfully submit that this Honourable Court has statutory authority in section 11.4 to exercise its discretion to grant the Access Charge.

> The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights-based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations in the context of a dynamic, forward moving process that is seeking an outcome to the debtor's financial distress. [emphasis added]

Madam Justice G.R. Jackson and Dr. J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2007) 3 Annual Review of Insolvency Law (Westlaw) at page 9 **[Tab 26]**

05.22a-2609

173. Section 11 of the CCAA also confers this Honourable Court with a general discretion to provide this relief, balancing the interests of the affected stakeholders, considering the relative prejudice and assessing the reasonableness of a particular process, decision or remedy.

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. [emphasis added.]

Re Stelco Inc, (2005), 196 OAC 142 at para 36
[Tab 27]
05.22a-2612
CCAA, *supra*, s 11 **[Tab 3]**
05.22a-2420

174. Although JMB respectfully submits that section 11.4 provides sufficient basis for the Access Charge, section 11 also provides permits this Honourable Court to grant the Access Charge. The Access Charge appropriately balances the interests of the many stakeholders of JMB, including the AEP, the landowners and the public at large, does not prejudice any of those stakeholders in any way, and is a reasonable way to ensure that JMB has continued access to the JMB Inactive Royalty Lands to perform and complete the Reclamation Obligations.

175. With respect to the priority sought for the Access Charge, section 11.3(4) provides that the Court may order that a critical supplier's charge ranks in priority to any other claim. In this case, the Access Charge would only secure access, and therefore Excluded Creditors of ResidualCo do not bear the burden of the Reclamation Obligations. Priority is required to preserve the Access Charge a bankruptcy, but does not prejudice any other stakeholders.

176. Accordingly, JMB respectfully submits that the Access Charge should be granted.

177. In the event that a landowner does not give access to Inactive Private Lands after JMB has attempted to get access and the AEP is unable or unwilling to help secure access, the Amended RVO permits JMB to direct counsel to pay to the AEP that portion of the Trust Fund related to such Inactive Private Lands, which is to be held by the AEP as Reclamation Security. Thereafter, JMB will have no further Reclamation Obligations in respect of such Inactive Private Lands. In such a case, there is nothing more that can be accomplished by JMB to discharge the Reclamation Obligations for those Inactive Private Lands. JMB cannot make the landowner accept the reclamation work to be done by JMB. However, should this occur, the Reclamation Security provided under the Protocol should adequately address this risk.

E. CONCLUSION

178. The Transaction Parties have acted as diligently and expeditiously as the difficult circumstances of these CCAA Proceedings have allowed and have worked towards a proposed transaction that preserves as much value as possible for the stakeholders while specific concerns of stakeholders such as the AEP have been addressed to the extent possible. In response to the concerns raised by the AEP, the Transaction Parties, Fiera and ATB went back to the drawing board to devise a transaction that would address those concerns while ensuring that other stakeholders, and specifically the unsecured creditors of the CCAA Applicants, would not be affected by the changes to the Plan.

179. To the extent that there is any opposition to the relief being sought, the Transaction Parties submit that such opposition must be viewed against the same three baseline considerations. If such opposition is not appropriate in light of the policy objectives of the CCAA, or does not demonstrate that the stakeholder opposing the relief is acting in good faith or has not acted with due diligence with respect to the CCAA proceedings, the Transaction Parties submit that such opposition must fail.

180. Having demonstrated that the three baseline considerations have been met, the Transaction Parties respectfully request that this Honourable Court exercise its jurisdiction to grant the relief sought pursuant to section 11.1 of the CCAA.

All of which is respectfully submitted this 23rd day of March, 2021.

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05.22a-2194

IV. TABLE OF AUTHORITIES

1. *Public Lands Act*, RSA 2000, c P-4, ss 1, 15, 15.1, 26, 43, 113, 114
2. *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, ss 65, 70
3. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, ss 2, 11, 11.02, 11.1, 11.4, 18.6, 19(1), 23(2), 26, 36(4)
4. *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5
5. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60
6. *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10
7. *Alberta (Attorney General) v Moloney*, 2015 SCC 51
8. *407 ETR Concession Co. v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52
9. *Ontario (Minister of Finance) v Clarke*, 2013 ONSC 1920
10. *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67
11. *Re Target Canada Co.*, 2016 ONSC 3651
12. *Re Doman Industries Ltd.*, 2003 BCSC 376
13. *Re AT&T Canada Inc.* (25 February 2003), Toronto, Ont CA 02-CL-4715, 03-CL-4874 (order)
14. *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488
15. *Re Canadian Airlines Corp.*, 2000 ABQB 442
16. *Bhasin v Hrynew*, 2014 SCC 71
17. *Roncarelli v Duplessis*, [1959] SCR 121
18. *Alberta Health Services v Wang*, 2018 ABCA 339
19. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817
20. *Smith v Vanier (Municipality)* (1972), 30 DLR (3d) 386 (Ont HC)
21. *Congrégations des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, [2004] 2 SCR 650

05.22a-2195

22. Julien Morissette et al, *Being a Good Sport: A Comparative Analysis of Good Faith as a Statutory Obligation in Insolvency Proceedings*, (2020), online: ARIL Society Inc. <https://canlii.ca/t/t1wt>

23. Ari Y Sorek & Charlotte Dion, *Good Faith in Insolvency and Restructuring: At The Intersection of Civilian and Common Law Paradigms, at a Fork in the Road or in a Merging Lane?* (2020), online: ARIL Society Inc. <https://canlii.ca/t/t1wm>

24. *Marcoux c St-Charles-de-Bellechasse (Municipalité de)*, 2015 QCCS 4353

25. *Re iMarketing Solutions Group*, 2013 ONSC 2223

26. Madam Justice G.R. Jackson and Dr. J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" (2007) 3 Annual Review of Insolvency Law (Westlaw)

27. *Re Stelco Inc*. (2005), 196 OAC 142

05.22a-2196

TAB 1

Alberta Statutes
Public Lands Act

R.S.A. 2000, c. P-40, s. 1

s 1. Definitions

Currency

1.Definitions
In this Act,

(a) **"adjoining land"** means

(i) parcels of land that adjoin or corner,

(ii) parcels of land separated by a road allowance or a surveyed highway or road that would adjoin or corner if they were not so separated, or

(iii) parcels of land on either side of a correction line that are declared by the director to be adjoining land for the purposes of this Act;

(a.1) **"agricultural disposition"** means an agricultural disposition within the meaning of the regulations;

(b) **"Assistant Deputy Minister"** means the Assistant Deputy Minister designated by the Minister;

(c) **"certificate of title"** means a certificate of title granted pursuant to the *Land Titles Act* in respect of an estate in fee simple;

(c.1) **"conservation"** means the planning, management and implementation of an activity with the objective of protecting the essential physical, chemical and biological characteristics of the environment against degradation;

(c.2) **"conveyance"** includes a motor vehicle, off-highway vehicle, trailer, watercraft, aircraft, bicycle, animal and tack when used as a conveyance, and any other means of conveyance pulled by animals or people, but does not include any conveyance used as a private dwelling;

(c.3) **"corporation"** means an incorporated body, with or without share capital and wherever and however incorporated or otherwise established, and includes

(i) a limited liability partnership, and

(ii) any other person or body or class of person or body designated as a corporation in the regulations;

(d) **"Department"** means the Department administered by the Minister;

(d.1) **"director"** means, except in references to a director of a corporation in sections 37, 59.91, 59.92 and 114.1(2), a person designated as a director under section 5;

(e) **"disposition"** means any instrument executed pursuant to this Act, the former Act, *The Provincial Lands Act*, R.S.A. 1942, c. 62, or the *Dominion Lands Act* (Canada), R.S.C. 1927, c. 113, whereby

(i) any estate or interest in land of the Crown, or

(ii) any other right or privilege in respect of land of the Crown that is not an estate or interest in land,

is or has been granted or conveyed by the Crown to any person, but does not include a grant;

(f) **"farm"** means an area of land on which commercial farming or ranching operations are conducted;

(g) **"former Act"** means *The Public Lands Act*, S.A. 1949, c. 81 and R.S.A. 1955, c. 259;

(h) **"grant"** means letters patent under the Great Seal of Canada or a notification issued pursuant to *The Provincial Lands Act*, R.S.A. 1942, c. 62, the former Act or this Act;

(i) **"holder"** means the holder of a disposition according to the records of the Department;

(j) [Repealed 2009, c. A-26.8, s. 91(2)(e).]

(k) **"land"** does not include mines and minerals;

(l) **"livestock"** means horses, sheep, cattle and, to the extent permitted by the regulations, bison;

(l.1) **"loss or damage"**, concerning public land under the administration of the Minister, includes

(i) with respect to employees, agents and contractors of the Crown in the exercise of their service to the Crown,

(A) personal injury to any of them, and

(B) loss of life of any of them,

(ii) with respect to any real property, personal property and resources of the Crown, whether or not a disposition has been issued for them,

(A) loss of use or enjoyment of any property or resource,

(B) any unlawful conversion of any property or resource, and

(C) any unauthorized alteration of any property or resource,

and

(iii) any direct or indirect pecuniary loss of the Crown suffered in connection with matters listed in subclauses (i) and (ii), including costs;

(m) **"Minister"** means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(n) **"notification"** means a notification in the prescribed form;

(o) **"officer"** means, except in sections 37, 59.91, 59.92 and 114.1(2),

(i) an officer appointed under section 5;

(ii) the Assistant Deputy Minister;

(iii) a director;

(iv) a member of the Royal Canadian Mounted Police;

(v) a member of a police service other than the Royal Canadian Mounted Police whom the director authorizes in writing to act in respect of one or more purposes under this Act or the regulations;

(vi) a conservation officer appointed under section 1 of Schedule 3.1 of the *Government Organization Act*;

(vii) a forest officer under the *Forests Act*;

(viii) a wildlife officer under the *Wildlife Act*;

(ix) a peace officer under the *Peace Officer Act* authorized by the peace officer's appointment under that Act to enforce all or part of this Act and the regulations;

(o.1) **"person responsible"**, when referring to an activity or use on public land, means

(i) the holder of a disposition issued for the public land,

(ii) the holder of an authorization issued under section 20,

(iii) any person who has, or had, charge, management or control of the activity or use,

(iv) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i), (ii) or (iii), or

(v) a principal or agent of a person referred to in subclause (i), (ii), (iii) or (iv) concerning the activity or use;

(p) **"public land"** means land of the Crown in right of Alberta;

(q) **"Registrar"** means the Registrar within the meaning of the *Land Titles Act*;

(r) **"rent"** includes royalties, dues, fees, rates, charges or other money payable by any person to the Crown in right of Alberta under and by virtue of any disposition, but does not include money payable as the whole or part of a purchase price;

(r.1) **"resource"** includes any naturally occurring or man-made thing on or concerning land;

(s) **"township"**, **"section"**, **"half section"**, **"quarter section"**, and **"legal subdivision"** mean

(i) a township, section, half section, quarter section or legal subdivision, respectively, within the meaning of the *Surveys Act*, or

(ii) with reference to unsurveyed territory, what would be a township, section, half section, quarter section or legal subdivision, respectively, if the land were surveyed in accordance with the *Surveys Act*;

(t) **"Transfer Agreement"** means the agreement in the Schedule to *The Alberta Natural Resources Act*, S.A. 1930, c. 21, and all amendments to that agreement;

(u) **"veteran"** means a person certified under the *Veterans' Land Act* (Canada) as a veteran.

Amendment History
2003, c. 11, s. 3(2); 2003, c. 46, s. 2; 2006, c. 21, s. 26(6); 2009, c. A-26.8, s. 91(2)

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

Alberta Statutes
Public Lands Act
Part 1 — Administration of Public Land (ss. 5-71)
Powers of Officials [Heading amended 2009, c. A-26.8, s. 91(8).]

R.S.A. 2000, c. P-40, s. 15

s 15. Terms and conditions of disposition

Currency

15.Terms and conditions of disposition

15(1) Subject to the regulations, the director may make and renew a disposition for any term the director considers appropriate.

15(2) The director may, in a disposition or renewal, prescribe terms and conditions to which the disposition is subject.

15(3) The director may amend any disposition at any time if

(a) in the director's opinion, an amendment is necessary in order for the disposition to comply with any applicable ALSA regional plan,

(b) the director believes the amendment is necessary to prevent the continuation or occurrence of loss or damage not foreseen at the time of issuance of the disposition,

(c) the amendment provides a monitoring or reporting requirement with respect to an activity on, or use of, the public land under disposition,

(d) the amendment is consequential to an enforcement order or stop order issued under this Act or the regulations, whether the amendment is permanent or temporary in nature, or

(e) the amendment is a condition of the director's or any other director's consent to a mortgage, assignment, transfer or sublet of all or part of the public land under the disposition.

15(4) If, in the opinion of the director, there is a conflict between the holder of a disposition and one or more other holders of a disposition concerning the whole or a part of the same parcel of land or adjoining land, the director may amend one or more of the relevant dispositions at any time if, in the opinion of the director, the amendment is necessary to resolve the conflict.

Amendment History
2003, c. 11, s. 3(9); 2009, c. A-26.8, s. 91(11), (51)

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

Alberta Statutes
Public Lands Act
Part 1 — Administration of Public Land (ss. 5-71)
Powers of Officials [Heading amended 2009, c. A-26.8, s. 91(8).]

R.S.A. 2000, c. P-40, s. 15.1

s 15.1 Refusal for non-compliance

Currency

15.1Refusal for non-compliance
The director may refuse to issue, mortgage, assign, transfer, sublet or renew a disposition if the applicant

(a) is indebted to the Crown, or

(b) is otherwise in non-compliance with this Act or the regulations.

Amendment History
2009, c. A-26.8, s. 91(12)

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

Alberta Statutes
Public Lands Act
Part 1 — Administration of Public Land (ss. 5-71)
Powers of Officials [Heading amended 2009, c. A-26.8, s. 91(8).]

R.S.A. 2000, c. P-40, s. 26

s 26. Cancellation, suspension or amendment of disposition

Currency

26.Cancellation, suspension or amendment of disposition
26(1) The director may cancel, suspend or amend a disposition when

(a) the holder of the disposition fails to comply with the disposition, this Act or the regulations, or fails to comply with a notice given under this Act or the regulations,

(b) in the case of a holder that is a corporation, the holder ceases to be incorporated or registered under the appropriate enactment regulating the carrying on of business by the corporation in Alberta,

(c) the holder acquired the disposition in error or through fraud, misrepresentation, personation or improvidence,

(d) the holder of the disposition is convicted of an offence under an ALSA regional plan, this Act or the regulations that relates to the use of the land contained in the holder's disposition, or

(e) the holder of the disposition is indebted to the Crown.

26(1.1) [Repealed 2009, c. A-26.8, s. 91(18).]

26(2) Where the director is authorized to cancel a disposition under subsection (1)(a) or (d), the director may instead withdraw part of the land from the disposition, and in that case section 27(1), (2) and (3) apply in respect of the proposed withdrawal.

26(3) The director may cancel a disposition if the director is requested in writing by the holder to do so.

26(4) The director may cancel a disposition containing a clerical error, misnomer or wrong or defective description of land and issue a correct disposition in its place.

Amendment History
2003, c. 11, s. 3(13); 2009, c. A-26.8, s. 91(18)

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

Alberta Statutes
Public Lands Act
Part 1 — Administration of Public Land (ss. 5-71)
Dispositions

R.S.A. 2000, c. P-40, s. 43

s 43. Consent to assignment, etc.

Currency

43.Consent to assignment, etc.
43(1) The holder shall not mortgage, assign, transfer or sublet the land contained in the holder's disposition, or any part of it, without the written consent of the director.

43(2) The Minister may make regulations

(a) classifying dispositions for the purposes of this section and the regulations;

(b) respecting the terms and conditions on which consent may be given for dispositions to be mortgaged, assigned, transferred or sublet;

(c) respecting rules and procedures for obtaining consent to a mortgage, assignment, transfer or sublet of dispositions for the purposes of this section;

(d) respecting any other procedural and substantive matters necessary for carrying out the Minister's or director's powers under this section.

Amendment History
2009, c. A-26.8, s. 91(25)

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

05.22a-2204

Alberta Statutes
Public Lands Act
Part 5 — Registration of Assignments (ss. 113-117)

R.S.A. 2000, c. P-40, s. 113

s 113. Definitions

Currency

113.Definitions
In this Part,

(a) **"assignment"** includes transfer;

(b) **"disposition"** includes any lease, permit or licence, or any instrument granting an estate or interest in public land and made pursuant to the *Forests Act* or its predecessors;

(c) **"registration"** or **"register"** means

(i) the entering in a book authorized by the Minister for that purpose of an assignment, and

(ii) the endorsing on or attaching to the disposition affected of a memorandum evidencing an entry under subclause (i).

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

05.22a-2205

Alberta Statutes
Public Lands Act
Part 5 — Registration of Assignments (ss. 113-117)

R.S.A. 2000, c. P-40, s. 114

s 114. Registration of assignment

Currency

114.Registration of assignment

114(1) An assignment of a disposition that the holder is not prohibited from assigning by any Act or regulation or by the disposition itself may be registered by the director.

114(2) The Minister shall cause to be kept in the Department books for the registration of assignments.

114(3) The director may refuse to register an assignment unless

(a) the assignment, other than an assignment of a mineral surface lease, is unconditional,

(b) all of the persons to whom the disposition was made are the assignors under the assignment,

(c) the assignment is executed in a manner satisfactory to the director and accompanied with proof of execution satisfactory to the director,

(d) the assignment is in a form satisfactory to the director, and

(e) all required charges and fees are paid.

114(4) When an assignment is executed by an attorney or agent, proof of the authority of the attorney or agent, in a form satisfactory to the director, shall be submitted to the Department.

Amendment History

2003, c. 11, s. 3(27); 2009, c. A-26.8, s. 91(51)

Currency

Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

TAB 2

Alberta Statutes
Environmental Protection and Enhancement Act
Part 2 — Environmental Assessment Process, Approvals and Registrations (ss. 39-86)
Division 2 — Approvals, Registrations and Certificates

R.S.A. 2000, c. E-12, s. 65

s 65. Refusal for unpaid debts

Currency

65.Refusal for unpaid debts
The Director may refuse to issue an approval or registration where the applicant is indebted to the Government.

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

Alberta Statutes
Environmental Protection and Enhancement Act
Part 2 — Environmental Assessment Process, Approvals and Registrations (ss. 39-86)
Division 2 — Approvals, Registrations and Certificates

R.S.A. 2000, c. E-12, s. 70

s 70. Amendment, suspension and cancellation of approval or registration

Currency

70.Amendment, suspension and cancellation of approval or registration
70(1) On application by an approval or registration holder, the Director may, in accordance with the regulations,

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an approval, or

(b) cancel an approval or registration,

if the Director considers it appropriate to do so.

70(2) An application under subsection (1) must be made in the manner provided for in the regulations.

70(3) If the Director considers it appropriate to do so, the Director may on the Director's own initiative in accordance with the regulations

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an approval

(i) if in the Director's opinion an adverse effect that was not reasonably foreseeable at the time the approval was issued has occurred, is occurring or may occur,

(ii) if the term or condition relates to a monitoring or reporting requirement,

(iii) where the purpose of the amendment, addition or deletion is to address matters related to a temporary suspension of the activity by the approval holder, or

(iv) where the approval is transferred, sold, leased, assigned or otherwise disposed of under section 75,

(b) cancel or suspend an approval or registration, or

(c) correct a clerical error in an approval or registration.

70(4) Without limitation to subsection (3)(b), the Director may cancel or suspend an approval or registration if the approval or registration holder is indebted to the Crown.

Amendment History
2002, c. 4, s. 1(2)

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to March 19, 2020

Last amended on November 1, 2019

À jour au 19 mars 2020

Dernière modification le 1 novembre 2019

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

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

05.22a-2211

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

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

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

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Short Title

Titre abrégé

Short title

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

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

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies.*

S.R., ch. C-25, art. 1.

Interpretation

Définitions et application

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*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

05.22a-2212

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account; (*garantie financière*)

income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations. (*secured creditor*)

demande initiale La demande faite pour la première fois en application de la présente loi relativement à une compagnie. (*initial application*)

état de l'évolution de l'encaisse Relativement à une compagnie, l'état visé à l'alinéa 10(2)a) portant, projections à l'appui, sur l'évolution de l'encaisse de celle-ci. (*cash-flow statement*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par règlement à la date à laquelle des procédures sont intentées sous le régime de la présente loi, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;

c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

intérêt relatif à des capitaux propres

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; (*contrôleur*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

prescribed means prescribed by regulation; (*Version anglaise seulement*)

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garanti*)

shareholder includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

Superintendent of Bankruptcy means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; (*surintendant des faillites*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

title transfer credit support agreement means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

unsecured creditor means any creditor of a company who is not a secured creditor, whether resident or

a) S'agissant d'une compagnie autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

obligation Sont assimilés aux obligations les débentures, stock-obligations et autres titres de créance. (*bond*)

réclamation S'entend de toute dette, de tout engagement ou de toute obligation de quelque nature que ce soit, qui constituerait une réclamation prouvable au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*. (*claim*)

réclamation relative à des capitaux propres Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

surintendant des faillites Le surintendant des faillites nommé au titre du paragraphe 5(1) de la *Loi sur la faillite et l'insolvabilité*. (*Superintendent of Bankruptcy*)

surintendant des institutions financières Le surintendant des institutions financières nommé en application du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

tribunal

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

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

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

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

General power of court

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

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

Pouvoir général du tribunal

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

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

Relief reasonably necessary

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

2019, c. 29, s. 136.

Redressements normalement nécessaires

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

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

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

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

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

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

Suspension : demande initiale

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

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

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

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

Stays, etc. — other than initial application

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

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

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

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

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

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

2005, c. 47, s. 128; 2009, c. 33, s. 28.

renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Meaning of *regulatory body*

11.1 (1) In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Définition de *organisme administratif*

11.1 (1) Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un

05.22a-2218

before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

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.

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.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the

organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

11.31 [Abrogé, 2005, ch. 47, art. 128]

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

05.22a-2221

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. 131; 2019, 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

18.2 [Abrogé, 2005, ch. 47, art. 131]

18.3 [Abrogé, 2005, ch. 47, art. 131]

18.4 [Abrogé, 2005, ch. 47, art. 131]

18.5 [Abrogé, 2005, ch. 47, art. 131]

PARTIE III

Dispositions générales

Obligation d'agir de bonne foi

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

1997, ch. 12, art. 125; 2005, ch. 47, art. 131; 2019, ch. 29, art. 140.

Réclamations

Réclamations considérées dans le cadre des transactions ou arrangements

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir

05.22a-2222

before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

R.S., 1985, c. C-36, s. 19; 1996, c. 6, s. 167; 2005, c. 47, s. 131; 2007, c. 36, s. 69.

assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

Exception

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

a) toute ordonnance d'un tribunal imposant une amende, une pénalité, la restitution ou une autre peine semblable;

b) toute indemnité accordée en justice dans une affaire civile :

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant d'un acte visé au sous-alinéa (i);

c) toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors que la compagnie agissait, au Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

e) toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas a) à d).

L.R. (1985), ch. C-36, art. 19; 1996, ch. 6, art. 167; 2005, ch. 47, art. 131; 2007, ch. 36, art. 69.

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

Détermination du montant de la réclamation

20 (1) Pour l'application de la présente loi, le montant de la réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est celui :

(i) dans le cas d'une compagnie en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, dont la preuve a été établie en conformité avec cette loi,

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

f) de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

f.1) afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

g) d'assister aux audiences du tribunal tenues dans le cadre de toute procédure intentée sous le régime de la présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

h) dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie soit intentée sous le régime de la *Loi sur la faillite et l'insolvabilité*, d'en aviser le tribunal;

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

k) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)b) à d.1), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

Right of access

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

Droit d'accès aux biens

24 Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

Obligation to act honestly and in good faith

25 In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

2005, c. 47, s. 131.

Powers, Duties and Functions of Superintendent of Bankruptcy

Public records

26 (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

Other records

(2) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, any other records relating to the administration of this Act that he or she considers appropriate.

Agreement to provide compilation

(3) The Superintendent of Bankruptcy may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

2005, c. 47, s. 131; 2007, c. 36, s. 73.

Applications to court and right to intervene

27 The Superintendent of Bankruptcy may apply to the court to review the appointment or conduct of a monitor and may intervene, as though he or she were a party, in any matter or proceeding in court relating to the appointment or conduct of a monitor.

2005, c. 47, s. 131.

Complaints

28 The Superintendent of Bankruptcy must receive and keep a record of all complaints regarding the conduct of monitors.

2005, c. 47, s. 131.

Investigations

29 (1) The Superintendent of Bankruptcy may make, or cause to be made, any inquiry or investigation regarding

Diligence

25 Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

Attributions du surintendant des faillites

Registres publics

26 (1) Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, un registre public contenant des renseignements réglementaires sur les procédures intentées sous le régime de la présente loi. Il fournit ou voit à ce qu'il soit fourni à quiconque le demande tous renseignements figurant au registre, sur paiement des droits réglementaires.

Autres dossiers

(2) Il conserve également, ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, les autres dossiers qu'il estime indiqués concernant l'application de la présente loi.

Accord visant la fourniture d'une compilation

(3) Enfin, il peut conclure un accord visant la fourniture d'une compilation de tout ou partie des renseignements figurant au registre public.

2005, ch. 47, art. 131; 2007, ch. 36, art. 73.

Demande au tribunal et intervention

27 Le surintendant des faillites peut demander au tribunal d'examiner la nomination ou la conduite de tout contrôleur et intervenir dans toute affaire ou procédure devant le tribunal se rapportant à ces nomination ou conduite comme s'il y était partie.

2005, ch. 47, art. 131.

Plaintes

28 Le surintendant des faillites reçoit et note toutes les plaintes sur la conduite de tout contrôleur.

2005, ch. 47, art. 131.

Investigations et enquêtes

29 (1) Le surintendant des faillites effectue ou fait effectuer au sujet de la conduite de tout contrôleur les investigations ou les enquêtes qu'il estime indiquées.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Additional factors — related persons

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

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

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

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Related persons

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

(a) a director or officer of the company;

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

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

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction — employers

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

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie

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TAB 4

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

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

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

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

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

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

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Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
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Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.7 Unsecured claims
X.7.b Priority with respect to secured creditors

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

Headnote

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

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

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

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

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

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells

Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

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

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

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

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

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

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article

14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

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

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

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

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

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

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

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

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

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

all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

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

Held: The appeal was allowed.

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

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

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers

as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

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

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

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

Arrêt: Le pourvoi a été accueilli.

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

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

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

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une

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

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Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

III. Analysis

A. The Doctrine of Paramountcy

63 As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

64 The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 3).

65 Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) , at para. 66).

66 Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

67 The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, *Lemare*, at para. 45.

68 GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

69 The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

70 The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

71 I will consider each alleged conflict in turn.

B. Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?

72 As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

73 At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the *BIA*, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline Act*, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the *BIA* based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose

solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme. In my view, this is not a reason to ignore the plain meaning of s. 14.06(4). No principle of statutory interpretation requires that the plain meaning of a provision be contorted to make its scheme more coherent. This Court has been tasked with interpreting s. 14.06(4), and, in my view, the wording of s. 14.06(4) admits of only one interpretation.

(2) There Is No Operational Conflict or Frustration of Purpose Between Section 14.06(2) and Section 14.06(4) of the BIA and the Alberta Regulatory Scheme

102 The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets. Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

103 Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline Act*, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

104 There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline Act*. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

105 I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act* should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism. The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

106 Importantly, the situation in this case is completely different from the one before the Court in *Moloney* . In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in *Moloney* , at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

107 According to the evidence in this case, the *OGCA* and the *Pipeline Act* have included trustees in the definition of "licensee" for 20 years now, and, in that time, the Regulator has never attempted to hold a trustee personally liable. The Regulator does not look beyond the assets remaining in the bankrupt estate in seeking compliance with the bankrupt's environmental obligations. If the Regulator were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict. As it stands, however, GTL can both be protected from personal liability by s. 14.06(2) and comply with the Alberta regime in administering the Redwater estate as a "licensee".

108 The suggestion, in the dissenting reasons, that the Regulator is seeking to hold GTL personally liable is untrue. No one disputes that significant value remains in the Redwater estate. Although the Regulator's entitlement is, of course, dependent on the priorities established by the *BIA*, the history of this regulatory system demonstrates that there are ways for the Regulator to access that value without holding GTL personally liable. It is not this Court's role to mandate a particular mechanism for the Regulator to achieve that end. Even if this was not the case, the fact that Redwater's assets have already been sold and are currently being held in trust means that personal liability is no longer a concern. There is no operational conflict.

109 I turn now to frustration of purpose. The chambers judge identified a number of purposes of s. 14.06 in his reasons. GTL relies on three of them, namely: "limit[ing] the liability of insolvency professionals, so that they will accept mandates despite environmental issues"; "reduc[ing] the number of abandoned sites in the country"; and "permit[ing] receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, and giv[ing] receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions" (chambers judge's reasons, at paras. 128-29).

110 The burden is on GTL to establish the specific purposes of s. 14.06(2) and s. 14.06(4) if it wishes to demonstrate a conflict. This has been described as a "high" burden, requiring "[c]lear proof of purpose" (*Lemare*, at para. 26). In my view, based on the plain wording of s. 14.06(2) and s. 14.06(4) (a "trustee is not personally liable") and the Hansard evidence, it is evident that the purpose of these provisions is to protect trustees from personal liability in respect of environmental matters affecting the estates they are administering.

111 This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the *BIA*.

112 In arguing that s. 14.06 has the broader goals of reducing the number of abandoned sites (in the non-technical sense of "abandoned") and encouraging trustees to accept mandates, GTL relies on what it calls "the available extrinsic evidence and the actual words and structure of that section" (GTL's factum, at para. 91). In my view, the arguments it advances are insufficient for GTL to meet its high burden and demonstrate that the purpose of s. 14.06(2) and s. 14.06(4) should be defined as including these broader objectives. Reducing the number of unaddressed sites and encouraging trustees to accept mandates may be positive side effects of s. 14.06(2) and s. 14.06(4), but it is a stretch to see them as the purpose of the provisions. Like the provision at issue in *Lemare*, it is more plausible that they serve a "simple and narrow purpose" (para. 45).

113 Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least *Northern Badger* that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency

"creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met... but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

125 Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.) , at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.) , at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) , at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24 (S.C.C.) , at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

126 First, in a letter to GTL dated May 14, 2015, the Regulator advanced the position that it was "not a creditor of [Redwater]", but, rather, had a "statutory mandate to regulate the oil and gas industry in Alberta" (GTL's Record, vol. 1, at p. 78). I note that this was the initial communication between the Regulator and GTL, only two days after the latter's appointment as receiver of Redwater's property. Second, the issue of whether the Regulator is a creditor was discussed in the parties' factums. Third, during oral arguments before this Court, the Regulator was questioned about its concession. Counsel made the undisputed point that higher courts are not bound by such concessions and took the position that, on the correct interpretation of *Abitibi*, the Regulator was not a creditor. Fourth, when the Regulator's status as a creditor was raised as an issue before this Court, opposing counsel did not argue that they would have adduced further evidence on the issue had it been raised in the courts below. Finally, a proper understanding of the "creditor" step of the *Abitibi* test is of fundamental importance to the proper functioning of the national bankruptcy scheme and of provincial environmental schemes throughout Canada. I conclude that this case is one in which it is appropriate to disregard the Regulator's concession in the courts below.

127 Returning to the analysis, I note that the unique factual matrix of*Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently, AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("EPA"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

128 In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in*Abitibi*. The distinction between the facts of this appeal and those of*Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in *Abitibi*. The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

> ... the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.
>
> From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.
>
> (*AbitibiBowater inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.))

129 This Court recognized in *Abitibi* that the Province "easily satisfied" the creditor requirement (para 49). It was therefore not necessary to consider at any length how the "creditor" step should be understood or how it would apply in other factual situations. However, even at para. 27 of *Abitibi*, the paragraph relied on by the majority of the Court of Appeal, Deschamps J. made a point of noting that "[m]ost environmental regulatory bodies *can be* creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes" (emphasis added). The interpretation of the "creditor" step adopted by the majority of the Court of Appeal and urged upon this Court by GTL leaves no room for a regulator that enforces obligations not to be a creditor, though this possibility was clearly contemplated by para. 27 of*Abitibi*. As noted above, GTL's interpretation leaves the "creditor" step with no independent work to perform.

130 *Northern Badger* established that a regulator enforcing a public duty by way of non-monetary order is not a creditor. I reject the claim in the dissenting reasons that*Northern Badger* should be interpreted differently. First, I note that whether the Regulator has a contingent claim is relevant to the sufficient certainty test, which presupposes that the Regulator is a creditor. I cannot accept the proposition in the dissenting reasons that *Northern Badger* was concerned with what would become the third prong of the *Abitibi* test. In *Northern Badger*, Laycraft C.J.A. accepted that abandonment was a liability and identified the issue as "whether that liability is to the board so that it is the board which is the creditor" (para. 32). Second, the underlying scenario here with regards to Redwater's end-of-life obligations is exactly the same as in *Northern Badger* — a regulator is ordering an entity to comply with its legal obligations in furtherance of the public good. This reasoning from *Northern Badger* was subsequently adopted in cases such as *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221 (Alta. Q.B.), at paras. 23-25, and *Lamford Forest Products Ltd., Re* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.).

131 I cannot agree with the suggestion by the majority of the Court of Appeal in this case that *Northern Badger* "is of limited assistance" in the application of the *Abitibi* test (para. 63). Rather, I agree with Martin J.A. that *Abitibi* did not overturn the reasoning in *Northern Badger*, but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy" (para. 164). As Martin J.A. noted, even following *Abitibi*, the law continues to be that "public obligations are not provable claims that can be counted or compromised in the bankruptcy" (para. 174).*Abitibi* clarified the scope of *Northern Badger* by confirming that a regulator's environmental claims will be provable claims under certain circumstances. It does not stand for the proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

132 In *Abitibi*, Deschamps J. noted that insolvency legislation had evolved in the years since *Northern Badger*. That legislative evolution did not, however, change the meaning to be ascribed to the term "creditor". In this regard, I agree with the conclusion in *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536 (Alta. Q.B.), that the amendments to the *BIA* dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. As should be clear from the earlier discussion of s. 14.06, the amendments to the *BIA* do not speak to when a regulator enforcing an environmental claim is a creditor.

133 The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while*Abitibi* discussed*Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing

the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

134 For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life ... But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

135 Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in*Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

136 I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed*Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained,*Abitibi* clearly contemplates a place for regulators who are not creditors.

137 Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test.

(2) There Is No Sufficient Certainty That the Regulator Will Perform the Environmental Work and Advance a Claim for Reimbursement

138 The "sufficient certainty" test articulated in paras. 30 and 36 in*Abitibi* essentially does no more than reorganize and restate the requirements of the relevant provisions of the *BIA*. Section 121(2) provides that contingent claims may be provable claims. In other words, contingent debts or liabilities owed by a bankrupt to a creditor may be, but are not necessarily, provable claims. Section 135(1.1) provides for the valuation of such a claim. A contingent claim must be capable of valuation under s. 135(1.1) — it cannot be too remote or speculative — in order to be a provable claim under s. 121(2).

151 At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

152 The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

153 Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the *OGCA*, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

154 Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) The Conditions for the Transfer of Licenses

155 I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney* , at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were

received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot

This power was available to GTL in the circumstances of this case, and GTL validly disclaimed the non-productive assets. The result is that it is no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime does not recognize these disclaimers as lawful (by virtue of the fact that receivers and trustees are regulated as licensees, who cannot disclaim assets), there is an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

170 Second, the AER has required that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts, which contravenes the *BIA*'s priority scheme. Because the Abandonment Orders are "claims provable in bankruptcy" under the three-part test outlined by this Court in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) — from which this Court should not depart either explicitly or implicitly — the AER cannot assert those claims outside the bankruptcy process. To do so would frustrate an essential purpose of the *BIA*: distributing the estate's value in accordance with the statutory priority scheme. Nor can the AER achieve the same result indirectly by imposing conditions on the sale of Redwater's valuable assets. The province's licensing scheme effectively operates as a debt collection mechanism in relation to a bankrupt company: it prevents GTL from discharging its duties as trustee unless the AER's environmental claims are satisfied. As such, it should be held inoperative as applied to Redwater under the second prong of the paramountcy test, frustration of purpose.

II. Background

171 Redwater was a publicly traded oil and gas company that operated wells, pipelines and other facilities in central Alberta. In mid-2014, it suffered a number of financial setbacks following a series of acquisitions and unsuccessful drilling initiatives. As a result, it became unable to meet its obligations to its largest secured creditor, ATB Financial, which commenced enforcement proceedings.

172 GTL was appointed as Redwater's receiver on May 12, 2015. Upon its appointment, but before taking possession of any AER-licensed properties, GTL carried out an analysis of the economic viability and marketability of Redwater's assets. It determined that only a portion of the company's properties was actually saleable and that it would not be in Redwater's best interests — or in the interests of its creditors — for GTL, as receiver, to take possession of the non-producing properties. It therefore informed the AER on July 3, 2015, that it would take possession of only 20 of Redwater's 127 licensed wells and facilities. On November 2, 2015, shortly after its appointment as trustee, GTL again disclaimed the same non-producing properties it had previously renounced in its capacity as receiver.

173 According to GTL's assessment, Redwater's valuable assets were worth $4.152 million and would generate significant value for the estate's creditors if they were sold at auction. On the other hand, the net value of the non-producing properties was -$4.705 million, reflecting the extensive abandonment and reclamation liabilities owed to the AER. The net value of the estate as a whole was -$0.553 million. This was why, in GTL's business judgment, a sale of all the estate's assets together was simply not realistic.

174 The AER responded to GTL's first disclaimer notice by issuing the Abandonment Orders which required Redwater to carry out environmental work on the non-producing properties that GTL had disclaimed. But the AER's enforcement efforts were not limited to the debtor's estate itself. In its initial application that spurred this litigation, the AER filed suit against GTL seeking three principal remedies: (1) a declaration that GTL's disclaimers were void and unenforceable; (2) an order compelling GTL, in its capacity as receiver, to comply with the Abandonment Orders issued in relation to a portion of Redwater's assets; and (3) an order compelling GTL to fulfill its obligations as licensee under Alberta's legislation, specifically in relation to the abandonment, reclamation and remediation of Redwater's licensed properties.

175 The genesis of this litigation, then, was a clear and forceful effort by the AER to require GTL to satisfy Redwater's environmental obligations. To understand why the AER took that approach, it is important to note that it had provincial law on its side. Under the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*") and the *Pipeline Act*, R.S.A. 2000, c. P-15 ("*PLA*"), the term "licensee" is defined to include receivers and trustees in bankruptcy (*OGCA*, s. 1(1)(cc); *PLA*, s. 1(1)(n)). As a result, insolvency professionals become subject to the same regulatory obligations as the insolvent debtor itself by

effectively stepping into its shoes. They can therefore be compelled to carry out abandonment and reclamation work on the direction of the AER (*OGCA*, s. 27; *PLA*, s. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 ("*OGCA Rules*"), s. 3.012); to reimburse anyone else who does abandonment work (*OGCA*, ss. 29 and 30; *PLA*, s. 25); to pay the orphan fund levy for any of the debtor's assets (*OGCA*, s. 74); to provide a security deposit, under certain circumstances, at the AER's request (*OGCA Rules*, s. 1.100(2)); and to pay a fine for failing to comply with an order made by the AER (*OGCA*, ss. 108 and 110(1); *PLA*, ss. 52(2) and 54(1)). These liabilities are all personal in nature. Other comparable legislation expressly limits the liability of insolvency professionals. For example, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, states that the liability of a receiver or trustee under an environmental protection order "is limited to the value of the assets that the person is administering", absent "gross negligence or wilful misconduct" (s. 240(3)). Alberta's oil and gas statutory regime, however, does not include such a clause protecting receivers and trustees. And as the AER's initial application makes clear, the AER itself viewed these obligations as personal. This was why it sued GTL to compel it, among other things, to comply with its obligations as a licensee under provincial law.

176 The AER also exercised its enforcement power in another capacity. In addition to issuing the Abandonment Orders, the AER imposed restrictions and conditions on the sale of Redwater's assets — conditions that effectively required GTL to satisfy those same obligations before a sale could be approved. Thus, even if GTL defied the AER's request to abandon the non-producing properties, it would still be unable to discharge its duties as receiver and trustee.

177 Both the chambers judge and the majority of the Court of Appeal found in favour of GTL on each prong of the paramountcy test, concluding that there is an operational conflict and a frustration of purpose (2016 ABQB 278, 33 Alta. L.R. (6th) 221 (Alta. Q.B.); 2017 ABCA 124, 50 Alta. L.R. (6th) 1 (Alta. C.A.)). They agreed with GTL and ATB Financial that the provisions of Alberta's statutory regime permitting the AER to enforce compliance with Redwater's environmental abandonment and reclamation obligations were constitutionally inoperative during bankruptcy. The AER and the Orphan Well Association ("OWA") then appealed to this Court.

III. Analysis

178 The *Constitution Act, 1867*, grants the federal government exclusive jurisdiction to regulate matters relating to bankruptcy and insolvency (s. 91(21)). In the exercise of that jurisdiction, Parliament enacted the *BIA*, "a complete code governing bankruptcy" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 85). The *BIA* outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims that fall within the bankruptcy process (see *BIA*, ss. 16 to 38 and 121 to 154).

179 Although the operation of the *BIA* "depends upon the survival of various provincial rights" (*Moloney* , at para. 40), this is true only to the extent that "substantive provisions of any [provincial] law or statute relating to property ... are not in conflict with [the *BIA*]" (*BIA*, s. 72(1)). When a conflict arises, the *BIA* necessarily prevails (*Moloney* , at paras. 16 and 29; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.) , at para. 16). This reflects the constitutional principle that federal laws are paramount (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 32).

180 The respondents in this appeal — GTL and ATB Financial — posit two distinct conflicts between the federal and provincial legislation. First, they argue that the *BIA* grants receivers and trustees the power to disclaim any interest in any real property, even where they are not at risk of personal liability by virtue of their possession of the property. This disclaimer power enables trustees to renounce valueless and liability-laden property of a bankrupt in pursuit of their primary goal, which is to maximize global recovery for all creditors. The respondents argue that GTL validly disclaimed the non-producing assets and therefore cannot be held responsible for carrying out the Abandonment Orders; nor can the AER make any sale of Redwater's assets conditional on the fulfillment of obligations with respect to the disclaimed properties.

181 Second, they argue that the AER's Abandonment Orders constitute "claims provable in bankruptcy". In their view, it would undermine the *BIA*'s priority scheme if the AER could assert those claims outside the bankruptcy process — and ahead

TAB 5

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

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

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

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

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

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

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

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

Related Abridgment Classifications

Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax
III.14 Collection and remittance
III.14.b GST held in trust

Headnote

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

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

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

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

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

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

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

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

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

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

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

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

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

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

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

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

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

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

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

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

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

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

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

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

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

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

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

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

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

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

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

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

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee

studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

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

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

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

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

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

3.2 GST Deemed Trust Under the CCAA

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

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4).

TAB 6

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,
1 B.L.R. (6th) 1, 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.)

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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
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 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.

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 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

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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

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

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).

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' 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 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).

(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.

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.

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 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

TAB 7

2015 SCC 51, 2015 CSC 51
Supreme Court of Canada

Alberta (Attorney General) v. Moloney

2015 CarswellAlta 2091, 2015 CarswellAlta 2092, 2015 SCC 51, 2015 CSC 51, [2015] 12 W.W.R. 1, [2015] 3 S.C.R. 327, [2015] A.W.L.D. 4293, [2015] A.W.L.D. 4294, [2015] A.W.L.D. 4341, 22 Alta. L.R. (6th) 287, 259 A.C.W.S. (3d) 20, 29 C.B.R. (6th) 173, 391 D.L.R. (4th) 189, 476 N.R. 318, 606 A.R. 123, 652 W.A.C. 123, 85 M.V.R. (6th) 37, J.E. 2015-1777

Attorney General of Alberta, Appellant and Joseph William Moloney, Respondent and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan and Superintendent of Bankruptcy, Interveners

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: January 15, 2015
Judgment: November 13, 2015
Docket: 35820

Proceedings: affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 64 M.V.R. (6th) 82, 569 A.R. 177, 370 D.L.R. (4th) 267, 9 C.B.R. (6th) 278, 91 Alta. L.R. (5th) 221, [2014] 4 W.W.R. 272, 2014 CarswellAlta 225, 2014 ABCA 68, Frans Slatter J.A., Jack Watson J.A., Ronald Berger J.A. (Alta. C.A.); affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2012), 550 A.R. 257, 39 M.V.R. (6th) 21, 2012 ABQB 644, 2012 CarswellAlta 1757, [2012] A.J. No. 1094, 73 Alta. L.R. (5th) 44, A.B. Moen J. (Alta. Q.B.)

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Peter Southey, Michael Lema for Intervener, Superintendent of Bankruptcy

Subject: Constitutional; Insolvency; Public
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation
Bankruptcy and insolvency
XV Discharge of bankrupt
XV.10 Effect of discharge
XV.10.c Miscellaneous
Motor vehicles
II Constitutional issues
II.1 Conflict with federal legislation
II.1.g Licence suspension

Headnote

Motor vehicles --- Constitutional issues — Conflict with federal legislation — Licence suspension

Applicant was responsible for accident while he was driving uninsured vehicle — Administrator obtained default judgment against applicant — Applicant made arrangements to pay back debt by monthly payments, but later made assignment in bankruptcy — Debt to administrator was listed among applicant's obligations and valued at $195,823 — After discharge, applicant's driving privileges were suspended by operation of s. 102 of Traffic Safety Act (TSA) — Applicant's application for stay of suspension was granted — Appeal by administrator and Attorney General was dismissed — Appellate court found that impugned provisions of TSA had effect of frustrating Parliament's legislative purpose in enacting Bankruptcy and Insolvency Act (BIA) — Section 102 of TSA had unacceptable impact on rehabilitative purposes of bankruptcy regime and adverse impact on objective of providing fair and equal distribution to creditors — Appellate court found there was operational conflict between two statutes, and federal legislation had to prevail — Appellate court found Province was not entitled to deny applicant driver's licence because of unsatisfied personal injury debt that had been discharged in bankruptcy — Attorney General of Alberta appealed — Appeal dismissed — Conflict triggering federal paramountcy doctrine will arise in one of two situations — First is when operational conflict arises because it is impossible to comply with both laws, second is when operation of provincial law frustrates purpose of federal law — Alleged conflict arose between s. 178 of BIA, purpose of which was to ensure financial rehabilitation of debtor, and, on other hand, s. 102 of TSA — Purpose and effect of s. 102 was to deprive judgment debtor of driving privileges until judgment arising from motor vehicle accident was paid — Section 102 of TSA constituted debt collection mechanism — True incompatability existed between laws — No distinction exists between extinguishing and releasing debt, and there is no distinction between civil and administrative means to recover debt.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

Applicant was responsible for accident while he was driving uninsured vehicle — Administrator obtained default judgment against applicant — Applicant made arrangements to pay back debt by monthly payments, but later made assignment in bankruptcy — Debt to administrator was listed among applicant's obligations and valued at $195,823 — After discharge, applicant's driving privileges were suspended by operation of s. 102 of Traffic Safety Act (TSA) — Applicant's application for stay of suspension was granted — Appeal by administrator and Attorney General was dismissed — Appellate court found that impugned provisions of TSA had effect of frustrating Parliament's legislative purpose in enacting Bankruptcy and Insolvency Act (BIA) — Section 102 of TSA had unacceptable impact on rehabilitative purposes of bankruptcy regime and adverse impact on objective of providing fair and equal distribution to creditors — Appellate court found there was operational conflict between two statutes, and federal legislation had to prevail — Appellate court found Province was not entitled to deny applicant driver's licence because of unsatisfied personal injury debt that had been discharged in bankruptcy — Attorney General of Alberta appealed — Appeal dismissed — Conflict triggering federal paramountcy doctrine will arise in one of two situations — First is when operational conflict arises because it is impossible to comply with both laws, second is when operation of provincial law frustrates purpose of federal law — Alleged conflict arose between s. 178 of BIA, purpose of which was to ensure financial rehabilitation of debtor, and, on other hand, s. 102 of TSA — Purpose and effect of s. 102 was to deprive judgment debtor of driving privileges until judgment arising from motor vehicle accident was paid — Section 102 of TSA constituted debt collection mechanism — True incompatability existed between laws — No distinction exists between extinguishing and releasing debt, and there is no distinction between civil and administrative means to recover debt.

Bankruptcy and insolvency --- Discharge of bankrupt — Effect of discharge — Miscellaneous

Applicant was responsible for accident while he was driving uninsured vehicle — Administrator obtained default judgment against applicant — Applicant made arrangements to pay back debt by monthly payments, but later made assignment in bankruptcy — Debt to administrator was listed among applicant's obligations and valued at $195,823 — After discharge, applicant's driving privileges were suspended by operation of s. 102 of Traffic Safety Act (TSA) — Applicant's application for stay of suspension was granted — Appeal by administrator and Attorney General was dismissed — Appellate court found that impugned provisions of TSA had effect of frustrating Parliament's legislative purpose in enacting Bankruptcy and Insolvency Act (BIA) — Section 102 of TSA had unacceptable impact on rehabilitative purposes of bankruptcy regime and adverse impact on objective of providing fair and equal distribution to creditors — Appellate court found there was operational conflict between two statutes, and federal legislation had to prevail — Appellate court found Province was not entitled to deny applicant driver's licence because of unsatisfied personal injury debt that had been discharged in bankruptcy — Attorney General of Alberta

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Véhicules à moteur --- Questions d'ordre constitutionnel — Conflit avec la législation fédérale — Suspension de permis

Requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré — Administrateur a obtenu un jugement par défaut contre le requérant — Requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens — Créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $ — Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA) — Demande du requérant en vue d'obtenir la levée de la suspension a été accordée — Appel interjeté par l'administrateur et le procureur général a été rejeté — Cour d'appel a conclu que les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI) — Article 102 de la TSA avait un impact inacceptable sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers — Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir — Province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite — Procureur général de l'Alberta a formé un pourvoi — Pourvoi rejeté — Conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances — Première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois et la deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale — Conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif était d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA — Objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif à l'accident d'automobile soit payé — Article 102 constituait un mécanisme de recouvrement de créances — Il s'agissait d'une véritable incompatibilité — Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative.

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale

Requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré — Administrateur a obtenu un jugement par défaut contre le requérant — Requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens — Créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $ — Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA) — Demande du requérant en vue d'obtenir la levée de la suspension a été accordée — Appel interjeté par l'administrateur et le procureur général a été rejeté — Cour d'appel a conclu que les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI) — Article 102 de la TSA avait un impact inacceptable sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers — Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir — Province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite — Procureur général de l'Alberta a formé un pourvoi — Pourvoi rejeté — Conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances — Première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois et la deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale — Conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif était d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA — Objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif

à l'accident d'automobile soit payé — Article 102 constituait un mécanisme de recouvrement de créances — Il s'agissait d'une véritable incompatibilité — Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative.

Faillite et insolvabilité --- Libération du failli — Effet de la libération — Divers

Requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré — Administrateur a obtenu un jugement par défaut contre le requérant — Requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens — Créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $ — Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA) — Demande du requérant en vue d'obtenir la levée de la suspension a été accordée — Appel interjeté par l'administrateur et le procureur général a été rejeté — Cour d'appel a conclu que les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI) — Article 102 de la TSA avait un impact inacceptable sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers — Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir — Province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite — Procureur général de l'Alberta a formé un pourvoi — Pourvoi rejeté — Conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances — Première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois et la deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale — Conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif était d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA — Objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif à l'accident d'automobile soit payé — Article 102 constituait un mécanisme de recouvrement de créances — Il s'agissait d'une véritable incompatibilité — Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative.

The applicant was responsible for an accident while he was driving an uninsured vehicle. The administrator obtained default judgment against the applicant. The applicant made arrangements to pay back debt by monthly payments, but later made an assignment in bankruptcy. The debt to the administrator was listed among applicant's obligations and valued at $195,823.

After discharge, the applicant's driving privileges were suspended by operation of s. 102 of the Traffic Safety Act (TSA).

The applicant's application for a stay of the suspension was granted. An appeal by the administrator and the Attorney General was dismissed.

The appellate court found that the impugned provisions of the TSA had the effect of frustrating Parliament's legislative purpose in enacting the Bankruptcy and Insolvency Act (BIA). Section 102 of the TSA had an unacceptable impact on rehabilitative purposes of the bankruptcy regime and an adverse impact on the objective of providing fair and equal distribution to creditors. The appellate court found there was operational conflict between the two statutes, and federal legislation had to prevail. The Province was not entitled to deny the applicant a driver's licence because of an unsatisfied personal injury debt that had been discharged in bankruptcy.

The Attorney General of Alberta appealed.

Held: The appeal was dismissed.

Per Gascon J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ. concurring): Conflict triggering the federal paramountcy doctrine will arise in one of two situations. The first is when an operational conflict arises because it is impossible to comply with both laws. The second is when the operation of the provincial law frustrates the purpose of the federal law. Finding an operational conflict is not limited to examination of the actual words of the provisions at issue. The frustration of purpose branch is determined by examining whether effect of the provincial law frustrates the purpose of the federal law, even if it does not entail a direct violation of the federal law's provisions. If the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law.

In the case at bar, it was conceded that both laws were valid.

The alleged conflict arose between s. 178 of the BIA, the purpose of which was to ensure the financial rehabilitation of the debtor, and, on the other hand, s. 102 of the TSA. The purpose and effect of s. 102 was to deprive a judgment debtor of driving privileges until the judgment arising from a motor vehicle accident was paid. Section 102 of the TSA constituted a debt collection mechanism, allowing a judgment creditor to deprive the debtor of his or her driver's licence. The purpose was not to discourage people from driving without insurance. That a debtor could choose not to drive did not eliminate the operational conflict. The province still compelled payment of a provable claim that had been released, in contradiction with s. 178(2) of the BIA.

The laws at issue give inconsistent answers to the question whether an enforceable obligation existed. One law said yes while the other said no. One law consequently provided for the release of all claims provable in bankruptcy and prohibited creditors from enforcing them, while the other disregarded this release and allowed for the use of a debt enforcement mechanism. This created true incompatibility. No distinction exists between extinguishing and releasing a debt, and there is no distinction between civil and administrative means to recover a debt.

That the province was not required to use s. 102 amounted to a superficial application of the operational conflict test. It was impossible for the province to apply s. 102 of the TSA without contravening s. 178(2) of the BIA.

The purpose of the federal legislation was frustrated by the provincial legislation and the federal paramountcy doctrine was applied. The purpose of rehabilitating the bankrupt, in the BIA, was affected, in that s. 102 directly contradicted and defeated the purpose of the discharge provided for in s. 178(2). The matter was not one of forming a new binding contract with the discharged bankrupt for the repayment of the debt, with driving privileges as fresh consideration for such a contract. The effect and purpose of s. 102 was to compel payment of a discharged debt, which conflicted with s. 178(2). This made s. 102 of the TSA inoperable to the extent of the conflict, and could not ground the province's authority to withhold the respondent's driving privileges.

Per Côté J. (concurring in the result) (McLachlin C.J.C. concurring): The TSA frustrated the purpose of financial rehabilitation that underlay s. 178(2) of the federal BIA, and was inoperative to the extent of the conflict by reason of the doctrine of federal paramountcy. No operational conflict existed, rather the federal legislation was frustrated by the provincial. The conflict was indirect.

The majority's approach conflated the two branches of the federal paramountcy test, or at least blurred the difference between them. This conflation expanded the definition of conflict in the first branch, the operational conflict branch, and increased the number of situations in which federal law might pre-empt a provincial law without an in-depth analysis of Parliament's intent. Rather than considering whether to comply with one statute is to defy the other, it considered whether the effects of the provincial statute seemed to be incompatible with the federal prohibition. Instead of considering only the actual words of both provisions, the majority judgment improperly took into account their purposes and their effects.

The provincial and federal provisions at issue did not expressly conflict as they were different in terms of their contents and the remedies provided. One of them did not permit what the other specifically prohibits. Even a superficial possibility of dual compliance will suffice to conclude that there is no operational conflict.

Under s. 178 of the BIA, a bankrupt is discharged from all claims provable in bankruptcy, and the section says nothing more. The Act did not revive claims extinguished under s. 178 of the BIA. If a debtor chooses not to drive, the province simply cannot enforce its claim. Rather, s. 102 allowed the province to suspend a driver's licence, which gave it leverage to compel payment of the debt. The bankrupt was still discharged in the literal sense of the words of s. 178(2) of the BIA.

The purpose of the Federal legislation was frustrated by the provincial legislation and the federal paramountcy doctrine was applied.

Le requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré. L'administrateur a obtenu un jugement par défaut contre le requérant. Le requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens. La créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $.

Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA).

La demande du requérant en vue d'obtenir la levée de la suspension a été accordée. L'appel interjeté par l'administrateur et le procureur général a été rejeté.

La Cour d'appel a conclu que les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI). L'article 102 de la TSA avait un impact inacceptable

sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers.

La Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir. La province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite.

Le procureur général de l'Alberta a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Gascon, J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Un conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances. La première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois. La deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale. La recherche de la présence d'un conflit d'application ne se limite pas à l'examen du libellé des dispositions en litige. On arrive à conclure qu'un objectif est entravé après avoir vérifié si l'effet d'une loi provinciale porte atteinte à l'objectif d'une loi fédérale, même s'il n'y a pas de violation flagrante des dispositions de la loi fédérale. Si l'application de la loi provinciale a pour effet l'impossibilité de se conformer à une loi fédérale ou s'il est techniquement possible de se conformer aux deux législations, mais que l'application de la loi provinciale constitue néanmoins un obstacle à la réalisation de l'objectif poursuivi par le législateur fédéral, il y a conflit. Un tel conflit a pour conséquence de rendre la loi provinciale inopérante, mais uniquement dans la mesure où elle entre en conflit avec la législation fédérale.

En l'espèce, il a été reconnu que les deux lois en litige étaient valides.

Le conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif est d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA. L'objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif à l'accident d'automobile soit payé. L'article 102 constituait un mécanisme de recouvrement de créances permettant au créancier judiciaire de priver le débiteur de son permis de conduire. L'objectif poursuivi n'était pas de décourager les gens de conduire sans assurance. Le fait qu'un débiteur pourrait choisir de ne pas conduire n'éliminait pas le conflit d'application. La province contraignait toujours le paiement d'une réclamation prouvable dont le failli a été libéré, en contradiction avec l'art. 178(2) de la LFI.

Les lois en cause offrent des réponses contradictoires à la question de savoir s'il existait une obligation exécutoire. Une loi disait que oui, l'autre disait que non. Aussi, une loi prévoyait que le failli était libéré de toutes les réclamations prouvables dans le cadre de la faillite et interdisait aux créanciers d'en exiger le paiement, tandis que l'autre loi faisait fi de cette libération et permettait le recours à un mécanisme de recouvrement de cette créance. Il s'agissait là d'une véritable incompatibilité. Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative.

Le fait que la province n'était pas tenue de recourir à l'art. 102 constituait une application superficielle du critère servant à déterminer l'existence d'un conflit d'application. La province ne pouvait pas appliquer l'art. 102 de la TSA sans contrevenir à l'art. 178(2) de la LFI.

La législation provinciale empêchait l'atteinte de l'objectif poursuivi par la législation fédérale et la doctrine de la prépondérance fédérale s'appliquait. L'objectif de réhabilitation du failli poursuivi par la LFI était contrecarré en ce sens que l'art. 102 contredisait directement l'objectif visé par le processus de libération prévu à l'art. 178(2) et allait à son encontre. La question n'était pas de former un nouveau contrat ayant force exécutoire avec un failli libéré en vue du remboursement de la dette et prévoyant l'exercice de ses droits de conducteur comme nouvelle contrepartie. L'effet et l'objectif de l'art. 102 étaient de forcer le paiement d'une dette dont le failli a été libéré, ce qui entrait en conflit avec l'art. 178(2). Ceci rendait l'art. 102 de la TSA inopérant dans la mesure où ce conflit existait et ne pouvait servir de fondement au pouvoir de la province de suspendre les droits de conducteur de l'intimé.

Côté, J. (souscrivant à l'opinion des juges majoritaires quant au résultat) (McLachlin, J.C.C., souscrivant à son opinion) : La TSA empêchait l'atteinte de l'objectif de réhabilitation financière visé par l'art. 178(2) de la LFI, une loi fédérale, et était inopérante dans la mesure où ce conflit existait en raison de la doctrine de la prépondérance fédérale. Il n'existait aucun conflit d'application puisque c'était l'objectif poursuivi par la législation fédéral qui était contrecarré par la loi provinciale. Le conflit était indirect.

L'approche préconisée par les juges majoritaires confond les deux volets de l'analyse fondée sur la doctrine de la prépondérance fédérale ou obscurcit à tout le moins la différence entre les deux. Cette confusion élargit la définition de conflit sous le premier

volet, celui du conflit d'application, et accroît le nombre de cas où une loi fédérale pourrait court-circuiter une loi provinciale sans que l'on analyse en profondeur l'intention du Parlement. Plutôt que d'examiner si l'observance d'une loi entraîne l'inobservance de l'autre, les juges majoritaires se demandent si les effets de la loi provinciale semblent contraires à l'interdiction fédérale. Au lieu d'examiner seulement le libellé des deux dispositions, ils prennent en considération leurs objets et leurs effets.

Les dispositions provinciale et fédérale en cause n'étaient pas expressément en conflit; elles différaient de par leur contenu et les recours qu'elles offraient. L'une ne permet pas ce que l'autre interdit expressément. Même une possibilité superficielle de se conformer aux deux lois suffit pour qu'un tribunal conclue à l'absence de conflit d'application.

En vertu de l'art. 178 de la LFI, un failli est libéré de toutes réclamations prouvables en matière de faillite. Cet article ne prévoit rien de plus. La TSA ne fait pas revivre une réclamation éteinte en vertu de l'art. 178 de la LFI. Si un débiteur choisit de ne pas conduire, la province ne peut tout simplement pas recouvrer sa créance. Cet article autorise plutôt la province à suspendre un permis de conduire, ce qui lui donne un moyen pour contraindre le débiteur à payer la dette. Le failli demeure libéré au sens littéral du libellé de l'art. 178(2) de la LFI.

L'objectif poursuivi par la législation fédérale était contrecarré par la législation provinciale, et la doctrine de la prépondérance fédérale a été appliquée.

Table of Authorities

Cases considered by *Gascon J.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — referred to

Bank of Montreal v. Hall (1990), 9 P.P.S.A.C. 177, 46 B.L.R. 161, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, 104 N.R. 110, [1990] 2 W.W.R. 193, 82 Sask. R. 120, 1990 CarswellSask 25, 1990 CarswellSask 405 (S.C.C.) — considered

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

Bruyère c. Québec (Commission de la santé & de la sécurité du travail) (2011), 2011 SCC 60, 2011 CarswellQue 13253, 2011 CarswellQue 13254, 94 C.C.P.B. 1, (sub nom. *Canada (Ministere des Ressources humaines & Développement social) v. Bruyère)* 339 D.L.R. (4th) 473, D.T.E. 2011T-812, (sub nom. *A.G. (Quebec) v. Canada (H.R.S.D.))* 2012 C.L.L.C. 240-002, (sub nom. *Quebec (Attorney General) v. Canada (Minister of Human Resources & Social Development))* 424 N.R. 198, (sub nom. *Quebec (Attorney General) v. Canada (Human Resources & Social Development))* [2011] 3 S.C.R. 635, 99 C.C.E.L. (3d) 1 (S.C.C.) — referred to

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Burrardview Neighbourhood Assn. v. Vancouver (City) (2007), 2007 SCC 23, 2007 CarswellBC 1194, 2007 CarswellBC 1195, [2007] 6 W.W.R. 197, 34 M.P.L.R. (4th) 1, 66 B.C.L.R. (4th) 203, 362 N.R. 208, 281 D.L.R. (4th) 54, 241 B.C.A.C. 1, 399 W.A.C. 1, (sub nom. *British Columbia (Attorney General) v. Lafarge Canada Inc.)* [2007] 2 S.C.R. 86 (S.C.C.) — considered

Canada (Attorney General) v. Law Society (British Columbia) (1982), [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 1982 CarswellBC 133, 1982 CarswellBC 743 (S.C.C.) — considered

Canadian Western Bank v. Alberta (2007), 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 49 C.C.L.I. (4th) 1, [2007] 8 W.W.R. 1, 362 N.R. 111, 75 Alta. L.R. (4th) 1, 281 D.L.R. (4th) 125, [2007] I.L.R. I-4622, 409 A.R. 207, 402 W.A.C. 207, [2007] 2 S.C.R. 3 (S.C.C.) — considered

Clarke v. Clarke (1990), 28 R.F.L. (3d) 113, 113 N.R. 321, [1990] 2 S.C.R. 795, 73 D.L.R. (4th) 1, 101 N.S.R. (2d) 1, 275 A.P.R. 1, 1990 CarswellNS 49, 1990 CarswellNS 261 (S.C.C.) — referred to

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613, 38 Alta. L.R. (2d) 168 (S.C.C.) — referred to

n many aspects, the BIA [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are distribute to creditors, and how. It then sets out which claims are released on discharge and which claims survive bankruptcy.

driving

Driving is unlike other activities. For many, it is necessary to function meaningfully in society

paramountcy

In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws.

Termes et locutions cités:

conduite d'un véhicule

La conduite d'un véhicule se distingue d'autres activités. Pour bon nombre de personnes, elle est nécessaire pour fonctionner normalement dans la société

loi sur la faillite et l'insolvabilité

La LFI [*Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3] constitue à maints égards un code complet en matière de faillite. Elle précise les réclamations qui sont considérées comme des réclamations prouvables et les biens qui sont distribués aux créanciers, et la façon dont ils le sont. Elle énonce ensuite les réclamations dont le failli est libéré par une ordonnance de libération et les réclamations qui subsistent après la faillite

prépondérance

Conformément à la théorie du fédéralisme coopératif, la doctrine de la prépondérance est appliquée avec retenue. On présume que le Parlement a voulu que ses lois coexistent avec les lois provinciales.

APPEAL by Attorney General from judgment reported at *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), dismissing appeal from judgment granting application for judicial review of suspension of driver's licence.

POURVOI formé par le procureur général à l'encontre d'un jugement publié à *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant accordé une demande de contrôle judiciaire d'une décision ayant suspendu un permis de conduire.

***Gascon J.* (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Overview

1 In Canada, the federal and provincial levels of government must enact laws within the limits of their respective spheres of jurisdiction. The *Constitution Act, 1867* defines which matters fall within the exclusive legislative authority of each level. Still, even when acting within its own sphere, one level of government will sometimes affect matters within the other's sphere of jurisdiction. The resulting legislative overlap may, on occasion, lead to a conflict between otherwise valid federal and provincial laws. In this appeal, the Court must decide whether such a conflict exists, and if so, resolve it.

2 The alleged conflict in this case concerns, on the one hand, the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and on the other hand, Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6 ("*TSA*"). It stems from a car accident caused

by the respondent while he was uninsured, contrary to s. 54 of the *TSA*. The province of Alberta compensated the individual injured in the accident and sought to recover the amount of the compensation from the respondent. The latter, however, made an assignment in bankruptcy and was eventually discharged. The *BIA* governs bankruptcy and provides that, upon discharge, the respondent is released from all debts that are claims provable in bankruptcy. The *TSA* governs the activity of driving, including vehicle permits and driver's licences, and allows the province to suspend the respondent's licence and permits until he pays the amount of the compensation.

3 As a result of his bankruptcy and subsequent discharge, the respondent did not pay the amount of the compensation in full; because of this failure to pay, Alberta suspended his vehicle permits and driver's licence. The respondent contested this suspension, arguing that the *TSA* conflicted with the *BIA*, in that it frustrated the purposes of bankruptcy. The province replied that there was no conflict since the *TSA* was regulatory in nature and did not purport to enforce a discharged debt. The Court of Queen's Bench and the Court of Appeal found that there was a conflict between the federal and provincial laws. Relying on the doctrine of federal paramountcy, they declared the impugned provision of the *TSA* to be inoperative to the extent of the conflict. I agree with the outcome reached by the lower courts, and I would dismiss the appeal.

II. Facts

4 The car accident caused by the respondent occurred in 1989. In 1996, the individual injured in the accident obtained judgment against the respondent in the amount of $194,875. The Administrator appointed under the *Motor Vehicle Accident Claims Act*, R.S.A. 2000, c. M-22 ("*MVACA*"), indemnified the injured party for the amount of the judgment debt and was assigned the debt in accordance with the *MVACA*. Initially, the respondent made arrangements with the Administrator to pay the debt in instalments. Some years later, however, in January 2008, he made an assignment in bankruptcy. He listed the Administrator's claim in his Statement of Affairs. It is not disputed that the judgment debt assigned to the Administrator was a claim provable in bankruptcy. It was, by far, the respondent's most substantial debt and, in fact, the reason for his financial difficulties. At the time of the assignment, the outstanding amount due to the Administrator stood at $195,823.

5 In June 2011, the respondent obtained an absolute discharge, which no one opposed. In October of the same year, he received a letter from the Director, Driver Fitness and Monitoring, notifying him that, by application of s. 102(1) of the *TSA*, his operator's licence and vehicle registration privileges would be suspended until payment of the outstanding amount of the judgment debt. Later, in November, his lawyer received another letter, this time from Motor Vehicle Accident Recoveries, advising the respondent that he "remains indebted for the judgment debt obtained against him ... 'until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy'" (A.R., at p. 49). The letter proposed that new payment arrangements be made, failing which the suspension of his driving privileges would continue.

6 Given this situation, in March 2012, the respondent sought an order from the Court of Queen's Bench to stay the suspension of his driving privileges. He claimed that he had been discharged in bankruptcy and that s. 178 of the *BIA* precluded the Administrator from enforcing the judgment debt.

III. Judicial History

A. Alberta Court of Queen's Bench, 2012 ABQB 644, 73 Alta. L.R. (5th) 44 (Alta. Q.B.)

7 Moen J. first found that, as a result of the discharge, there was no longer a liability on the basis of which the judgment could be enforced (para. 21). In her view, the question at issue was whether the discharge precluded the province from suspending the respondent's driving privileges because of the unpaid judgment debt. This entailed looking at the operation of the *TSA* and the *BIA* and determining whether the relevant provisions were in conflict, making the doctrine of paramountcy applicable. According to Moen J., an "operational conflict" could arise in two situations, namely where (1) "compliance with both acts is rendered inconsistent or impossible by directly conflicting with an express provision of the *BIA*" or (2) "the *TSA* has the intent and/or effect of interfering with the provisions of the *BIA* or its fundamental objectives" (para. 30).

8 Moen J. emphasized the rehabilitative purpose of the *BIA* (para. 31). She described the purpose of the *TSA* as being the "protection of public safety via the regulation of traffic and motor vehicles" (para. 33), and the purpose of s. 102 of the *TSA*

[Emphasis added.]

(*Husky Oil*, at para. 39)

Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly: *Husky Oil*, at para. 39.

29 In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law: *Western Bank*, at para. 69; *Rothmans*, at para. 11; *Mangat*, at para. 74. In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists: *Husky Oil*, at para. 81; E. Colvin, "Constitutional Law — Paramountcy — Duplication and Express Contradiction — Multiple Access Ltd. v. McCutcheon" (1983), 17 *U.B.C.L. Rev.* 347, at p. 348.

30 I now turn to the application of the doctrine to the facts of this appeal.

B. Application

(1) The Legislative Schemes at Issue

31 The first step of the analysis is to ensure that the impugned federal and provincial provisions are independently valid. Early in the proceedings, the parties recognized the validity of the relevant provisions of the *BIA* and the *TSA*. Before this Court, they again conceded the validity of both laws. The only question is whether their concurrent operation results in a conflict. This requires analyzing the legislative schemes at issue at the outset so as to reach a proper understanding of the provisions that are allegedly in conflict.

(a) The Bankruptcy and Insolvency Act

32 Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867*. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).

33 The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the *BIA*; *Husky Oil*, at para. 9. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

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

Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

34 For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the *BIA* thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

debt, nor the resulting regulatory charge, is exempt from discharge under s. 178(1). As a provable claim is subject to s. 178(2), the province is precluded from compelling payment of the judgment debt.

68 Contrary to the appellant's contention, nothing suggests that s. 178(2) merely precludes civil enforcement of provable claims. Accepting the appellant's argument would amount to adding words to the provision that do not exist, and that the legislator did not include. While being expressly precluded from compelling payment of a discharged provable claim, the province could create an administrative scheme that had the effect of coercing a discharged debtor to pay a debt that has been released. The appellant's argument must be rejected. Pursuant to s. 178(2) of the *BIA*, creditors are precluded from compelling payment of a claim provable in bankruptcy, through either civil or administrative processes.

69 Neither can the question under the operational conflict branch of the paramountcy test be whether it is possible to refrain from applying the provincial law in order to avoid the alleged conflict with the federal law. To argue that the province is not required to use s. 102 in the context of bankruptcy, or that it can choose not to withhold the respondent's driving privileges, leads to a superficial application of the operational conflict test. To suggest that a conflict can be avoided by complying with the federal law to the exclusion of the provincial law cannot be a valid answer to the question whether there is "actual conflict in operation", as the majority of the Court put it in *Multiple Access*: see also *COPA*, at para. 64. To so conclude would render the first branch of the paramountcy test meaningless, since it is virtually always possible to avoid the application of a provincial law so as not to cause a conflict with a federal law. Furthermore, any provincial law that could survive the first branch under the latter argument would necessarily also survive the second branch. If it is possible to avoid operational conflict simply by declining to apply the provincial law, the same could be done to avoid any frustration of the federal purpose under the second branch.

70 In fact, this would be tantamount to rendering the provincial law inoperative to the extent of the conflict even before a conflict is found. Under the doctrine of paramountcy, this is precisely the remedy that courts grant once a conflict is found; it is not a tool courts can use to avoid finding a conflict. The remedy of not applying the provincial law cannot be determinative of whether a conflict exists in the first place. In this case, whether or not the province has discretion not to apply s. 102 is irrelevant: see *Lafarge*, at para. 75. The province chose to take advantage of the scheme. The question is whether it can do so while also complying with the *BIA*.

71 This view, with which my colleague disagrees, appears to me to be consistent with this Court's jurisprudence on operational conflict. For instance, in *M & D Farm*, the creditor held a mortgage on the debtors' family farm. After defaulting on the mortgage, the debtors obtained a stay of proceedings under the federal *Farm Debt Review Act*, R.C.S. 1985, c. 25 (2nd Supp.). While the stay was still in effect, the creditor sought, and was granted, leave under the provincial *Family Farm Protection Act*, C.C.S.M., c. F15, which authorized the immediate commencement of foreclosure proceedings. The question arose as to whether there was a conflict between the federal stay and the provincial leave. The Court concluded that there was an operational conflict (pp. 982-85), and this conclusion was later reaffirmed in *Lafarge*, at para. 82, and again in *Lemare Lake*, at para. 18. As I read *M & D Farm*, the fact that the debtors could choose to voluntarily pay the mortgage debt, as my colleague suggests, did not mean that there was no operational conflict. Nor was conflict avoided because the creditor could have chosen not to seek leave to commence foreclosure proceedings. There was an operational conflict because the provincial law expressly authorized the very proceedings that the federal stay precluded.

72 More recently, in *Sun Indalex*, Deschamps J., with Moldaver J. concurring, found that there was an operational conflict (the Court was unanimous on this point). On the one hand, there was an order made under the federal *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which authorized an insolvent company to obtain debtor-in-possession ("DIP") financing and granted priority to the DIP lender. On the other hand, the provincial *Personal Property Security Act*, R.S.O. 1990, c. P.10, gave priority to the administrator of the company's employee pension plans: para. 60. Deschamps J. did not avoid the operational conflict by concluding, for instance, that the debtor could have chosen not to seek DIP financing in the first place.

73 My analysis does not "expan[d] the definition of conflict in the first branch" of the paramountcy test, nor does it "conflate" its two branches, contrary to what my colleague indicates (paras. 93 and 106). In my view, this analysis instead applies the principles developed by this Court on federal paramountcy to the operational conflict situation at issue here, where the federal

law includes a prohibition that the provincial law effectively disregards. I discuss the two legislative schemes separately from the application of the two branches of the paramountcy test. My analysis of the operational conflict focuses on the existence of an actual and direct conflict between the provisions at issue. The two branches are not "conflated" simply because, in a situation like the current one, the wording of s. 178(2) and the clear prohibition it contains happen to exemplify the goal behind the provision and one of the key objectives of the *BIA*, that is, the financial rehabilitation of the debtor. I consider that my colleague's remarks to the effect that impossibility of dual compliance is a "secondary consideration" in my discussion of operational conflict (para. 99) are misplaced as well. The classic statement of the test for operational conflict in *Multiple Access* that she cites with approval (para. 100) is precisely the one I am relying upon here. It is in light of that statement that I find there is no real possibility of dual compliance as understood by this Court. Indeed, the opposite conclusion would depend on a creditor refusing to apply (or a debtor refusing to comply with) the provincial law, or, alternatively, on a debtor renouncing (or a creditor refusing to comply with) the protection afforded by the federal law. To find a possibility of dual compliance with the conflicting laws at issue — on the basis of hypotheticals that call for "single" compliance, by any one of the actors involved, with one law but not with the other — would be inconsistent with this Court's precedents on federal paramountcy.

74 In this regard, this case is distinguishable from precedents like *Rothmans* and *COPA*, on which my colleague relies. Those cases both dealt with provincial laws that took a more restrictive approach to matters covered by permissive federal laws. In each of them, the relevant statutes were held not to create an operational conflict. In *COPA*, the federal *Aeronautics Act*, R.S.C. 1985, c. A-2, allowed private citizens to build airports, while the provincial *Act respecting the preservation of agricultural land and agricultural activities*, R.S.Q., c. P-41.1, prohibited such activities on agricultural land absent an administrative authorization: para. 8. In *Rothmans*, s. 30 of the federal *Tobacco Act*, S.C. 1997, c. 13, permitted the display of tobacco products at retail, while the provincial *Tobacco Control Act*, S.S. 2001, c. T-14.1, banned the advertising, display and promotion of tobacco products in places where persons under 18 years of age were allowed. *Rothmans* and *COPA* did not involve a direct contradiction between the two applicable laws as does the instant case. They merely involved one law that imposed stricter conditions in allowing activities that were also permitted by the government at the other level. In the case at bar, the question with respect to operational conflict is whether debts incurred while driving uninsured can be enforced even though the debtor has been discharged from bankruptcy. On this question, the two laws directly contradict each other.

75 I therefore conclude that s. 102 of the *TSA* allows the province, or a third party creditor, to enforce a provable claim that has been released. To that extent, it conflicts with s. 178(2) of the *BIA*. It is impossible for the province to apply s. 102 without contravening s. 178(2) and, as a result, for the respondent to simultaneously be liable to pay the judgment debt under the provincial scheme and be released from that same claim pursuant to s. 178(2): *Lafarge*, at para. 82; *M & D Farm*, at para. 41. Section 178 is a complete code in that it sets out which debts are released on discharge and which debts survive bankruptcy. In effect, s. 102 creates a new class of exempt debts that is not listed in s. 178(1). Hence, in the words used by my colleague in her reasons (paras. 95, 110 and 128), "the provincial law allows the very same thing" — the enforcement of a debt released under s. 178(2) of the *BIA* — that "the federal law prohibits". The result is an operational conflict between the provincial and federal provisions.

76 Although this conclusion makes it unnecessary to discuss the second branch of the test, I will nonetheless address it in order to respond to the province's arguments.

(b) Frustration of Federal Purpose

(i) Financial Rehabilitation

77 Like the lower courts, I find that the province's use of its administrative powers relating to driving privileges to burden the respondent until he repays a discharged debt frustrates the financial rehabilitation of the bankrupt. The effect of s. 102 directly contradicts and defeats the purpose of the discharge provided for in s. 178(2):

> The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge of all his or her debts in order

> that he or she may be able to integrate into the business of life of the country as a useful citizen free from the crushing burden of debts... .
>
> [Emphasis added.]
>
> (Houlden, Morawetz and Sarra, at p. 1-2.1)

As explained already, the language of s. 178(2) makes it clear that the purpose of this provision is to give effect to one of the goals underlying the *BIA* regime — the financial rehabilitation of the debtor — by releasing "the bankrupt from all claims provable in bankruptcy". In other words, s. 178(2) is aimed precisely at providing the bankrupt with a fresh start. The facts of this case establish that the province's use of s. 102 despite the respondent's discharge undermines this purpose.

78 The respondent was a truck driver. In 1996, after the accident, the province was assigned the judgment rendered against him in the amount of $194,875. In 2008, after attempting to pay the debt in instalments for about 12 years, he made an assignment in bankruptcy. At that time, the outstanding amount of the debt had increased to $195,823; it was, by far, the largest of the respondent's financial liabilities. In 12 years, the respondent had not been able to keep up with his interest payments. The crushing burden of the province's claim against him was the main reason for his bankruptcy. In 2012, at the time his application for discharge was heard, the respondent had only managed to pay the judgment debt down to $192,103.79. By the effect of s. 102, he was exiting bankruptcy while carrying the same financial burden that had caused his bankruptcy four years earlier. If s. 102 is allowed to operate despite the respondent's discharge, the respondent is not offered the opportunity to rehabilitate that Parliament intended to give him. This is particularly compelling in the respondent's case. As a truck driver, his ability to gain a livelihood is tied to his ability to drive. But more generally, inability to drive can constitute a significant impediment to any person's capacity to earn income: see *Lucar, Re* (2001), 32 C.B.R. (4th) 270 (Ont. S.C.J.), at paras. 22-23.

79 In furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate: *AbitibiBowater*, at para. 35; *Schreyer*, at para. 19. In 1970, the Study Committee on Bankruptcy and Insolvency Legislation emphasized this concern:

> ... much of the rehabilitative effect of his discharge and release from debts is lost, when a bankrupt is left with substantial debts after his discharge. Indeed, in some cases, it may almost be regarded as a mockery of the bankruptcy system to take all of the sizable property of a debtor, distribute it among the creditors and then leave the debtor to cope with some of his largest creditors from whose debts he has not been released.
>
> (*Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970), at para. 3.2.085)

When operating in the context of bankruptcy, s. 102 undermines this balancing exercise and imperils the bankrupt's ability to rehabilitate. In effect, s. 102 creates a new class of debts that survive bankruptcy. As such, it leaves the debtor with a substantial financial liability that was not contemplated by Parliament. Had Parliament intended judgment debts arising from motor vehicle accidents, or the resulting regulatory charges, to survive bankruptcy, it would have stated so expressly in s. 178(1) of the *BIA*. It did not. Together, s. 178(1) and (2) are comprehensive. It is beyond the province's constitutional authority to interfere with Parliament's discretion in that regard.

80 Notwithstanding this, Alberta asserts that, like any creditor, the province is allowed to form a new binding contract with the discharged bankrupt for the repayment of the debt. In its view, the respondent's driving privileges can serve as fresh consideration for such a contract. I disagree. Like the Court of Appeal, I conclude that this alleged fresh consideration is neither genuine nor consistent with the purpose of s. 178(2).

81 As a general rule, a creditor cannot cause a debtor to revive an obligation from which the debtor was released, unless the creditor offers fresh consideration: Wood, at p. 301. Between private parties, it is arguable that a debtor may freely agree to revive a discharged debt in exchange for the creditor's provision of goods or services. The province, however, is unlike any

private creditor. While a private creditor is under no obligation to provide goods or services, the province cannot withhold the respondent's driving privileges arbitrarily. Suspension of privileges by administrative bodies must be based on a legal rule: see *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at pp. 141-42; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.), at para. 59; *Secession Reference*, at para. 71; *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 10. In the case at bar, the effect and purpose of s. 102 are to compel payment of a discharged debt, which conflicts with s. 178(2). As a result, s. 102 is, to that extent, inoperative and cannot ground the province's authority to withhold the respondent's privileges. If those privileges are being suspended on the sole basis that the respondent refuses to satisfy a judgment debt that was released in bankruptcy, the province is acting without authority. The province's promise to refrain from doing what it has no authority to do cannot constitute fresh consideration capable of supporting any contract. This includes a contract for the repayment of a discharged debt. More importantly, the respondent need not enter into such a contract in order to recover his driving privileges, because the province has no authority to withhold them.

82 Finally, Alberta's other assertion, to the effect that Parliament's power over bankruptcy and insolvency matters does not extend to the regulation of driving privileges, does not entail that the province can withhold those privileges on the basis of an unpaid released debt. In my view, the province is conflating the scope of Parliament's authority and the consequences of the conflict between the *BIA* and the *TSA*. The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person's driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province's condition conflicts with s. 178(2) of the *BIA* and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative.

83 The rehabilitative purpose of s. 178(2) is not meant to give debtors a fresh start in all aspects of their lives. Bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct. However, by ensuring that all provable claims are treated as part of the bankruptcy regime, the *BIA* gives debtors an opportunity to rehabilitate themselves financially. While this does not amount to erasing all regulatory consequences of their past conduct, it is certainly meant to free them from the financial burden of past indebtedness.

(ii) Equitable Distribution

84 The Court of Appeal concluded that the *TSA* also disrupts the equitable distribution purpose of the *BIA*. In that court's view, the province's legislative scheme allows it to obtain more than the ordinary dividend paid under the bankruptcy regime, which is contrary to the objective of the *BIA* to "treat all creditors of the same class equally" (para. 50). For its part, the province asserts that s. 102 does not alter the priorities set out in the *BIA*, since payment for the privilege of driving does not draw on the estate of the bankrupt that is available to other creditors.

85 I disagree with this conclusion of the Court of Appeal. The purpose of s. 178, the only provision of the *BIA* that is at issue in this appeal, is to give the discharged bankrupt a fresh start. The section sets out the limits of this fresh start by excluding specific debts from being released by the order of discharge (s. 178(1)), and it provides for the consequences of that order by releasing the bankrupt from all other provable claims (s. 178(2)). Section 178 does not further the purpose of equitable distribution of assets. What the Court of Appeal points to are the consequences of survival of the judgment debt as a result of s. 102 of the *TSA*, despite the discharge contemplated in s. 178. This concerns the financial rehabilitation purpose of the *BIA* and nothing more.

86 This Court has repeatedly cautioned against giving "too broad a scope to paramountcy on the basis of frustration of federal purpose": *Lemare Lake*, at para. 23, quoting *Marcotte*, at para. 72; *Marine Services*, at para. 69; *Western Bank*, at para. 74. In the federal paramountcy analysis, it is therefore always essential to ascertain the exact purpose of the specific provision of the federal law that is at issue. The Court of Appeal does not cite any authority supporting the assertion that s. 178 has purposes other than the debtor's financial rehabilitation. Although other provisions of the *BIA*, discussed earlier in these reasons and dealing mostly with the property of the bankrupt and the administration of the bankrupt's estate, are meant to ensure this equitable distribution purpose, those provisions are not at issue in the case at bar. At best, the assertion made by the Court of Appeal unduly broadens the *BIA*'s equitable distribution purpose and the related single proceeding model. This is contrary to the

presumption of constitutionality according to which, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes": *Western Bank*, at para. 75, quoting *Law Society of B.C.*, at p. 356; *Marine Services*, at para. 69.

87 Professor Wood, at p. 3, explains as follows the rationale behind the collective proceeding through which equitable distribution is achieved:

> The race to grab assets in the absence of a collective insolvency regime does not provide an environment within which an efficient and orderly liquidation can occur. The process is inefficient because each creditor must separately attempt to enforce their claims against the debtor's assets, and this produces duplication in enforcement costs. The piecemeal selling off of assets also results in a much smaller recovery than if a single person were in control of the liquidation. Similarly, the race to seize assets does not produce an environment within which negotiations with creditors can easily occur. A reasonable creditor who is inclined to negotiate with the debtor will be unlikely to do so if other creditors are actively taking steps to make away with the debtor's realizable assets; instead, the creditor will feel compelled to join the wild dash to seize assets. Although some of the creditors (those who are able to strike first) are better off in such a scenario, the creditors as a group receive less than if a more orderly liquidation or negotiated arrangement had taken place.
>
> (See also *Husky Oil*, at para. 7.)

88 The single proceeding model is focused on ensuring the orderly distribution of assets and reducing inefficiencies, and ultimately on maximizing global recovery for creditors. If, after the bankrupt's discharge, that is, after the administration of the estate and the orderly distribution contemplated by the *BIA*, the province is allowed to compel a bankrupt to make payments outside the collective proceeding and to obtain property that would not, in any event, be distributed to the creditors as part of the bankruptcy process, I fail to see how the single proceeding model is disrupted. The assets to be distributed to creditors remain the same, and they are still allocated according to the bankruptcy scheme and any priorities it dictates. Whether or not s. 102 of the *TSA* operates after the discharge does not impact the orderly distribution to creditors, nor does it affect the pool of assets to be distributed to them. In this regard, the judgment debt is not "preferred" or given any kind of priority under the *BIA* scheme; it is quite simply unaffected by the bankruptcy process as a result of the provincial scheme in the same way as the other debts listed in s. 178(1) that are not released by the order of discharge. The operation of s. 102 does not cause any chaos or inefficiencies in the bankruptcy process. If anything, allowing s. 102 to operate increases global recovery for the other creditors while leaving the single proceeding intact.

89 Thus, although it is clear that the purpose of s. 178(2) is to ensure the debtor's financial rehabilitation and that s. 102 frustrates that purpose, I am not convinced that the operation of the provincial scheme in the context of this appeal interferes with the equitable distribution of assets, a purpose that is undoubtedly served by other provisions of the *BIA*, but not by s. 178.

VI. Disposition

90 In my view, the doctrine of paramountcy dictates that s. 102 of the *TSA* is inoperative to the extent that it conflicts with the *BIA*, and in particular s. 178(2). Therefore, the province cannot withhold the respondent's driving privileges on the basis of an unsatisfied but discharged judgment debt. I would dismiss the appeal with costs and answer the constitutional question as follows:

> Is s. 102(2) of Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6, constitutionally inoperative by reason of the doctrine of federal paramountcy?
>
> Answer: Yes, s. 102 of the Alberta *Traffic Safety Act* is inoperative to the extent that it is used to enforce a debt discharged in bankruptcy.

***Côté J.* (McLachlin C.J.C. concurring):**

TAB 8

2015 SCC 52, 2015 CSC 52
Supreme Court of Canada

407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)

2015 CarswellOnt 17183, 2015 CarswellOnt 17184, 2015 SCC 52, 2015 CSC 52, [2015] 3 S.C.R. 397, 135 O.R. (3d) 400 (note), 259 A.C.W.S. (3d) 18, 30 C.B.R. (6th) 207, 340 O.A.C. 1, 391 D.L.R. (4th) 248, 477 N.R. 1, 85 M.V.R. (6th) 1, J.E. 2015-1776

407 ETR Concession Company Limited, Appellant and Superintendent of Bankruptcy, Respondent and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Michael Dow, Gwendolyn Miron and Peter Teolis, Interveners

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: January 15, 2015
Judgment: November 13, 2015
Docket: 35696

Proceedings: affirming *Moore, Re* (2013), 2013 ONCA 769, *(*sub nom. *Moore (Bankrupt), Re)* 314 O.A.C. 152, *(*sub nom. *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.)* 118 O.R. (3d) 161, 7 C.B.R. (6th) 167, 2013 CarswellOnt 17670, 369 D.L.R. (4th) 385, 53 M.V.R. (6th) 169, Doherty J.A., Janet Simmons J.A., S.E. Pepall J.A. (Ont. C.A.); reversing *Moore, Re* (2011), [2011] O.J. No. 6476, 2011 ONSC 6310, 2011 CarswellOnt 15701, 30 M.V.R. (6th) 137, Newbould J. (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Constitutional; Insolvency; Public
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation
Constitutional law
VII Distribution of legislative powers
VII.5 Relation between federal and provincial powers
VII.5.c Paramountcy of federal legislation
VII.5.c.i General principles
Motor vehicles
X Offences and penalties
X.4 Suspension of licence

X.4.b Types of suspension
X.4.b.iii Miscellaneous

Headnote

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

Motorist accumulated large toll debt by repeatedly using open-access private highway, operation of which was governed by Highway 407 Act, 1998 (407 Act) — ETR, company operating highway, notified Registrar of Motor Vehicles, who refused to renew motorist's licence plates — Motorist obtained discharge from bankruptcy — Motorist sought order that ETR claim had been discharged in bankruptcy — Superior Court found that s. 22(4) of 407 Act was not in conflict with Bankruptcy and Insolvency Act (BIA) — Court of Appeal found that there was no operational conflict, but that s. 22(4) frustrated rehabilitative purpose of BIA — ETR appealed — Appeal dismissed — Section 22(4) of 407 Act was constitutionally inoperative to extent that it was used to enforce provable claim that had been discharged pursuant to s. 178(2) of BIA — Section 178 of BIA is complete code which sets out which debts are released on bankrupt's discharge and which debts survive bankruptcy — Through s. 22(4), province created new class of exempt debts that was not listed in s. 178(1) — This operational conflict offended doctrine of federal paramountcy — Operation of s. 22(4) frustrated Parliament's purpose of providing discharged bankrupts with ability to financially rehabilitate themselves.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — General principles

Motorist accumulated large toll debt by repeatedly using open-access private highway, operation of which was governed by Highway 407 Act, 1998 (407 Act) — ETR, company operating highway, notified Registrar of Motor Vehicles, who refused to renew motorist's licence plates — Motorist obtained discharge from bankruptcy — Motorist sought order that ETR claim had been discharged in bankruptcy — Superior Court found that s. 22(4) of 407 Act was not in conflict with Bankruptcy and Insolvency Act (BIA) — Court of Appeal found that there was no operational conflict, but that s. 22(4) frustrated rehabilitative purpose of BIA — ETR appealed — Appeal dismissed — Section 22(4) of 407 Act was constitutionally inoperative to extent that it was used to enforce provable claim that had been discharged pursuant to s. 178(2) of BIA — Section 178 of BIA is complete code which sets out which debts are released on bankrupt's discharge and which debts survive bankruptcy — Through s. 22(4), province created new class of exempt debts that was not listed in s. 178(1) — This operational conflict offended doctrine of federal paramountcy — Operation of s. 22(4) frustrated Parliament's purpose of providing discharged bankrupts with ability to financially rehabilitate themselves.

Motor vehicles --- Offences and penalties — Suspension of licence — Types of suspension — Miscellaneous

Motorist accumulated large toll debt by repeatedly using open-access private highway, operation of which was governed by Highway 407 Act, 1998 (407 Act) — ETR, company operating highway, notified Registrar of Motor Vehicles, who refused to renew motorist's licence plates — Motorist obtained discharge from bankruptcy — Motorist sought order that ETR claim had been discharged in bankruptcy — Superior Court found that s. 22(4) of 407 Act was not in conflict with Bankruptcy and Insolvency Act (BIA) — Court of Appeal found that there was no operational conflict, but that s. 22(4) frustrated rehabilitative purpose of BIA — ETR appealed — Appeal dismissed — Section 22(4) of 407 Act was constitutionally inoperative to extent that it was used to enforce provable claim that had been discharged pursuant to s. 178(2) of BIA — Section 178 of BIA is complete code which sets out which debts are released on bankrupt's discharge and which debts survive bankruptcy — Through s. 22(4), province created new class of exempt debts that was not listed in s. 178(1) — This operational conflict offended doctrine of federal paramountcy — Operation of s. 22(4) frustrated Parliament's purpose of providing discharged bankrupts with ability to financially rehabilitate themselves.

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale

Conducteur a accumulé une importante dette de péage après avoir emprunté à de nombreuses occasions une autoroute privée ouverte au public dont l'exploitation était régie par la Loi de 1998 sur l'autoroute 407 (LA407) — ETR, la compagnie exploitant l'autoroute, en a informé le registraire des véhicules automobiles, lequel a refusé de renouveler les plaques d'immatriculation du conducteur — Ce dernier a fait faillite avant de recevoir une libération de dettes — Conducteur a demandé à ce que l'on déclare que la réclamation d'ETR avait été annulée au terme du processus de faillite — Cour supérieure a conclu que l'art. 22(4) de la LA407 n'entrait pas en conflit avec la Loi sur la faillite et l'insolvabilité (LFI) — Cour d'appel a conclu qu'il n'y avait pas

de conflit d'application, mais que l'art. 22(4) de la LA407 contrecarrait l'objectif de réhabilitation de la LFI — ETR a formé un pourvoi — Pourvoi rejeté — Article 22(4) de la LA407 était constitutionnellement inopérant dans la mesure où il était invoqué pour recouvrer une réclamation prouvable qui avait été annulée aux termes de l'art. 178(2) de la LFI — Article 178 de la LFI constitue un code complet en ce qu'il précise les dettes dont le failli est libéré et celles qui subsistent après la libération de faillite — À l'art. 22(4) de la LA407, la province crée une nouvelle catégorie de dettes exemptées qui ne sont pas énumérées à l'art. 178(1) de la LFI — Ce conflit d'application était contraire à la doctrine de la prépondérance fédérale — Application de l'art. 22(4) contrecarrait l'objectif du législateur fédéral de donner aux faillis libérés la possibilité de se réhabiliter financièrement.

Droit constitutionnel --- Partage des compétences législatives — Rapport entre les compétences fédérales et compétences provinciales — Prépondérance des lois fédérales — Principes généraux

Conducteur a accumulé une importante dette de péage après avoir emprunté à de nombreuses occasions une autoroute privée ouverte au public dont l'exploitation était régie par la Loi de 1998 sur l'autoroute 407 (LA407) — ETR, la compagnie exploitant l'autoroute, en a informé le registraire des véhicules automobiles, lequel a refusé de renouveler les plaques d'immatriculation du conducteur — Ce dernier a fait faillite avant de recevoir une libération de dettes — Conducteur a demandé à ce que l'on déclare que la réclamation d'ETR avait été annulée au terme du processus de faillite — Cour supérieure a conclu que l'art. 22(4) de la LA407 n'entrait pas en conflit avec la Loi sur la faillite et l'insolvabilité (LFI) — Cour d'appel a conclu qu'il n'y avait pas de conflit d'application, mais que l'art. 22(4) de la LA407 contrecarrait l'objectif de réhabilitation de la LFI — ETR a formé un pourvoi — Pourvoi rejeté — Article 22(4) de la LA407 était constitutionnellement inopérant dans la mesure où il était invoqué pour recouvrer une réclamation prouvable qui avait été annulée aux termes de l'art. 178(2) de la LFI — Article 178 de la LFI constitue un code complet en ce qu'il précise les dettes dont le failli est libéré et celles qui subsistent après la libération de faillite — À l'art. 22(4) de la LA407, la province crée une nouvelle catégorie de dettes exemptées qui ne sont pas énumérées à l'art. 178(1) de la LFI — Ce conflit d'application était contraire à la doctrine de la prépondérance fédérale — Application de l'art. 22(4) contrecarrait l'objectif du législateur fédéral de donner aux faillis libérés la possibilité de se réhabiliter financièrement.

Véhicules à moteur --- Infractions et sanctions — Suspension de permis — Types de suspension — Divers

Conducteur a accumulé une importante dette de péage après avoir emprunté à de nombreuses occasions une autoroute privée ouverte au public dont l'exploitation était régie par la Loi de 1998 sur l'autoroute 407 (LA407) — ETR, la compagnie exploitant l'autoroute, en a informé le registraire des véhicules automobiles, lequel a refusé de renouveler les plaques d'immatriculation du conducteur — Ce dernier a fait faillite avant de recevoir une libération de dettes — Conducteur a demandé à ce que l'on déclare que la réclamation d'ETR avait été annulée au terme du processus de faillite — Cour supérieure a conclu que l'art. 22(4) de la LA407 n'entrait pas en conflit avec la Loi sur la faillite et l'insolvabilité (LFI) — Cour d'appel a conclu qu'il n'y avait pas de conflit d'application, mais que l'art. 22(4) de la LA407 contrecarrait l'objectif de réhabilitation de la LFI — ETR a formé un pourvoi — Pourvoi rejeté — Article 22(4) de la LA407 était constitutionnellement inopérant dans la mesure où il était invoqué pour recouvrer une réclamation prouvable qui avait été annulée aux termes de l'art. 178(2) de la LFI — Article 178 de la LFI constitue un code complet en ce qu'il précise les dettes dont le failli est libéré et celles qui subsistent après la libération de faillite — À l'art. 22(4) de la LA407, la province crée une nouvelle catégorie de dettes exemptées qui ne sont pas énumérées à l'art. 178(1) de la LFI — Ce conflit d'application était contraire à la doctrine de la prépondérance fédérale — Application de l'art. 22(4) contrecarrait l'objectif du législateur fédéral de donner aux faillis libérés la possibilité de se réhabiliter financièrement.

A motorist made numerous trips on an open-access private highway, the operation of which was governed by the Highway 407 Act, 1998 (407 Act). The motorist accumulated a toll debt of $34,977.06. ETR, the company operating the highway, notified the Registrar of Motor Vehicles of the motorist's failure to pay the toll debt. The Registrar of Motor Vehicles refused to renew the motorist's licence plates. The motorist made an assignment in bankruptcy, and ultimately obtained an absolute discharge. The motorist moved before the Registrar in Bankruptcy for an order that ETR's claim had been discharged in bankruptcy and that the Ministry of Transportation was compelled to issue him a permit upon payment of the usual fees. The order was granted but was set aside before the matter was heard de novo in Superior Court. The motorist contended that ETR could not use s. 22(4) of the 407 Act to collect and enforce the toll debt because it had been discharged pursuant to s. 178 of the Bankruptcy and Insolvency Act (BIA). The Superior Court judge found that s. 22(4) was not in conflict with the BIA, since it did not affect the equitable distribution of a bankrupt's property. On a successful appeal by the Superintendent of Bankruptcy, the Court of Appeal found that there was no operational conflict, but that s. 22(4) of the 407 Act frustrated the rehabilitative purpose of the BIA. ETR appealed.

Held: The appeal was dismissed.

Per Gascon J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring): Section 22(4) of the 407 Act was constitutionally inoperative under the doctrine of federal legislative paramountcy to the extent that it was used to enforce a provable claim that had been discharged pursuant to s. 178(2) of the BIA.

There was an agreement with the Court of Appeal that the purpose and effect of s. 22(4) of the 407 Act were to allow a creditor, ETR, to enforce the collection of toll debts, which in the context of this appeal constituted a claim provable in bankruptcy. Since the debt collection mechanism put in place by s. 22(4) provided the creditor with an administrative enforcement scheme, it was impossible for ETR to use that remedy while also complying with s. 178(2) of the BIA. While the provincial scheme had the effect of maintaining the debtor's liability beyond his or her discharge, the federal law expressly released him or her from that same liability. The conflict was not "indirect" and did not concern something that was merely "implicitly" prohibited by s. 178(2) of the BIA. The majority of this Court was not resorting to a broad intepretation of s. 178(2) in order to find that an operational conflict existed. The language of s. 22(1) did not provide a possibility for there to be no operational conflict. Section 22(4) used mandatory language ("shall"), such that the Registrar had no choice but to refuse to validate the debtor's vehicle permits. It was not valid to suggest that to negate the operational conflict the debtor could renounce his right under the BIA by paying the released debt or by accepting the debt collection mechanism of the 407 Act and foregoing his right to a vehicle permit. The operation of s. 22(4) to enforce a debt that was discharged in bankruptcy was in conflict with s. 178(2) of the BIA. Section 178 is a complete code which sets out which debts are released on the bankrupt's discharge and which debts survive the bankruptcy. Through s. 22(4), the province created a new class of exempt debts that was not listed in s. 178(1). This operational conflict offended the doctrine of federal paramountcy.

The operation of s. 22(4) frustrated Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves. While the intent of s. 178(2) of the BIA is that the debtor will no longer be encumbered by the burden of pre-bankruptcy indebtedness, s. 22(4) allowed ETR to continue burdening the discharged bankrupt until full payment of the debt, as if the discharge in bankruptcy never occurred. If s. 22(4) was allowed to operate despite the debtor's bankruptcy and subsequent absolute discharge, this effectively created an ever-increasing financial burden on the debtor. It was not established that s. 178(2) furthered the purpose of equitable distribution of assets to creditors, or that this purpose of bankruptcy was frustrated by the operation of s. 22(4).

Per Côté J. (concurring in the result) (McLachlin C.J.C. concurring): There was no apparent operational conflict in this case. The relevant standard is impossibility of dual compliance and express conflict. It was possible to comply with s. 22(1) of the 407 Act without defying s. 178(2) of the BIA in the literal sense of the words. The majority of this Court interpreted s. 178(2) broadly on the basis of Parliament's intent to foster the financial rehabilitation of the bankrupt, and this resulted in a conflict. Since s. 178(2) provides only that a bankrupt is discharged from claims provable in bankruptcy, the two laws can operate side by side without conflict. If a debtor chooses not to drive, the province simply cannot enforce its claim. The same was true if ETR opted not to notify the Registrar of Motor Vehicles of the debtor's failure to pay, in which case s. 22(4) did not apply.

However, s. 22(1) of the 407 Act allowed Ontario to do indirectly what it was implicitly prohibited from doing under s. 178(2) of the BIA. In light of the indirect nature of the conflict, this issue was properly dealt with in the second branch of the federal paramountcy test. The appeal therefore had to be decided on the basis of a frustration of federal purpose analysis. There was agreement with the majority to the extent that it found that s. 22 of the 407 Act frustrated the federal purpose of financial rehabilitation underlying s. 178(2) of the BIA.

Un conducteur a emprunté à de nombreuses occasions une autoroute privée ouverte au public dont l'exploitation était régie par la Loi de 1998 sur l'autoroute 407 (LA407). Le conducteur a accumulé une dette s'élevant à 34 977,06 $. ETR, la compagnie exploitant l'autoroute, a informé le registraire des véhicules automobiles que le conducteur n'avait pas payé sa dette de péage. Le registraire des véhicules automobiles a refusé de renouveler les plaques d'immatriculation du conducteur. Ce dernier a fait une cession de biens et a obtenu une libération absolue. Le conducteur s'est adressé au registraire des faillites en vue de faire déclarer que la réclamation d'ETR avait été annulée au terme du processus de faillite et que le ministère des Transports était tenu d'émettre un permis en sa faveur une fois les frais usuels payés. Une ordonnance en ce sens a été rendue, mais a été annulée avant que l'affaire soit entendue de nouveau en Cour supérieure. Le conducteur a fait valoir qu'ETR ne pouvait invoquer la LA407 dans le but de recouvrer la créance portant sur le péage puisque cette dette avait été annulée aux termes de l'art. 178 de la Loi sur la faillite et l'insolvabilité (LFI). La Cour supérieure a conclu que l'art. 22(4) n'entrait pas en conflit avec la LFI puisqu'elle ne portait pas sur la distribution équitable des biens du failli. La Cour d'appel a accueilli l'appel interjeté par le surintendant

des faillites et a conclu qu'il n'y avait pas de conflit d'application, mais que l'art. 22(4) de la LA407 contrecarrait l'objectif de réhabilitation de la LFI. ETR a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Gascon, J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : L'article 22(4) de la LA407 était constitutionnellement inopérant en vertu de la doctrine de la prépondérance de la législation fédérale dans la mesure où il était invoqué pour recouvrer une réclamation prouvable qui avait été annulée aux termes de l'art. 178(2) de la LFI. On était d'accord avec la Cour d'appel pour dire que l'objectif et l'effet de l'art. 22(4) de la LA407 étaient de permettre à un créancier, en l'occurrence ETR, de recouvrer sa créance portant sur un droit de péage impayé, qui, dans le contexte du présent pourvoi, constituait une réclamation prouvable en faillite. Puisque le mécanisme de recouvrement de créances mis en place par l'art. 22(4) mettait à la disposition du créancier un mécanisme administratif de recouvrement, il était impossible pour ETR d'exercer ce recours tout en se conformant à l'art. 178(2) de la LFI. Alors que le régime provincial faisait en sorte que l'obligation du débiteur survivait à sa libération, la loi fédérale le libérait expressément de cette même obligation. Le conflit n'était pas « indirect » et ne concernait pas une mesure simplement interdite « implicitement » par l'art. 178(2) de la LFI. Les juges majoritaires de la présente Cour n'avaient pas eu recours à une interprétation large de l'art. 178(2) pour conclure à l'existence d'un conflit d'application. Le libellé de l'art. 22(1) laissait une possibilité qu'il n'y ait pas de conflit d'application. L'obligation exprimée à l'art. 22(4) (par l'auxiliaire « *shall* » dans la version anglaise) faisait en sorte que le registraire n'avait d'autre choix que de refuser de valider les certificats d'immatriculation de véhicule. Il n'était pas valable de prétendre que, pour annuler l'existence d'un conflit d'application en l'espèce, le débiteur pouvait renoncer au droit que lui confère la LFI en payant la dette dont il a été libéré ou en acceptant le mécanisme de recouvrement de créances prévu à la LA407 et en renonçant à son droit à un certificat d'immatriculation. En permettant le recouvrement d'une dette dont le failli a été libéré, l'application de l'art. 22(4) entrait en conflit avec l'art. 178(2) de la LFI. L'article 178 constitue un code complet en ce qu'il précise les dettes dont le failli est libéré et celles qui subsistent après la libération de faillite. À l'art. 22(4) de la LA407, la province crée une nouvelle catégorie de dettes exemptées qui ne sont pas énumérées à l'art. 178(1) de la LFI. Ce conflit d'application était contraire à la doctrine de la prépondérance fédérale.

L'application de l'art. 22(4) contrecarrait l'objectif du législateur fédéral de donner aux faillis libérés la possibilité de se réhabiliter financièrement. Alors que l'art. 178(2) vise à délester pour toujours le débiteur du fardeau de l'endettement antérieur à la faillite, l'art. 22(4) permettait à ETR de continuer d'accabler le failli libéré jusqu'à ce qu'il rembourse entièrement la dette, comme s'il n'avait jamais été libéré de la faillite. Permettre l'application de l'art. 22(4) malgré la faillite du débiteur et sa libération absolue subséquente imposait en fait à ce dernier un fardeau financier sans cesse croissant. On n'a pas réussi à établir que l'art. 178(2) favorisait l'atteinte de l'objectif consistant à partager équitablement les biens entre les créanciers, ou que l'application de l'art. 22(4) entravait la réalisation de cet objectif de la faillite.

Côté, J. (souscrivant au résultat des juges majoritaires) (McLachlin, J.C.C., souscrivant à son opinion) : Il n'y avait pas de conflit d'application apparent en l'espèce. L'impossibilité de se conformer aux deux lois en raison d'un conflit exprès constitue la norme applicable. Or, il était possible de se conformer à l'art. 22(1) de la LA407 sans enfreindre l'exigence littérale de l'art. 178(2) de la LFI. Les juges majoritaires de la présente Cour se sont fondés sur l'intention du Parlement de favoriser la réhabilitation financière du failli pour donner une interprétation large qui les a amenés à conclure à l'existence d'un conflit. Puisque l'art. 178(2) de la LFI prévoit seulement qu'une ordonnance de libération libère le failli des réclamations prouvables en matière de faillite, les deux lois peuvent coexister simultanément sans conflit. Si un débiteur décide de ne pas conduire, la province ne peut tout simplement pas recouvrer sa créance. Il en va de même si ETR choisissait de ne pas aviser le registraire des véhicules automobiles du défaut de paiement du débiteur, auquel cas, l'art. 22(4) ne s'appliquait pas.

Toutefois, l'art. 22(1) de la LA407 autorisait la province de l'Ontario à faire indirectement ce qu'il lui était interdit implicitement de faire en vertu de l'art. 178(2) de la LFI. Compte tenu du fait que le conflit était indirect, la question en litige devait être examinée sous le deuxième volet de l'analyse fondée sur la doctrine de la prépondérance fédérale. Il fallait donc trancher le présent pourvoi sur la base d'une analyse de l'entrave à la réalisation de l'objectif fédéral. On était d'accord avec les juges majoritaires dans la mesure où ils ont conclu que l'art. 22 de la LA407 contrecarrait l'objectif du législateur fédéral de réhabilitation financière exprimé à l'art. 178(2) de la LFI.

Table of Authorities

Cases considered by *Gascon J.*:

V. Analysis

16 In the companion appeal, I fully discuss the principles of the doctrine of federal paramountcy, as well as the purposes and relevant provisions of the *BIA*. Like in the companion appeal, there is no dispute here concerning the independent validity of the provincial and federal laws. Section 22 of the *407 Act* and s. 178 of the *BIA* were validly enacted by their respective governments. The only question before the Court is whether their concurrent operation results in a conflict. Building on my comments in the companion appeal, I need only examine s. 22(4) of the *407 Act* and ascertain its true meaning and substantive effect in the context of bankruptcy before applying the doctrine of paramountcy.

A. The 407 Act

17 There is no question that the *407 Act* creates, in substance, a debt enforcement scheme. This was the legislative purpose identified by the motions judge and the Court of Appeal. Section 13(3) of the *407 Act* is also unequivocal:

> **13.** . . .
>
> (3) Sections 16 to 25 apply to the enforcement and collection of tolls and related fees and interest payable under this Act by a person described in subsection (1) but do not apply to the enforcement and collection of such tolls, fees and interest if,
>
> (a) the person is responsible for the payment of such tolls, fees and interest under clause (1) (b); and
>
> (b) the toll device that was affixed to the vehicle in question was obtained without providing information identifying the plate portion of a vehicle permit.

18 In *407 ETR Concession Co. v. Ontario (Registrar of Motor Vehicles)* (2005), 82 O.R. (3d) 703 (Ont. Div. Ct.), the Ontario Divisional Court analyzed the *407 Act* in detail, describing its purpose as well as the nature of the process it establishes:

> As noted above, the purpose of the Act was to privatize the operation of Highway 407 and, given its open-access character, to provide the owner an effective method of toll collection. The legislature recognized that plate denial is a necessary feature of an open-access toll highway given the exceptionally large number of transactions, the small balances and the cost of other means of debt collection... .
>
> . . . . .
>
> Sections 16 to 25 of the Act describe the process by which tolls and other charges are collected and enforced. [Emphasis added; paras. 27 and 29.]

19 The appellant concedes that s. 22(4) is a debt collection and enforcement mechanism. The appellant also does not dispute that, in the context of this appeal, the toll debt being enforced is a claim provable in bankruptcy. However, the appellant argues that the Court of Appeal erred in its analysis of the purpose of s. 22 and the merits of the public-private partnership that the provision implements. It says the purpose of the provincial law, and thus the merits of the public-private partnership, are irrelevant to the paramountcy analysis, which focuses on the operation of the provincial law. In its opinion, the provincial purpose is relevant only at the division of powers stage of the analysis.

20 I disagree with the appellant's assertions. In the companion appeal, I explain that, while the focus of paramountcy is the effect of the provincial law, its purpose cannot be ignored. It forms part of the interpretative exercise that allows the substantive effect of the provincial law to be ascertained. In any event, I do not think the Court of Appeal considered the "merits" of the public-private partnership themselves to be "inadequate". The Court of Appeal merely stated that the "introduction into the mix of a private commercial participant in a public-private enterprise is inadequate ... to remove the evident inconsistency with ... the *BIA*" (para. 111 (emphasis added)). Before the Court of Appeal, ETR was arguing that the enforcement scheme was in the public interest, in that it ensured that the private-public partnership for the operation of the highway flourished. Responding to that argument, the Court of Appeal held that the purpose and effect of s. 22(4) were to enforce the collection of toll debts (para. 108). It rejected the appellant's argument that the private-public partnership, and the fact that it could further the public interest,

could somehow erase the conflict caused by the substantive effect of the scheme. It was in that sense that the public-private partnership was "inadequate ... to remove the evident inconsistency" between the provincial scheme and the *BIA*.

21 I consequently agree with the Court of Appeal that the purpose and the effect of s. 22(4) of the *407 Act* are to allow a creditor, ETR, to enforce the collection of toll debts, which in the context of this appeal constitutes a claim provable in bankruptcy. The remaining issue is whether this enforcement scheme conflicts with s. 178(2) of the *BIA*.

B. Operational Conflict

22 In the companion appeal, I describe what I consider to be a proper application of the operational conflict branch of the paramountcy test: Is it possible to apply the provincial law while complying with the federal law? Here, the Court of Appeal held that there was no operational conflict. In its view, the debtor was not required to pay the toll debt and could forego his right to a vehicle permit (para. 86), while ETR could comply with both laws by declining to pursue its remedy under s. 22 of the *407 Act* (para. 90). Although the Court of Appeal acknowledged that, with respect to the collection of a debt from a discharged bankrupt, the *BIA* said "no", while the *407 Act* said "yes" (para. 91), it nonetheless concluded that, on a strict reading of the test, there was no operational conflict.

23 The appellant does not argue this point before us, agreeing with the Court of Appeal that there is no operational conflict. The respondent takes the position that there is such a conflict, as s. 178(2) of the *BIA* prohibits the enforcement of provable claims after the bankrupt's discharge, while s. 22(4) of the *407 Act* allows ETR to enforce its provable claim despite the discharge. In her concurring reasons, my colleague Côté J. agrees with the Court of Appeal and the appellant. In the companion appeal, I explain why I disagree with her understanding of the application of this first branch of the paramountcy test in a situation like this one.

24 In my view, the respondent is correct on this issue of operational conflict. Pursuant to s. 178(2) of the *BIA*, creditors cease to be able to enforce their provable claims upon the bankrupt's discharge: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605 (S.C.C.), at para. 21. As I indicate in the companion appeal, it is undisputed that a discharge under s. 178 of the *BIA* releases a debtor, thus preventing creditors from enforcing claims that are provable in bankruptcy. They are deemed to give up their right to enforce those claims. This includes both civil and administrative enforcement. In this case, ETR, the creditor, is faced with a clear prohibition under s. 178(2) of the *BIA*. It cannot enforce its provable claim, which has been released by an order of discharge. Since the debt collection mechanism put in place by s. 22(4) provides the creditor with an administrative enforcement scheme, it is impossible for ETR to use that remedy while also complying with s. 178(2): *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 72; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at para. 46. Indeed, ETR's toll debt is not listed as an exemption under s. 178(1), and the resulting financial liability of the debtor cannot survive his or her discharge. As a result, the *407 Act* says "yes" to the enforcement of a provable claim, while s. 178(2) of the *BIA* says "no", such that the operation of the provincial law makes it impossible to comply with the federal law.

25 In other words, while the provincial scheme has the effect of maintaining the debtor's liability beyond his or her discharge, the federal law expressly releases him or her from that same liability. Both laws cannot "apply concurrently" (*Western Bank*, at para. 72) or "operate side by side without conflict" (*Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.), at para. 76); a debtor cannot be found liable under the provincial law after having been released from that same liability under the federal law: *Burrardview Neighbourhood Assn. v. Vancouver (City)*, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.), at para. 82; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.), at para. 41; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at p. 191. I respectfully disagree with my colleague that this conflict is "indirect" or concerns something that is merely "implicitly" prohibited by s. 178(2) of the *BIA* (*Moloney*, para. 92), or that I am resorting to a broad interpretation of s. 178(2) in order to find that an operational conflict exists (para. 36). Under the federal law, the debt is not enforceable; under the provincial law, it is. The inconsistency is clear and definite. One law allows what the other precisely prohibits.

26 In that regard, unlike my colleague, I do not believe that the language of s. 22(1) provides a possibility for there to be no operational conflict (para. 39). Once the Registrar is notified by ETR, as was the case on the facts on this appeal, s. 22(4)

uses mandatory language ("shall"), such that the Registrar has no choice but to refuse to validate the debtor's vehicle permits. From that point in time, the Registrar is left with no discretion to terminate the enforcement process after, for instance, the debtor's discharge in bankruptcy. The Registrar is only required to reinstate the debtor's permits once notified that the debt is paid: ss. 22(6) and 22(7). To suggest that dual compliance with both laws remains possible if ETR declines to pursue its remedy under s. 22 of the *407 Act* would be to turn a blind eye to the factual reality of this case, on the basis of which it was argued. In addition, as I explain in the companion appeal, to suggest that an operational conflict can be avoided in circumstances in which the provincial law does not operate leads, with respect, to a circular reasoning that removes a key condition for consideration of either of the two branches of the paramountcy doctrine, that is, the existence of two valid laws that operate side by side. Nor, as in the companion appeal, is it in my view valid to suggest that, to negate the operational conflict that exists here, the debtor can renounce his right under the *BIA* by paying the released debt or by accepting the debt collection mechanism of the *407 Act* and foregoing his right to a vehicle permit. If that were the case, the situation would no longer be one of a possibility of dual compliance with both laws. Rather, it would be one of "single" compliance with one of the laws, and renunciation of the operation of the other law by one of the actors involved. When the two laws operate side by side, ETR cannot comply with both at the same time, and the provincial law denies the debtor the benefit of the federal law.

27 I therefore conclude that the operation of s. 22(4) to enforce a debt that was discharged in bankruptcy is in conflict with s. 178(2) of the *BIA*. Section 178 is a complete code in that it sets out which debts are released on the bankrupt's discharge and which debts survive the bankruptcy. Through s. 22(4), the province creates a new class of exempt debts that is not listed in s. 178(1). This operational conflict offends the doctrine of federal paramountcy.

C. Frustration of Federal Purpose

(a) Financial Rehabilitation

28 That said, I consider that the operation of s. 22(4) also frustrates Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves. In the companion appeal, I explain this purpose of the *BIA* and its close relationship with the language of s. 178(2), which is aimed precisely at providing the bankrupt with a fresh start. While the intent of s. 178(2) is that the debtor will no longer be encumbered by the burden of pre-bankruptcy indebtedness, s. 22(4) allows ETR to continue burdening the discharged bankrupt until full payment of the debt, as if the discharge in bankruptcy had never occurred.

29 When making his assignment in bankruptcy, Mr. Moore was indebted to ETR in the amount of $34,977.06. This was in November 2007. At the time of the hearing in the Superior Court, that is, in October 2011, the debt had more than doubled to $88,767.83. As time passes, the burden of ETR's debt gets heavier as interest accrues. In early 2011, the interest alone amounted to almost $1,400 per month. This is a crushing financial liability. Yet the more Mr. Moore delays payment of the toll debt, the more unlikely it is that he will ever be able to pay it and recover his vehicle registration privileges.

30 If s. 22(4) is allowed to operate despite the debtor's bankruptcy and subsequent absolute discharge, this effectively creates an ever-increasing financial burden on the debtor. This burden attaches to the debtor despite a discharge in bankruptcy, even though the debtor will most likely never be able to pay ETR's debt in full. The debtor will be forever burdened by a pre-bankruptcy financial liability. This is contrary to Parliament's intention to give discharged bankrupts a fair opportunity to rehabilitate financially, freeing them from past indebtedness.

31 ETR was notified of Mr. Moore's bankruptcy. It chose not to participate in the proceeding. It did not file a proof of claim, nor did it oppose Mr. Moore's discharge. In order to enforce its provable claim, ETR was required to take part, like any creditor, in the bankruptcy process. Had Parliament wished to exempt ETR's toll debt from that process, as well as from the consequences of a discharge, it would have done so expressly in s. 178(1) of the *BIA*. It did not. Therefore, I conclude that s. 22(4), if allowed to operate with respect to toll debts that are discharged in bankruptcy, frustrates the financial rehabilitation purpose of bankruptcy pursuant to s.178(2).

(b) Equitable Distribution

TAB 9

2013 ONSC 1920
Ontario Superior Court of Justice

Ontario (Minister of Finance) v. Clarke

2013 CarswellOnt 4324, 2013 ONSC 1920, 115 O.R. (3d) 33, 227 A.C.W.S. (3d) 628, 44 M.V.R. (6th) 95

Minister of Finance, Plaintiff and Sandra Clarke and Superintendent of Insurance for Ontario, Defendants Superintendent of Bankruptcy, Intervener

Goldstein J.

Heard: November 15, 2012
Judgment: April 12, 2013
Docket: 90-CU-402495

Counsel: Stan Sokol, Hart Schwartz, for Plaintiff
Sandra Clarke, for herself
Mark Taggart, for Intervener

Subject: Public; Torts; Corporate and Commercial; Constitutional; Insolvency
Related Abridgment Classifications
Debtors and creditors
VIII Executions
VIII.2 Writs of execution
VIII.2.a Writ of seizure and sale (fi. fa.)
VIII.2.a.v Expiry of writ
Motor vehicles
XII Accident claims funds
XII.7 Miscellaneous
Headnote
Motor vehicles --- Accident claims funds — Miscellaneous
Minister tried to renew expired writ in relation to judgment against SC, uninsured motorist who had motor vehicle accident — Minister brought motion seeking order permitting renewal of writ — Motion was dismissed on grounds that to do so would violate Bankruptcy and Insolvency Act ("BIA") — Minister appealed — Appeal dismissed — Section 10(1) of Motor Vehicle Accident Claims Act was in conflict with BIA and was inoperative to extent of inconsistency — Even if rational connection could be demonstrated, every judgment debtor still had opportunity to obtain licence as long as they paid something — Discretion undoubtedly existed so that people of modest means will not be unduly penalized, but it meant that even most irresponsible drivers also had opportunity to regain licence, not by taking driving test or driver education, but by paying judgment debt — SC had been able to keep driver's licence by making instalment payments.
Debtors and creditors --- Executions — Writs of execution — Writ of seizure and sale (fi. fa.) — Expiry of writ
Minister tried to renew expired writ in relation to judgment against SC, uninsured motorist who had motor vehicle accident — Minister brought motion seeking order permitting renewal of writ — Motion was dismissed on grounds that to do so would violate Bankruptcy and Insolvency Act ("BIA") — Minister appealed — Appeal dismissed — Section 10(1) of Motor Vehicle Accident Claims Act was in conflict with BIA and was inoperative to extent of inconsistency — Even if rational connection could be demonstrated, every judgment debtor still had opportunity to obtain licence as long as they paid something — Discretion undoubtedly existed so that people of modest means will not be unduly penalized, but it meant that even most irresponsible drivers also had opportunity to regain licence, not by taking driving test or driver education, but by paying judgment debt — SC had been able to keep driver's licence by making instalment payments.

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(3) if the provinces could create their own priorities or affect priorities under the BIA, this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;

(4) the definition of terms such as "secured creditor", if defined under the BIA, must be interpreted in bankruptcy cases as defined by the federal parliament, not the provincial legislatures; provinces cannot affect how such terms are defined for the purposes of the BIA;

(5) in determining the relationship between provincial legislation and the BIA, the form of the provincial interest created must not be allowed to triumph over its substance; provinces are not entitled to do indirectly what they are prohibited from doing directly; and

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the BIA in order to render the provincial law inapplicable; it is sufficient that the effect of provincial legislation is to do so.

50 The parties agree, and it is obvious, that the purposes of the MVA Claims Act and the HTA are not in conflict with the purpose of the BIA.

51 In my view, however, the effect of *Husky Oil* and *AbitibiBowater* is to confirm that a monetary claim must be dealt with through the bankruptcy process. These cases are consistent with the American position as set out in *Perez v. Campbell*. In applying the three-part test set out by Deschamps J. in *AbitibiBowater*, I note: First, there is no doubt that Ms. Clarke became a judgment debtor and the Minister a judgment creditor for the purposes of the BIA. Second, that relationship crystallized prior to Ms. Clarke's consumer proposal. And third, there is obviously a monetary value to the claim. As the Minister conceded, it has no further power to collect the judgment from Ms. Clarke, although the debt itself is not extinguished. Thus, Ms. Clarke's debt is *prima facie* caught by the BIA scheme. That is all conceded by the Minister, but it does not end the argument. The real question is whether the MVA Claims Act is being used to enforce a judgment debt or promote responsible driving.

52 A court must look at the substance of the provincial order rather than the form. In my view, if the Minister's argument is accepted it would amount to creating a carve-out for provincial regulatory or licensing schemes to permit debt enforcement after discharge. In my view, the effect of *AbitibiBowater* in the context of this case is to confirm that regulatory bodies with provable claims that can be reduced to a monetary amount are subject to the bankruptcy process. Thus, the cases of *Caporale, Re* and *Moore* have been overtaken. Regulatory bodies cannot claim a "carve-out" from bankruptcy legislation in order to carry out their duties. No such carve-out exists except where Parliament specifically creates one. Indeed, carve-outs, such as those for provincial student loan schemes, do exist in the BIA. The presence of statutory carve-outs indicates that Parliament intended that claims not specifically carved out in the BIA will be subject to insolvency legislation, as Deschamps J. noted in *AbitibiBowater*:

> 33 If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

53 I also agree with the Superintendent that the Minister and the cases in support of the Minister's position focus on the wrong property. In this case, the property is not Ms. Clarke's driver's licence, but the funds used to make the instalment payments. Those funds are not available to other judgment creditors. The *effect* of the licensing scheme is to alter the scheme of distribution and re-arrange priorities among creditors by taking funds that would otherwise be available to other judgment creditors, *because* the Minister obtains funds outside the bankruptcy process. As Gonthier J. noted in *Husky Oil*, even if it is not the intent of the MVA Claims Act or the HTA to re-arrange priorities, there is no room for an incidental or ancillary effect of provincial legislation if it alters the priorities of creditors or affects the scheme of distribution. I also agree that the licensing scheme offends the "fresh start" principle. Ms. Clarke listed the Fund as creditor when she made her proposal, but the Fund took no steps to file a proof of claim.

54 Finally, with great respect to those with a contrary view, I also believe that there are logical flaws in the Minister's position:

• The Minister seeks to renew a writ of execution in relation to a judgment. Since the Minister concedes that it cannot take further steps to actually enforce the judgment, why seek to renew the writ? A writ of execution is notice to the world that Ms. Clarke is a judgment debtor and the Minister is a judgment creditor. This has nothing to do with safe driving, or the regulation of highways and roads.

• The record shows that virtually all of the correspondence with Ms. Clarke consists of financial disclosure made by Ms. Clarke and letters threatening to suspend her licence unless she makes payments. I excerpt an example of correspondence from the Fund to Ms. Clarke dated October 26, 2010, after the date of her consumer proposal. I do not see how this can be anything other than a collection notice:

> On checking your account, it is noted that you are now in arrears. The sum of $60.00 is required by return mail in order to bring your account up to date.
>
> Failure to bring your repayments up to date by November 5, 2010 will result in the request for an automatic suspension of your driver's licence and the possibility of legal proceedings without further notice.

• I do not see any evidence of rational connection between paying a judgment debt and good driving habits. In a different context, where the government seeks to uphold a law that is not in compliance with the *Canadian Charter of Rights And Freedoms*, it must actually demonstrate (as part of the analysis) a rational connection: *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

• More important, even if a rational connection could be demonstrated, every judgment debtor still has the opportunity to obtain their licence as long as they pay something. This discretion undoubtedly exists so that people of modest means will not be unduly penalized, but it means that even the most irresponsible drivers also have an opportunity to regain their licence - not by taking a driving test or driver education, but by paying a judgment debt. In the case before me, Ms. Clarke has been able to keep her driver's licence by making instalment payments. In the *Moore* case, Mr. Moore, hardly the most sympathetic litigant, would have had the opportunity to keep a vehicle permit as long as he was able to pay something to operator of the 407 highway and a judge approved the payment schedule.

• The Minister's argument that paying something toward the judgment debt promotes responsibility also suffers from a logical flaw: once the debt is paid off, the driver is subject to the same conditions for obtaining a licence as any other driver. It is true, as the Minister argues, that a motorist like Ms. Clarke is subject to monitoring by the Director of the Fund to ensure that she has the financial ability to maintain insurance. That part of the regime is unobjectionable, of course. Once the debt is paid, however, the Minister has no more leverage. In other words, the Minister assumes that an uninsured motorist will always be irresponsible until he or she pays the judgment. A driver shifts from "irresponsible" to "responsible" based only on the fulfillment of the judgment. There is no evidence that a driver shifts from "irresponsible" to "responsible" based on anything else. If Ms. Clarke had won the lottery and paid off the debt, that would have fulfilled the critical condition for renewing the licence without conditions. Obviously serendipitous winning of the lottery does not make a driver more responsible.

• This judgment is not *mandamus* by other means. There are many other ways for the Minister to promote responsibility other than by requiring a payment. The Minister can require ongoing financial disclosure, as it does, or compulsory driver education.

• I do not agree that withholding a driver's licence is similar to withholding a professional licence. The Minister need not issue a licence to an irresponsible driver, any more than the Law Society must permit a bankrupt lawyer who has engaged in professional misconduct lawyer to practice law. Although I found the analysis of Paperny J.A. in *Hover* to be extremely helpful, like Moen J. in *Moloney*, I distinguish the result on the basis that the underlying source of the fines in *Hover* was

professional misconduct, rather than a judgment debt. A professional, like Dr. Hover, is denied a licence as punishment for professional misconduct. Ms. Clarke is not being punished for irresponsible driving but for failing to pay a judgment debt.

• Section 11(2) of the MVA Claims Act permits the making of regulations for the restoration of driver's licences. Ontario Regulation 208/04 made under the MVA Claims Act provides for the financial terms and conditions for the restoration of a licence, including the application form to be approved by the Director of the Fund. The Regulation is directed entirely towards repayment of judgment debts. Several examples of the form filled out by Ms. Clarke are in evidence. The forms are also exclusively directed towards her financial situation. No doubt financial disclosure is important and appropriate, but there are no other terms (such as driver education) related to Ms. Clarke's fitness for driving.

Disposition

55 Section 10(1) of the MVA Claims Act is in conflict with the BIA and is inoperative to the extent of the inconsistency. The appeal is dismissed. No costs shall be payable.

Appeal dismissed.

TAB 10

2012 SCC 67
Supreme Court of Canada

AbitibiBowater Inc., Re

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

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

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

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

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

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

Subject: Insolvency; Environmental
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.1 Provable debts
IX.1.c Contingent claims
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.iv Crown claims

Environmental law
II Liability for environmental harm
II.1 Nuisance
II.1.b Liability in particular cases
II.1.b.iv Miscellaneous

Headnote

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

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Crown claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Environmental law --- Liability for environmental harm — Nuisance — Liability in particular cases — Miscellaneous

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet

formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Faillite et insolvabilité --- Preuve de réclamation — Créances prouvables — Réclamations éventuelles

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Procédures assujetties à la suspension — Créances de l'État

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Droit de l'environnement --- Responsabilité pour dommages causés à l'environnement — Nuisance — Catégories particulières de responsabilité — Divers

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

In 2008, A Inc. experienced financial difficulties and announced the closure of a mill in the province. One year later, A Inc. sought protection under the Companies' Creditors Arrangement Act (CCAA), and a claims procedure order was issued. Province's Minister of Environment and Conservation issued five orders under s. 99 of the Environmental Protection Act (the "EPA orders") requiring A Inc. to submit remediation action plans to the Minister and to complete them. The province then brought a motion for a declaration that the claims procedure order did not bar the province from enforcing the EPA orders.

The trial judge dismissed the province's motion. The trial judge found that the EPA orders remained truly financial and monetary in nature and, as such, were subject to the claims procedure order. The province brought a motion for leave to appeal.

The Court of Appeal held that the appeal had no reasonable chance of success because the trial judge had found as a fact that the orders were financial or monetary in nature, and it denied leave to appeal. The province appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Deschamps J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): The CCAA provides a single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. In light of wording of the CCAA, the legislative history and the purpose of the reorganization process, to exempt environmental orders would be inconsistent with the insolvency legislation. However, courts will not necessarily conclude that all orders will be subject to the CCAA process. Courts must determine whether the facts indicate that the conditions for inclusion in the claims process are met. There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process. First, there must be a creditor. Here, the province identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Here, the environmental damage occurred before the time of the CCAA proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. Here, the province had not yet formally exercised its power to ask for the payment of money. Thus, the question was whether it was sufficiently certain that the EPA orders would eventually result in a monetary claim. The trial judge relied on a unique and inescapable set of facts — including the fact that the province actually intended to perform the remediation work itself and assert a claim against A Inc. — to conclude that it was. The majority held that the trial judge reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. Therefore, the majority confirmed the trial judge's finding that the province was a creditor with a monetary claim that should be subject to the CCAA process.

The majority noted that subjecting an order to the claims process merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. It does not extinguish the debtor's obligation to pay its debts, it does not exempt the

debtor from complying with environmental regulations and it does not invite corporations to restructure in order to rid themselves of their environmental liabilities.

Per McLachlin C.J.C. (dissenting): The CCAA draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised. Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. In narrow circumstances, where a province has done the work or where it is "sufficiently certain" that it will do the work, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the CCAA proceedings. Here, the Minister had neither done the clean-up work nor was it sufficiently certain that he or she would do so. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

Per LeBel J. (dissenting): The only regulatory orders that can be subject to compromise are those which are monetary in nature. The trial judge's decision was not consistent with the principle that the CCAA does not apply to purely regulatory obligations. Based on the evidence before him, the trial judge could not conclude with "sufficient certainty" that the province would perform the remedial work itself. In fact, it appeared that the trial judge was more concerned with the fact that the arrangement would fail if A Inc. was not released from its regulatory obligations. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

En 2008, A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province. Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise. Le ministre provincial de l'Environnement et de la Conservation a prononcé, en vertu de l'art. 99 de l'Environmental Protection Act, cinq ordonnances (les « ordonnances EPA ») contraignant A Inc. à présenter au ministre des plans de restauration et à les réaliser. La province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter les ordonnances EPA.

Le juge de première instance a rejeté la requête de la province. Le juge de première instance a conclu que les ordonnances EPA demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations. La province a déposé une requête en permission d'appeler.

La Cour d'appel a estimé que l'appel n'avait aucune chance raisonnable de succès parce que le juge de première instance avait conclu, comme question de fait, que les ordonnances EPA étaient de nature financière ou pécuniaire, et elle a refusé d'autoriser l'appel. La province a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Deschamps, J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) : La LACC prévoit une procédure unique permettant de traiter la presque totalité des réclamations contre un débiteur devant un même tribunal. Considérant le libellé de la LACC, de l'historique des dispositions législatives et des objectifs du processus de réorganisation, une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Toutefois, les tribunaux ne vont pas nécessairement conclure que toutes les ordonnances seront assujetties au processus régi par la LACC. Les tribunaux doivent déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit y avoir un créancier. En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite. En l'espèce, les dommages environnementaux sont survenus avant que les procédures en vertu de la LACC ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. En l'espèce, la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent. Ainsi, la question était de savoir s'il était suffisamment certain que les ordonnances EPA mèneraient éventuellement à la présentation d'une réclamation pécuniaire. En se fondant sur un contexte factuel unique et dont il ne pouvait pas faire abstraction, y compris le fait que la province avait de fait l'intention d'exécuter les travaux de décontamination elle-même pour ensuite présenter une réclamation contre A Inc., le juge de première instance a conclu que c'était le cas. Les juges majoritaires ont estimé que le juge de première instance a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait en l'espèce. Par conséquent, les juges majoritaires

ont confirmé la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC.

Les juges majoritaires ont fait remarquer que le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Cela n'éteint pas l'obligation du débiteur de payer ses dettes, ni le dégage de son obligation de respecter la réglementation environnementale, ni n'incite les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

McLachlin, J.C.C. (dissidente) : La LACC établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction. Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. En certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la LACC, une réclamation pécuniaire couvrant le coût des travaux de décontamination. En l'espèce, le ministre n'a pas effectué les travaux de décontamination et il n'était pas suffisamment certain qu'il le ferait. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

LeBel, J. (dissident) : Les seules ordonnances réglementaires pouvant faire l'objet d'une transaction sont celles qui sont de nature pécuniaire. La décision du juge de première instance n'était pas conforme avec le principe selon lequel la LACC ne s'applique pas aux exigences purement réglementaires. En se fondant sur la preuve dont il disposait, le juge de première instance ne pouvait pas conclure avec « suffisamment de certitude » que la province exécuterait les travaux de décontamination elle-même. En fait, il semblait que le juge de première instance était davantage préoccupé par le fait que l'arrangement risquait d'échouer si A Inc. n'était pas libérée de ses exigences réglementaires. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

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

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

III. Constitutional Questions

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

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

17 I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) ("2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

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

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

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

IV. Claims under the CCAA

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

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

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

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

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

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

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

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

25 *Sections* 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

> **121.** . . .
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> **135.** . . .
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

27 The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

28 The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

> **11.8**. . . .
>
> (9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

29 The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases, the damage continues to be sustained after the reorganization has been completed.

30 With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

31 However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update", 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

3. The Distinction Between Regulatory Obligations and Claims under the CCAA

70 Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the property has been cleaned up or the matter otherwise resolved.

71 It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

72 The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

73 This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (Alta. C.A.), the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety ... as a charge to the public" (para. 29). He answered the question in the negative:

> The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgement for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
>
> [Emphasis added, para. 33]

74 The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.); *Shirley, Re* (1995), 129 D.L.R. (4th) 105 (Ont. Bktcy.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada Re [Regulators' motions]*, (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

75 Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

76 Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385 (Ont. C.A.), *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where

TAB 11

2016 ONSC 3651
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 21083, 2016 ONSC 3651, 274 A.C.W.S. (3d) 259, 42 C.B.R. (6th) 330

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

In the Matter of a plan of compromise or arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Morawetz J.

Heard: June 2, 2016
Judgment: June 2, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, John MacDonald, Shawn Irving, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz, for Target Corporation
William Sasso, Sharon Strosberg, Jacqueline Horvat, for Pharmacy Franchisee Association of Canada
Susan Philpott, for Employees of Applicants
Alan Mark, Melaney Wagner, Graham Smith, Francy Kussner, for Monitor, Alvarez & Marsal Inc.
Jane Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC
Andrew Hodhod, for Bell Canada
Harvey Chaiton, for Directors and Officers

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Applicants, Canadian operations of T Co., became insolvent and Companies' Creditors Arrangement Act protection was granted — Applicants brought motion for court approval of second amended and restated joint plan of compromise and arrangement, and sought further extension of stay — Motion granted — Amended plan represented equitable balancing of stakeholder interests in accordance with Act, and was fair and reasonable — Amended plan was unanimously approved by affected creditors, which

far exceeded required statutory majority under s. 6(1) of Act — Amended plan was only alternative to bankruptcy — Monitor opined that recoveries under amended plan would be well in excess of those that would have been received upon bankruptcy.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order
Applicants, Canadian operations of T Co., became insolvent and Companies' Creditors Arrangement Act protection was granted — Initial order granted stay of proceedings, which was extended eight times — Applicants brought motion for court approval of second amended and restated joint plan of compromise and arrangement, and sought further extension of stay — Motion granted — Extension of stay period approved — Proceedings under Act had to be extended to allow plan implementation to occur and provide sufficient time for post implementation details — Parties were working in good faith and with due diligence — Sufficient resources were available to fund applicants during proposed extension period.

Table of Authorities

Cases considered by *Morawetz 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.) — followed

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

Sino-Forest Corp., Re (2012), 2012 ONSC 7050, 2012 CarswellOnt 15913 (Ont. S.C.J. [Commercial List]) — referred to

SkyLink Aviation Inc., Re (2013), 2013 ONSC 2519, 2013 CarswellOnt 7670, 3 C.B.R. (6th) 83 (Ont. S.C.J. [Commercial List]) — considered

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

Target Canada Co., Re (2016), 2016 ONSC 316, 2016 CarswellOnt 589, 32 C.B.R. (6th) 48 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 2(1) "debtor company" — considered

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — considered

MOTION by applicant companies for approval of amended plan of arrangement under *Companies' Creditors Arrangement Act* and for extension of stay.

***Morawetz J.* (orally):**

1 Target Canada Co. ("TCC"), the other applicants listed above and certain related partnerships, (collectively, the "Target Canada Entities"), obtained relief under the *Companies' Creditors Arrangement Act*, (the "CCAA") by an Initial Order dated January 15, 2015, (the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this proceeding (the "Monitor"). The reasons which gave rise to the Initial Order are reported as *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) . Those reasons set out the factual background giving rise to the CCAA filing. The Initial Order granted a stay of proceedings until February 13, 2015, which was later extended eight times, most recently to June 6, 2016.

a. Classification and Creditor Approval: The Amended Plan was unanimously approved.

b. Recovery on Bankruptcy: The Monitor has expressed the view that recoveries under the Amended Plan are well in excess of those that would have been received on a bankruptcy of the Target Canada Entities. Recoveries against TCC in a bankruptcy would be 30%, as compared to the expected range of 71 to 80% under the Amended Plan.

c. Alternatives to the Amended Plan: The Amended Plan is the only alternative to bankruptcy.

d. No Oppression of Creditors: I am satisfied that the pre-insolvency rights and priorities of Affected Creditors are respected under the Amended Plan.

e. No Unfairness to Shareholders: Given that Affected Creditors are not being paid in full, there is no unfairness to shareholders in receiving no recovery.

f. Public interest: The Amended Plan resolves the Proven Claims against Target Canada Entities in a manner that is efficient and timely, and which avoids costly litigation.

32 Article 7.1 of the Amended Plan provides for full and final releases in favour of:

a. The Target Canada Released Parties;

b. The Third-Party Released Parties (which includes the Monitor and its affiliates, their directors, officers, employees, legal counsel, agents and advisors, as well as the Pharmacists' Representative Counsel and members of the Consultative Committee and their advisors;

c. It also provides a released in favour of the Plan Sponsor Released Parties, (Target Corporation and its subsidiaries other than the Target Canada Entities and the NE1, the HBC Entities and their respective directors, officers, employees, legal counsel agents and advisors), except in respect of the Landlord Guarantee Claims.

33 Finally, there is also release of the Employee Trust Released Parties.

34 It is accepted that Canadian courts have jurisdiction to sanction plans that containing releases in favour of third parties. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.) the Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release negotiated in favour of a third-party as part of the "compromise" or "arrangement" that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.

35 There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.

36 In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:

a. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b. Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c. Whether the plan could succeed without the releases;

d. Whether the parties being released were contributing to the plan;

e. Whether the release benefitted the debtors as well as the creditors generally;

f. Whether the creditors voting on the plan had knowledge of the nature and the effect of the releases or;

g. Whether the releases were fair and reasonable and not overly broad.

37 (See *Metcalfe, Cline Mining Corp.*, 2015 ONSC 662; and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]).)

38 In determining whether to approve a third-party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA. No single factor set out above will be determinative.

39 (See *Skylink and Cline Mining*.)

40 Courts have approved releases that benefit affiliates of the debtor corporation where the *Metcalfe* criteria is satisfied. In Sino-Forest, the subsidiaries of the debtor company were entitled to the benefit from the release under the plan as they were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors. It is not uncommon for CCAA courts to approve third-party releases in favour of person, such as directors or officers or other third parties, who could assert contribution and indemnity claims against the debtor company.

41 (See *Skylink and Cline Mining.)*

42 In my view, each of the Released Parties has contributed in tangible and material ways to the orderly wind down the Target Canada Entities' businesses. I accept that without the Releases, it is unlikely that all of the Released Parties would have been prepared to support the Amended Plan. The Releases are a significant part of the various compromises that were required to achieve the Amended Plan. They are a necessary element of the global, consensual resolution of this CCAA proceeding.

43 In particular, the economic contributions by Target Corporation, as Plan Sponsor, have demonstrably increased the available recoveries for Affected Creditors, as attested by the Monitor. Target Corporation's material direct and indirect contributions as Plan Sponsor include:

a. subordinating a number of Intercompany Claims against TCC;

b. partially subordinating various other Intercompany Claims;

c. a cash contribution of approximately $25.45 million towards the aggregate Landlord Guaranteed Enhancement;

d. a net cash contribution of approximately $4.1 million to fund the Landlord Non-Guaranteed Creditor Equalization;

e. a cash contribution of $700,000 towards costs of certain Landlord Guaranteed Creditors;

f. funding the Employee Trust in the amount of $95 million.

44 I am satisfied that the Releases are appropriately narrow and rationally connected to the overall purposes of the Amended Plan. The Plan Sponsor Released Parties are not released from the Landlord Guarantee Claims, which are separately resolved in the Landlord Guarantee Creditors Settlement Agreement. Nor will Target Corporation be released under the Amended Plan from any indemnity or guarantee in favour of any Director, Officer or employee.

45 I am also satisfied that the Releases apply to the extent permitted by law and expressly do not apply to liability for criminal, fraudulent or other willful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA.

46 Full disclosure of the Releases was made to the Affected Creditors in the Meeting Order Affidavit, in the Amended Plan and in the Letter to Creditors. The terms of the Release were also disclosed to creditors in the Original Plan. No party has objected to the scope of the Releases as contained in the Amended Plan.

TAB 12

2003 BCSC 376
British Columbia Supreme Court [In Chambers]

Doman Industries Ltd., Re

2003 CarswellBC 538, 2003 BCSC 376, [2003] B.C.W.L.D. 336, [2003] B.C.J. No. 562, 121 A.C.W.S. (3d) 276, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29

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

AND IN THE MATTER OF THE COMPANY ACT R.S.B.C. 1996, c. 62

AND IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT R.S.C. 1985, c. C-44

AND IN THE MATTER OF THE PARTNERSHIP ACT R.S.B.C. 1996, c. 348

AND IN THE MATTER OF DOMAN INDUSTRIES LIMITED, ALPINE PROJECTS LIMITED, DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED, DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN — WESTERN LUMBER LTD., EACOM TIMBER SALES LTD., WESTERN FOREST PRODUCTS LIMITED, WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and QUATSINO NAVIGATION COMPANY LIMITED (PETITIONERS)

Tysoe J.

Heard: March 7, 2003
Judgment: March 7, 2003
Docket: Vancouver L023489

Counsel: M.A. Fitch, Q.C., S. Martin, R. Millar for Petitioners
G. Morawetz, R. Chadwick, J.J.L. Hunter, Q.C. for Ad Hoc Committee of Senior Secured Noteholders
J.F. Dixon for Wells, Fargo, National Association
G.K. Macintosh, Q.C., R.P. Sloman for Herb Doman
R.D. Leong for Attorney General of Canada
W.C. Kaplan, Q.C., P.L. Rubin for CIT Business Credit Canada Inc.
J.I. McLean for Monitor, KPMG Inc.
D.I. Knowles, Q.C., M. Buttery, I. Nordholm for Brascan Financial, Merrill Lynch, Oppenheimer Funds
D.J. Hatter, R. Butler for Her Majesty the Queen in Right of British Columbia
P. Macdonald, G. Gehlen for Toronto Dominion Asset Management Inc., TD Securities Inc., Tordom Co.
K. Zimmer for Petro-Canada
W. Skelly for Pulp, Paper & Woodworkers of Canada, Locals 3 & 8

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.i Court

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Section 11(4) of Companies' Creditors Arrangement Act does not authorize courts to stay proceedings in respect of defaults or breaches which occur after implementation of reorganization or restructuring plan, even if they arise as result of implementation of plan — Words "staying", "restraining" and "prohibiting" in s. 11(4) of Act are not intended to relieve debtor company from performance of affirmative obligations which arise subsequent to implementation of plan of compromise or arrangement — Section 11(4) of Act does not give courts power to grant permanent injunctions as means to permit debtor company to unilaterally and prospectively vary terms of contract to which it is party.

Table of Authorities

Cases considered by *Tysoe J.*:

Dylex Ltd., Re, 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Menegon v. Philip Services Corp., 1999 CarswellOnt 3240, 11 C.B.R. (4th) 262, 39 C.P.C. (4th) 287 (Ont. S.C.J. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., 63 Alta. L.R. (2d) 361, 92 A.R. 81, 72 C.B.R. (N.S.) 1, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

Playdium Entertainment Corp., Re, 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — distinguished

Playdium Entertainment Corp., Re, 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — followed

Smoky River Coal Ltd., Re, 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, 1999 ABCA 179 (Alta. C.A.) — considered

T. Eaton Co., Re, 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331, 1992 CarswellBC 508 (B.C. S.C.) — referred to

Woodward's Ltd., Re, 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

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

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

Words and phrases considered:

staying, restraining and prohibiting

[The words "staying", "restraining" and "prohibiting" in s. 11(4) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 are] not intended . . . to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement.

APPLICATION by debtor group of companies for order authorizing calling of creditor meetings to consider plan of arrangement; APPLICATION by group of secured creditors for order allowing them to vote on plan, order authorizing them to file own plan and other orders relating to invalidity of plan.

***Tysoe J.*:**

11 I next turn my attention to clause (b) of Section 4.12, which is the provision upon which I believe counsel for the Doman Group is relying to prevent Senior Secured Noteholders from acting on their security following the implementation of the Reorganization Plan. Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.

12 The Court is given the power to grant stays of proceedings by s. 11(4) of the *CCAA*, which reads as follows:

> (4) A court may, on an application in respect of a company other than an initial application, make an order on such term as it may impose,
>
> > (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

13 Since the re-emergence of the *CCAA* in the 1980s, the Courts have utilized the stay provisions of the *CCAA* in a variety of situations for a purpose other than staying creditors from enforcing their security or otherwise preventing creditors from attempting to gain an advantage over other creditors. One of the seminal decisions is *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.), where the Court stayed the ability of a joint venture partner of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement.

14 Two other prominent examples are *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), as supplemented at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]). In the *T. Eaton Co.* case, tenants in shopping centres in which Eaton's was also a tenant were prevented during the restructuring period from terminating their leases on the basis of co-tenancy clauses in their leases requiring anchor stores such as Eaton's to stay open. In the *Playdium Entertainment Corp.* decision, the Court approved an assignment of an agreement in conjunction with a sale in a failed *CCAA* proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the *Playdium Entertainment Corp.* case relied on s. 11(4) of the *CCAA*, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.), where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

15 The law is clear that the court has the jurisdiction under the *CCAA* to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in *Playdium Entertainment Corp.* :

> In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency

> defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

16 Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in *Smoky River Coal Ltd., Re*, 1999 ABCA 179 (Alta. C.A.) is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

17 Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the court would decline to exercise its jurisdiction in respect of monetary defaults but this point is academic in the present case because the Doman Group does intend to pay the overdue interest on the Notes upon implementation of the Reorganization Plan.

18 The second issue is whether the court has the jurisdiction to grant a permanent stay to prevent the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on a breach of Section 4.13 of the Trust Indenture to accelerate payment of the indebtedness owed on the Notes. The potential breach under Section 4.13 would be occasioned by the Doman Group granting second ranking security to the Unsecured Noteholders upon the implementation of the Reorganization Plan. I use the term "potential breach" because counsel for the Doman Group takes the position that the granting of this security would not contravene the provisions of Section 4.13.

19 I have decided that I should decline to make a determination of this issue because I did not receive the benefit of detailed submissions on the interpretation of Section 4.13 and the defined terms used in that Section. Counsel for the Doman Group simply argued that the wording was circular or ambiguous and noted that the definition of Permitted Indebtedness could include a refinancing of the Unsecured Notes. Counsel for the Senior Secured Noteholders Committee took the position, without elaboration, that Section 4.13 would be breached if the proposed security were to be granted. If the granting of the security would not contravene Section 4.13, then it would not be necessary for the court to grant a permanent stay preventing the acceleration of the indebtedness owing on the Notes as a result of the granting of the security and the issue would be academic. In my opinion, it is not appropriate for me to decide a potentially academic issue and I decline to do so.

20 The third issue is whether the court has the jurisdiction to effectively stay the operation of Section 4.16 of the Trust Indenture. Although I understand that there is an issue as to whether the giving of 85% of the equity in the Doman Group to the Unsecured Noteholders as part of the reorganization would constitute a change of control for the purposes of the current version of the provincial forestry legislation, counsel for the Doman Group conceded that it would constitute a Change of Control within the meaning of Section 4.16.

21 The language of s. 11(4) of the *CCAA*, on a literal interpretation, is very broad and the case authorities have held that it should receive a liberal interpretation in view of the remedial nature of the *CCAA*. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

22 In my view, there are numerous purposes of stays under s. 11 of the *CCAA*. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial

affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementation of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

23 In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

24 Section 11(4) utilizes the verbs "staying", "Restraining" and "prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This wording is not intended, in my view, to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement. In the context of this case, the Doman Group is endeavouring to rely on s. 11(4) to relieve itself of the obligation to make an offer to repurchase the Senior Secured Notes upon a Change of Control. In my opinion, this goes beyond any liberal interpretation of s. 11(4).

25 Counsel for Doman Group submitted that the proposed injunction is no more than a restriction upon an acceleration clause. Even if that is the case, it is an acceleration clause which does not become operative until after the restructuring has been completed. It is not a provision which the Senior Secured Noteholders are entitled to enforce as a result of an event of a default or breach occurring or existing prior to or during the restructuring period.

26 There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.

27 Counsel for the Doman Group also submitted that the court has the inherent jurisdiction to restrain the Doman Group from making the offer under Section 4.16 of the Trust Indenture, much in the same way as I exercised the court's inherent jurisdiction in *Woodward's Ltd.*, prior to the enactment of s. 11.2 of the *CCAA* to restrain third parties from calling on letters of credit issued by a financial institution at the instance of the debtor company. The court has the inherent jurisdiction during the restructuring period to "fill in gaps" in the *CCAA* or to "flesh out the bare bones" of the *CCAA* in order to give effect to its objects: see *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) at p. 93 and *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) at p. 110. In my view, the Doman Group is not asking the court to fill in gaps in the *CCAA* during the restructuring period. Rather, it is asking the court to go beyond the type of stay contemplated by Parliament when it enacted s. 11(4) of the *CCAA*.

28 In the event that I am mistaken and the court does have the jurisdiction to grant a stay in respect of the operation of Section 4.16 of the Trust Indenture, I would exercise my discretion against the granting of such a stay on the basis of the current circumstances. The absence of a permanent injunction in relation to Section 4.16 will not necessarily frustrate the restructuring efforts of the Doman Group. Apart from any compromise which may be negotiated between the Doman Group and the Senior Secured Noteholders, it is far from a certainty that the Senior Secured Noteholders will accept an offer made by the Doman Group under Section 4.16 to purchase the Notes at 101% of their face value. Indeed, counsel for the Doman Group suggested that in light of the 12% interest rate applicable to the Notes and prevailing interest rates, the Noteholders would not want to accept the offer of a 1% premium because they would not be able to reinvest the funds at an interest rate as high as 11%. Counsel went so far as to characterize the right of repurchase and associated premium as "illusory benefits". In addition, it may be possible for the Doman Group to restructure its financial affairs in a fashion which does not involve a Change of Control while the Senior Secured Notes are outstanding. Finally, the Doman Group has not made any effort to negotiate an accommodation with the Senior Secured Noteholders.

TAB 13

I.I.C. Ct. Filing 105032818002

AT&T Canada Inc. et al — Court File Nos. 02-CL-4715, 03-CL-4874
34. — **CCAA Sanction Order of Farley, J. made February 25, 2003**

Re AT&T Canada Inc., AT&T Canada Corp., AT&T Canada Telecom Services Company, AT&T Canada Fiber Company, Metronet Fiber US Inc., Metronet Fiber Washington Inc., Netcom Canada Inc., Court File No. 02-CL-4715 (Superior Court of Justice, Commercial List, Toronto, Ontario)

— CCAA Sanction Order of Farley, J. made February 25, 2003

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended and In the Matter of a Plan of Compromise or Arrangement of AT&T Canada Inc., AT&T Canada Corp., AT&T Canada Telecom Services Company, AT&T Canada Fibre Company, Metronet Fiber US Inc., Metronet Fiber Washington Inc., and Netcom Canada Inc. Applicants

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 25{ th} DAY
	)	
JUSTICE FARLEY	)	OF FEBRUARY, 2003

— Order

THIS MOTION made by the Applicants for an Order sanctioning the consolidated plan of arrangement and reorganization of the Applicants dated January 20, 2003 (the "Plan"), as approved by the required majorities of Affected Creditors on February 20, 2003, was heard this day at 393 University Avenue, Toronto, Ontario

ON READING the Affidavit of David Lazzarato sworn February 20, 2003 and the exhibits thereto (the "Lazzarato Affidavit"), the Fifth Report to Court of KPMG Inc., in its capacity as Monitor of the Applicants (the "Monitor") dated February 12, 2003, the Sixth Report of the Monitor dated February 21, 2003 and the Affidavits of Service of Suzy Monteiro dated February 3, 2003, Roy Shanks dated February 19, 2003 and Pat McHugh dated February 19, 2003, of Georgeson Shareholder, filed, and on hearing the submissions of counsel for the Applicants, KPMG Inc. in its capacity as Monitor, the ad hoc committee of noteholders, AT&T Corp., and the board of directors of AT&T Canada Inc., no one appearing for the remainder of the service list, although duly served with the motion record as appears from the affidavit of service of Rosa Pedretti sworn February 21, 2003.

Definitions

1. *THIS COURT ORDERS* that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Plan.

Service

2. *THIS COURT ORDERS AND DECLARES* that there has been good and sufficient service and delivery of the notice of the Meeting, the Plan and the information circular in connection therewith to the Affected Creditors and that the Meeting was duly convened and held, all in conformity with the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and the Orders of this Honourable Court made in these proceedings.

3. *THIS COURT ORDERS* that the time for service of the Notice of Motion and the Motion Record in respect of this Motion be and is hereby abridged so that this motion is properly returnable today and that any further service of the Notice of Motion and the Motion Record upon any interested party is hereby dispensed with.

Sanction of Plan

4. *THIS COURT ORDERS AND DECLARES* that the Applicants have complied with the provisions of the CCAA and the Orders of this Honourable Court made thereunder in all respects.

5. *THIS COURT ORDERS AND DECLARES* that the Plan, attached hereto as Schedule "A", is hereby sanctioned and approved pursuant to section 6 of the CCAA.

6. *THIS COURT ORDERS AND DECLARES* that the Applicants have acted in good faith and with due diligence and that the Plan and all the terms and conditions of, and matters, transactions, corporate reorganizations and proceedings contemplated by, the Plan are fair and reasonable with respect to the Applicants and the persons to whom the New Shares and cash will be issued and distributed in exchange for their Affected Claims.

Plan Implementation

7. *THIS COURT ORDERS* that, upon the filing with this Court of the Monitor's Certificate on the Plan Implementation Date in accordance with the terms of the Plan, stating that all of the conditions precedent (the "Conditions Precedent") to the implementation of the Plan set out in Section 6.4 of the Plan have been satisfied ("Plan Implementation"), the Conditions Precedent shall be and be deemed to be satisfied and the Plan shall be implemented in accordance with its terms.

8. *THIS COURT ORDERS* that the Applicants, 6067760 Canada Inc. (referred to in the Plan as New PublicCo) ("6067760") and 6041027 Canada Inc. (referred to in the Plan as New OpCo) ("6041027") are authorized and directed, at the Effective Time, to take all actions necessary or appropriate to enter into, adopt, execute, deliver, implement and consummate the contracts, instruments, releases and all other agreements or documents to be created or which are to come into effect in connection with the Plan and such actions are hereby approved, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of any of the Applicants, 6067760 or 6041027. Further, to the extent not previously given, all necessary approvals to take such actions shall be deemed to have been obtained from the directors or the shareholders of the relevant company, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution, and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders in respect of any of the steps contemplated by the Plan shall be effective or shall have any force or effect.

9. *THIS COURT ORDERS AND DECLARES* that, upon Plan Implementation, the Plan and the compromises, transactions, releases and the reorganization effected thereby are approved, binding and effective in accordance with the provisions of the Plan, effected in the sequential order contemplated in Section 5.8 of the Plan, beginning as at the Effective Time, and shall enure to the benefit of and be binding upon the Applicants and the Affected Creditors and their respective heirs, executors, administrators, legal personal representatives, successors and assigns and all other Persons affected by the Plan.

10. *THIS COURT ORDERS* that, as at the Effective Time, and in the sequential order contemplated in Section 5.8 of the Plan, all Affected Claims of any nature against the Applicants shall be assigned and deemed to be transferred to 6067760 in accordance with the Plan and the ability of an Affected Creditor to proceed against the Applicants or 6067760 shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims are hereby permanently stayed, subject only to the right of Affected Creditors to receive the distributions in respect of Affected Claims in accordance with the Plan and the Claims Procedure Order.

11. *THIS COURT ORDERS* that, without limiting the provisions of the Claims Procedure Order, (a) an Affected Creditor that did not receive a Notice of Claim or file a Proof of Claim in accordance with the provisions of the Claims Procedure Order is forever barred from making any Claim against the Applicants and shall not be entitled to any distribution under the Plan, and that such Affected Creditor's Claim is forever extinguished; and (b) an Affected Creditor that did receive a Notice of Claim and did not file a Notice of Dispute of Claim in accordance with the provisions of the Claims Procedure Order is forever barred from proving an Affected Claim except for such Affected Creditor's Claim set out in such Notice of Claim.

12. *THIS COURT ORDERS AND DECLARES* that distributions from the Cash Pool and the Creditors' Equity Pool in relation to any Disputed Distribution Claim in existence at the Plan Implementation Date will be held in escrow with the Transfer Agent (and shall not form part of the assets of the Applicants, 6067760 or 6041027) pending final adjudication or settlement of the dispute and shall not be distributed until the Disputed Distribution Claim is finally resolved in accordance with the Claims Procedure Order. Distributions that are not cashed by the relevant Affected Creditor within 6 years of being issued shall revert back to 6067760. To the extent that any Disputed Distribution Claim is resolved at an amount which is less than

the amount of funds for the Cash Pool held in escrow by the Transfer Agent in respect of such Disputed Distribution Claim, and such funds held in escrow are not further required to protect in full other Disputed Distribution Claims pending their final resolution, the Applicants shall be entitled, at their discretion, to direct from time to time the Transfer Agent to make further distributions of such funds on account of Distribution Claims.

13. *THIS COURT ORDERS* that the Applicants shall and are hereby authorized to make payment to Her Majesty in Right of Canada or any Province in respect of Crown Priority Claims, as set out in Section 3.4 of the Plan, if any, within six (6) months of the date of this Order.

14. *THIS COURT ORDERS* that the Administrative Charge (as defined in the Initial CCAA Order) shall be terminated, discharged and released as against the Applicants and

— Schedule "A" — The Plan

Consolidated Plan of Arrangement and Reorganization ("Plan") of the Applicants Dated January 21, 2003

IS POSTED SEPARATELY ON THE WEBSITE

their present and future Property (as defined in the Initial CCAA Order) as of the Effective Time in the order contemplated by Section 5.8 of the Plan.

15. *THIS COURT ORDERS* that the D&O Charge (as defined in the Initial CCAA Order) shall be terminated, discharged and released as against the Applicants and their present and future Property as of the Effective Time in the order contemplated by Section 5.8 of the Plan.

16. *THIS COURT ORDERS* that, from and after Plan Implementation, the Applicants shall not be required to maintain the Segregated Accounts (as defined in the Initial CCAA Order).

17. *THIS COURT ORDERS AND DECLARES* that the articles of AT&T Canada are amended in accordance with the AT&T Canada Articles of Reorganization attached as Schedule "B" (to which the Plan will be attached), with effect from and after the Effective Time, in accordance with the provisions of the Plan, effected in the sequential order contemplated in Section 5.8 of the Plan, pursuant to Section 191 of the CBCA, including, *inter alia*, as follows:

(a) to provide that the board of directors of AT&T Canada shall be fixed at nine directors and shall consist of the persons referred to in paragraph 19 below;

(b) to reorganize the authorized capital of AT&T Canada, issue 10,000 new voting common shares to 6067760 which will be validly issued and outstanding as fully-paid and non-assessable on the Plan Implementation Date and cancel all of the Existing AT&T Canada Equity; and

(c) to change the corporate name of AT&T Canada to AT&T Canada Limited, with a French name of AT&T Canada Limitée.

18. *THIS COURT ORDERS* that AT&T Canada is authorized and directed to file the AT&T Canada Articles of Reorganization with the Director appointed under section 260 of the CBCA (the "Director") at the time contemplated in the Plan.

19. *THIS COURT ORDERS* that Gerald E. Beasley, Purdy Crawford, William A. Etherington, Deryk I. King, Ian D. Mansfield, Ian M. McKinnon, John T. McLennan, Jane Mowat and Daniel F. Sullivan be appointed as members of the New AT&T Canada Board of Directors as of the Effective Time in the order contemplated by Section 5.8 of the Plan. Further, Mr. Beasley, Mr. King, Mr. McKinnon and Ms. Mowat shall be deemed to have been elected by the holders of the Limited Voting Shares.

20. *THIS COURT ORDERS AND DECLARES* that the New Shares to be issued by 6067760 to the Affected Creditors pursuant to the Plan will be validly issued and outstanding as fully-paid and non-assessable on the Plan Implementation Date, and the amount of stated capital of 6067760 shall be determined in accordance with the Plan.

21. *THIS COURT ORDERS* that, from and after the Effective Time, and for all purposes of the Plan and the New PublicCo Articles, the Residency Declaration, the Acquisition Rights Agreement and the Shareholders Rights Plan, the references therein to (a) "Common Shares" shall be deemed to refer to and be redefined as "Class A Voting Shares" and (b) "Limited Voting Shares" shall be deemed to refer to and be redefined as "Class B Limited Voting Shares", and the New PublicCo Articles shall be filed accordingly.

22. *THIS COURT ORDERS AND DECLARES* that, on the Plan Implementation Date, 6067760 shall have the full benefit of all Residency Declarations received by the Transfer Agent on or prior to the Plan Implementation Date and shall be entitled to rely upon them, even if such Residency Declarations were given or received by the Transfer Agent prior to the incorporation of 6067760.

23. *THIS COURT ORDERS* that, at or before the Effective Time and in accordance with Sections 4.1(c) and 5.8 of the Plan and the Agency Distribution Agreement (as defined in the Lazzarato Affidavit) between 6067760, AT&T Canada and the Transfer Agent, 6067760 shall transfer the Cash Pool and the Creditors' Equity Pool to the Transfer Agent and the Cash Pool and the Creditors' Equity Pool shall be and shall be deemed to be held by the Transfer Agent for the benefit of the Affected Creditors entitled to share in such pools as of the Effective Time. The Transfer Agent shall then deliver the appropriate aggregate amount of pro rata shares of the Cash Pool and the Creditors' Equity Pool to DTC or CDS for distribution to each Affected Creditor who holds Notes through DTC or CDS respectively. The Transfer Agent shall also deliver the appropriate aggregate amount of pro rata shares of the Cash Pool and the Creditors' Equity Pool to each Affected Creditor who is entitled to receive such pro rata shares that is not a Noteholder or does not hold Notes through DTC or CDS. 6067760 and the Applicants shall have no liability or obligation in respect of cash payments from the Cash Pool, or deliveries of New Shares from the Creditors' Equity Pool, to participants of DTC or CDS or to beneficial holders of Notes or to Affected Creditors that are not Noteholders, once the transfer of the Cash Pool and the Creditors' Equity Pool to the Transfer Agent has been completed. Without limiting the effect of the immediately preceding sentence, 6067760 and the Applicants will take such steps as may be reasonably required to facilitate timely distributions to Affected Creditors.

24. *THIS COURT ORDERS* that, for Notes held by DTC or CDS, cash payments and the delivery of the New Shares will be made through the established facilities of DTC or CDS, to DTC or CDS participants (the "Participant Holders"), upon surrender of the Notes by DTC or CDS. The Participant Holders will in turn make the cash payments and deliveries, as applicable, to the beneficial holders of the Notes as of the Record Date pursuant to standing instruments and customary practices.

25. *THIS COURT ORDERS* that, after all of the distributions to Affected Creditors pursuant to and in accordance with the Agency Distribution Agreement have been completed, and upon the filing with the Court of a Certificate from an officer of the Applicants attesting that such distributions have been effected on the Plan Implementation Date, the trust indentures governing the issuance of the Notes to the Noteholders (the "Trust Indentures") shall be cancelled, and the obligations of the Indenture Trustees, the Bank of New York and CIBC Mellon Trust Company, pursuant to the Trust Indentures shall be terminated and at an end. Upon the cancellation of the Trust Indentures, the Indenture Trustees and their legal counsel shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert against the Indenture Trustees and their legal counsel in respect of any act or omission arising out of or in connection with the CCAA Proceedings and the CBCA Proceedings, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date, provided that nothing herein shall release an Indenture Trustee if the Indenture Trustee is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud.

26. *THIS COURT ORDERS* that distributions from the Cash Pool and the Creditors' Equity Pool to Affected Creditors who are employees and are entitled to receive such distributions shall be net of any statutory deductions, repayments, overpayments, remittances or withholdings (the "Statutory Deductions") and the amount of the Statutory Deductions shall first be deducted from the cash distribution payable to such employees.

Stay of Proceedings

27. *THIS COURT ORDERS* that, subject to further Order of this Court, the Stay Period under the Initial CCAA Order be and it is hereby extended to and including the Plan Implementation Date.

28. *THIS COURT ORDERS AND DECLARES* that, subject to the performance by the Applicants of their obligations under the Plan, and except to the extent, if any, expressly contemplated by the Plan or this Order, all obligations or agreements (including without limitation, leases) to which any one of the Applicants is a party (and which have not been or are not otherwise assigned) shall be and remain in full force and effect, unamended, as at the Plan Implementation Date unless terminated or repudiated by the Applicants pursuant to the Initial CCAA Order, and no Person party to any such obligation or agreement shall, on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy (including any right of set-off, dilution, buy-out, divestiture, forced sale, option or other remedy) or make demand under or in respect of any such obligations or agreements, by reason of:

(a) any event which occurred prior to the Commencement Time and is not continuing after the Plan Implementation Date or which is or continues to be suspended or waived under the Plan, which would have entitled any other Person party thereto to enforce those rights or remedies;

(b) the fact that the Applicants have sought or obtained relief under the CCAA, the CBCA or the *U.S. Bankruptcy Code*;

(c) any default or event of default arising as a result of the financial condition or insolvency of the Applicants, including any ongoing possible insolvency by reason of the restructuring, settlement or subordination of the AT&T Canada Canadian Inter-Company Indebtedness and the deemed acquisition of the Affected Claims by 6067760 and the continuance of the existence of such Affected Claims as restructured or settled under the Plan;

(d) the effect upon the Applicants of the completion of any of the transactions contemplated under the Plan;

(e) any change in the control of the Applicants arising from the implementation of the Plan; or

(f) any compromises, settlements, restructurings or reorganizations effected pursuant to the Plan.

29. *THIS COURT ORDERS* that, from and after Plan Implementation, all Persons shall be deemed to have waived any and all defaults of the Applicants then existing or previously committed by the Applicants, or caused by the Applicants, any of the provisions hereof or steps contemplated hereby, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, guarantee, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "Agreement"), existing between such Person and the Applicants or any other Person and any and all notices of default, demands for payment or any step or proceeding taken or commenced in connection therewith under any Agreement shall be deemed to be rescinded and of no further force or effect, provided that nothing herein shall excuse or be deemed to excuse the Applicants from performing their obligations under the Plan. Nothing herein shall be deemed to be a waiver of defaults by the Applicants under the Plan and related documents.

30. *THIS COURT ORDERS* that, until further order of this Court, any and all Persons shall be and are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including, without limitation, administrative hearings or orders, declarations or assessments, against any or all past, present and future directors and officers of the Applicants in respect of any Claim.

Relationship with AT&T Corp.

31. *THIS COURT ORDERS* that, by no later than September 9, 2003 and in accordance with the existing brand license agreements with AT&T Corp., which were approved by Order of this Honourable Court dated January 17, 2003, the corporate names of 6067760, 6041027 and AT&T Canada shall be amended.

32. *THIS COURT ORDERS* that 6067760, 6041027 and AT&T Canada are directed to file with the Director articles of reorganization, arrangement or amendment to give effect to such change of name without requiring any resolution or special resolution of shareholders which shall be deemed to have been given.

The Monitor

33. *THIS COURT ORDERS AND DECLARES* that the Monitor has satisfied all of its obligations required pursuant to the CCAA and the CCAA Proceedings and that the Monitor has no liability in respect of any information disclosed in the CCAA Proceedings.

34. *THIS COURT ORDERS AND DECLARES* that, upon filing of the Monitor's Certificate in accordance with the terms of the Plan, KPMG Inc. shall be and be deemed to be discharged from its duties as Monitor of the Applicants, effective on Plan Implementation, subject to completing its duties pursuant to:

(a) this Order;

(b) the Claims Procedure Order dated November 27, 2002, as amended;

(c) subparagraph 23(g) of the Initial CCAA Order; and

(d) any other assistance as ordered by the Court upon a motion duly served on the Applicants and the Monitor.

35. *THIS COURT ORDERS* that, effective on Plan Implementation, any and all claims against the Monitor, in connection with the performance of its duties as Monitor up to and including Plan Implementation, shall be and they are hereby stayed, extinguished and forever barred, and upon the Monitor completing its duties under each subsection of paragraph 34 above (the "Remaining Duties") and filing a Certificate with the Court stating that a Remaining Duty or the Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such duty or duties, all claims against the Monitor in connection with the performance of the Remaining Duty or Remaining Duties, as the case may be, shall be and they are hereby stayed, extinguished and forever barred, and the Monitor shall have no liability in respect thereof except for any liability arising out of gross negligence or wilful misconduct on the part of the Monitor.

36. *THIS COURT ORDERS AND DECLARES* that no action or other proceeding shall be commenced against KPMG Inc. in any way arising from or related to its capacity or conduct as Monitor, except with prior leave of this Court on notice to KPMG Inc., and upon further order securing, as security for costs, the substantial indemnity costs of KPMG Inc. in connection with the proposed action or proceeding.

Releases

37. *THIS COURT ORDERS AND DECLARES* that on the Plan Implementation Date, in accordance with and pursuant to Section 5.8(v) of the Plan, each and every present and former officer and director, employee, auditor, financial advisor, legal counsel and agent of the Applicants, the Ad Hoc Committee of Noteholders and each of its members (including members of the Restricted Committee) and its legal counsel and financial advisor, and the Monitor and its legal counsel (individually, a "Released Party") shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert, including, without limitation, any and all claims in respect of potential statutory liabilities of the former and present directors and officers of the Applicants, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date relating to, arising out of or in connection with Claims, the business and affairs of any of the Applicants, the issue of any securities by any one of the Applicants, the Plan, the CCAA Proceedings, the CBCA Proceedings and the US Proceedings; provided that nothing herein shall release or discharge a Released Party if the Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or where the claim is against a director of one or more of the Applicants and is a claim excepted pursuant to section 5.1(2) of the CCAA.

Additional Provisions

38. *THIS COURT ORDERS* that this Order shall have full force and effect in all provinces and territories in Canada and abroad and as against all Persons against whom it may otherwise be enforceable.

39. *THIS COURT ORDERS* that the Applicants, the Monitor or any Affected Creditor may apply to this Court for directions or to seek relief in respect of any matter arising out of or incidental to the Plan or this Order, including without limitation the interpretation of this Order and the Plan or the implementation thereof, and for any further Order that may be required, on notice to any party likely to be affected by the Order sought or on such notice as this Court orders.

40. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including, without limitation, the assistance of the Supreme Court of Nova Scotia, the New Brunswick Court of Queen's Bench and any other court in Canada pursuant to section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court or any judicial, regulatory or administrative body of the United States of America and the states or other subdivisions of the United States of America and of any nation or state to act in aid of and to be complementary to this court in carrying out the terms of this Order.

— Schedule "B" — Articles of Reorganization

Industry Canada / Industrie Canada
Canada Business Corporations Act / Loi canadienne sur les sociétés par actions

FORM 14
ARTICLES OF REORGANIZATION
(SECTION 191)

FORMULE 14
CLAUSES DE RÉORGANISATION
(ARTICLE 191)

1 -- Name of Corporation - Dénomination de la société

AT&T CANADA INC.

2 -- Corporation No. - N° de la société

3 -- In accordance with the order for reorganization, the articles of incorporation are amended as follows:

Conformément à l'ordonnance de réorganisation, les statuts constitutifs sont modifiés comme suit :

In accordance with the provisions of the Consolidated Plan of Arrangement and Reorganization attached hereto as Schedule III, and effected in the sequential order contemplated in section 5.8 of such Plan, beginning at the Effective Time (as defined in such Plan):

1. to create an unlimited number of Common Shares with the rights, privileges, restrictions and conditions attaching thereto as set forth in Schedule "A" hereto.

2. to provide that the Board of Directors shall be fixed at nine (9) directors;

3. to cancel all the issued Class A Voting Shares, Class B Non-Voting Shares and Preferred Shares without compensation or any repayment of capital in respect thereof;

4. to cancel all issued and outstanding warrants, options and agreements to purchase any Class A Voting Shares, Class B Non-Voting Shares or Preferred Shares, whether vested or not.

5. to remove the authorized but unissued Class A Voting Shares, Class B Non-Voting Shares and Preferred Shares and all the rights, privileges, restrictions and conditions attaching thereto;

6. to declare that the capital of the Corporation after giving effect to the foregoing consists of an unlimited number of Common Shares with the rights, privileges, restrictions and conditions attaching thereto as set forth in Schedule "A" hereto; and

7. to change the name of the Corporation to "AT&T Canada Limited/AT&T Canada Limitée.

Date	Signature	Title - Titre

IC 3409 (1998/11)

FOR DEPARTMENTAL USE ONLY - À L'USAGE DU MINISTÈRE SEULEMENT
Filed - Déposée

— Schedule "A" — Share Conditions of Common Shares

1. — Voting Rights

Each holder of common shares shall be entitled to receive notice of and to attend all meetings of shareholders of the Corporation and to vote thereat, except meetings at which only holders of a specified class of shares (other than common shares) or specified series of shares are entitled to vote. At all meetings of which notice must be given to the holders of the common shares, each holder of common shares shall be entitled to one vote in respect of each common share held by such holder.

2. — Dividends

The holders of the common shares shall be entitled, subject to the rights, privileges, restrictions and conditions attaching to any other class of shares of the Corporation, to receive any dividend declared by the Corporation.

3. — Liquidation, Dissolution or Winding-up

The holders of the common shares shall be entitled, subject to the rights, privileges, restrictions and conditions attaching to any other class of shares of the Corporation, to receive the remaining property of the Corporation on a liquidation, dissolution or winding-up of the Corporation, whether voluntary or involuntary.

— Schedule III — Consolidated Plan of Arrangement and Reorganization

[Plan to be attached]

[Not attached]

TAB 14

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029177-201, 500-09-029190-204
(500-11-057716-199)

DATE: November 11, 2020

BEFORE THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.

***IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT OF*:**

Nº : 500-09-029177-201

VICTOR CANTORE
APPLICANT – Objecting Party
v.

NEMASKA LITHIUM INC.
and
NEMASKA LITHIUM WHABOUCHI MINE INC.
and
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
and
NEMASKA LITHIUM P1P INC.
and
NEMASKA LITHIUM INNOVATION INC.
RESPONDENTS – Debtors
and
PRICEWATERHOUSECOOPERS INC.
IMPLEADED PARTY – Monitor
and
INVESTISSEMENT QUÉBEC
and
THE PALLINGHURST GROUP
and
OMF FUND II (K) LTD.

OMF FUND II (N) LTD.
and
FMC LITHIUM USA CORP.
and
BRIAN SHENKER
IMPLEADED PARTIES – Impleaded parties

***IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF*:**

Nº : 500-09-029190-204

BRIAN SHENKER
APPLICANT – Impleaded party
v.

NEMASKA LITHIUM INC.
and
NEMASKA LITHIUM WHABOUCHI MINE INC.
and
NEMASKA LITHIUM SHAWINIGAN TRANSFORMATION INC.
and
NEMASKA LITHIUM P1P INC.
and
NEMASKA LITHIUM INNOVATION INC.
RESPONDENTS – Debtors
and
PRICEWATERHOUSECOOPERS INC.
IMPLEADED PARTY – Monitor
and
INVESTISSEMENT QUÉBEC
and
THE PALLINGHURST GROUP
and
OMF FUND II (K) LTD.
OMF FUND II (N) LTD.
and
FMC LITHIUM USA CORP.
IMPLEADED PARTIES – Impleaded parties
and
VICTOR CANTORE
IMPLEADED PARTY – Opposing creditor

[16] After reviewing the Monitor's report and uncontradicted testimony, the CCAA judge dismissed the Cantore objections and concluded that the Nemaska entities had acted in good faith and with the required diligence, and that the approval of the RVO was the best possible outcome in light of the alternatives, being : (i) the realization of the rights held by secured creditors, (ii) the suspension of the restructuring process to attempt a new SISP at a high cost with an uncertain outcome in an uncertain market that had previously been thoroughly canvassed and had led to a single acceptable bid, or (iii) the bankruptcy of the debtor companies.

[17] He underlined the catastrophical impact of these alternatives on all stakeholders being the employees, creditors, suppliers, the Cree community and local economies.

[18] As far as the various arguments raised by Cantore are concerned, the CCAA judge pointed out that his attorney had conceded that his client would not have continued to oppose the RVO if his *sui generis* rights had been settled and incorporated into an offer to be approved by the Court.

[19] The CCAA judge dismissed Cantore's argument regarding the Court's limited authority to grant a vesting order, stating that the terms « *Sell or otherwise dispose of assets outside the ordinary course of business* » under subsection 36 (1) CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*.[6]

[20] He insisted that this would be particularly appropriate, where the proposed RVO brings an outcome to creditors more favourable than the alternatives and where available tax attributes contribute to significantly improve the offer, to eventually bring a greater distribution to the creditors.

[21] The CCAA judge also insisted on the fact that the expungement of real rights was contemplated by subsection 36(6) and was a necessary condition to the implementation of a solution, and served to prevent a veto on the part of the holders of those real rights.

[22] The CCAA judge further held that the offer did not constitute a plan of arrangement subject to prior creditor approval and that the residual companies would be submitting a plan of arrangement to the remaining creditors for a vote once the first step, being the acquisition of the Nemaska shares by the impleaded parties, is accomplished.

[23] He dismissed the argument of a potential violation of the applicable securities laws, insisting on the fact that the issue had become moot, given the written confirmation obtained from a representative of the Autorité des marchés financiers that

6 See Supra note 5.

TAB 15

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J. No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Paperny J.

Heard: June 5-19, 2000
Judgment: June 27, 2000 *
Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, *R.B. Low, Q.C.*, and *L. Goldbach*, for Petitioners.
S.F. Dunphy, *P. O'Kelly*, and *E. Kolers*, for Air Canada and 853350 Alberta Ltd.
D.R. Haigh, Q.C., *D.N. Nishimura*, *A.Z.A. Campbell* and *D. Tay*, for Resurgence Asset Management LLC.
L.R. Duncan, Q.C., and *G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.
F.R. Foran, Q.C., and *P.T. McCarthy, Q.C.*, for Monitor, PwC.
G.B. Morawetz, *R.J. Chadwick* and *A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.
C.J. Shaw, Q.C., for Unionized Employees.
T. Mallett and *C. Feasby*, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Costal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Civil practice and procedure
XXIII Practice on appeal

XXIII.10 Leave to appeal

XXIII.10.c Appeal from refusal or granting of leave

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Table of Authorities

Cases considered by *Paperny J.*:

Alabama, New Orleans, Texas & Pacific Junction Railway, Re (1890), [1891] 1 Ch. 213, 60 L.J. Ch. 221, [1886-90] All E.R. Rep. Ext. 1143, 64 L.T. 127, 7 T.L.R. 171, 2 Meg. 377 (Eng. C.A.) — referred to

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) — referred to

Algoma Steel Corp. v. Royal Bank (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.) — referred to

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169, 22 O.T.C. 247 (Ont. Gen. Div.) — referred to

Cadillac Fairview Inc., Re (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]) — considered

Cadillac Fairview Inc., Re (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]) — referred to

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — referred to

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

Crabtree (Succession de) c. Barrette, 47 C.C.E.L. 1, 10 B.L.R. (2d) 1, (sub nom. *Barrette v. Crabtree (Succession de))* 53 Q.A.C. 279, (sub nom. *Barrette v. Crabtree (Succession de))* 150 N.R. 272, (sub nom. *Barrette v. Crabtree Estate)* 101 D.L.R. (4th) 66, (sub nom. *Barrette v. Crabtree Estate)* [1993] 1 S.C.R. 1027 (S.C.C.) — referred to

Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36 (B.C. S.C.) — referred to

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.) — referred to

Hochberger v. Rittenberg (1916), 54 S.C.R. 480, 36 D.L.R. 450 (S.C.C.) — referred to

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246 (N.S. C.A.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

93 Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

94 In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

96 The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;

b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

a. Composition of the unsecured vote

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, *supra*:

TAB 16

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
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 did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H

were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Torts --- Conspiracy — Nature and elements of tort — Miscellaneous

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

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi

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

Contrats --- Réparation du défaut — Dommages-intérêts — Divers

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

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

Délits civils --- Incitation à violer un contrat — Éléments constitutifs du délit

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

Délits civils --- complot — Nature et éléments constitutifs du délit — Divers

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

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

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

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

Held: The appeal was allowed in part.

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

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

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

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

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

Arrêt: Le pourvoi a été accueilli en partie.

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

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

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

Table of Authorities

Cases considered by *Cromwell J.*:

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

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

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

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

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

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

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

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

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

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.

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

TAB 17

1959 CarswellQue 37
Supreme Court of Canada

Roncarelli v. Duplessis

1959 CarswellQue 37, [1959] S.C.R. 121, [1959] S.C.J. No. 1, 16 D.L.R. (2d) 689

Frank Roncarelli (Plaintiff), Appellant and The Honourable Maurice Duplessis (Defendant), Respondent

Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

Judgment: June 2, 1958
Judgment: June 3, 1958
Judgment: June 4, 1958
Judgment: June 5, 1958
Judgment: June 6, 1958
Judgment: January 27, 1959

Proceedings: On appeal from the Court of Queen's Bench, appeal side, province of Quebec

Counsel: *F.R. Scott* and *A.L. Stein*, for the plaintiff, appellant.
L.E. Beaulieu, Q.C., and *L. Tremblay, Q.C.*, for the defendant, respondent.

Subject: Public; Civil Practice and Procedure
Related Abridgment Classifications
Administrative law
V Discretion of decision maker under review
V.4 Miscellaneous
Administrative law
XI Private law remedies
XI.2 Damages for unlawful administrative action
Public law
VI Liquor control
VI.2 Liquor licensing and control boards
VI.2.b Powers and procedures
VI.2.b.iii Appeal or review
VI.2.b.iii.B Grounds
Remedies
I Damages
I.1 Causation
I.1.h Pure economic loss
Headnote
Administrative Law --- Discretion of tribunal under review
Licensing.
Per Rand J. "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions.".

1959 CarswellQue 37, [1959] S.C.R. 121, [1959] S.C.J. No. 1, 16 D.L.R. (2d) 689

Administrative Law --- Damages for unlawful administrative action

Liquor Commission — Cancellation of licence on order of Prime Minister — Alcoholic Liquor Act, R.S.Q. 1941, c. 255, s. 35 — Code of Civil Procedure, art. 88.

The appellant was the proprietor of a restaurant in Montreal which had been continually licensed for the sale of liquor for 34 years. He was also a member of a sect known as Witnesses of Jehovah, who were selling literature regarded as insulting and offensive by the Roman Catholic population of the province, and the appellant had been in the habit of providing bail for numerous members of the sect who had been arrested in connection with the sale of such literature. While his application for renewal of his annual liquor licence was before the Liquor Commission his existing licence was cancelled and his application for renewal was rejected with an added declaration that no future licence would ever be issued to him. The appellant was unable to operate the restaurant profitably without the liquor licence and eventually closed down and sold the premises. An action against the respondent for damages for causing the cancellation of his liquor licence without legal or statutory authority as an act of reprisal because of his having acted as surety or bondsman for the Witnesses of Jehovah was upheld by MacKinnon J. who found that the respondent, the Attorney General and Premier of the province, had ordered the cancellation of the licence and that as the result of such order the manager of the Commission had cancelled the licence accordingly. The appellant was awarded damages for loss of value of liquor seized by the Commission, for loss of profits from the date of cancellation of the licence to the date when it would normally have expired and for damage to his personal reputation. His decision was reversed by the Court of Appeal. On appeal from the decision of the Court of Appeal and from the refusal of the trial Judge to allow damages for loss of future profits and loss of good will and reputation of the business, held, the appeals should be allowed, and additional damages awarded for the diminution of the value of the good will and for the loss of future profits. There was ample evidence to support the finding that the cancellation of the licence was the result of instructions given by the respondent to the manager of the Commission. In giving such instructions the respondent was not acting in the exercise of any official power which he possessed, and the cancellation of the licence by the Commission was not a proper exercise of its powers under s. 35 of the Alcoholic Liquor Act. As the act of the respondent in causing the cancellation of the licence was something entirely outside his legal functions it was not necessary for the plaintiff to give notice of the action under art. 88 of the Code. Per Rand J.: "The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute.".

Damages --- Remoteness and foreseeability — Torts — Economic loss

Appellant was the proprietor of a restaurant in Montreal which had been continually licensed for the sale of liquor for 34 years. He was also a member of a sect known as Witnesses of Jehovah, who were selling literature regarded as insulting and offensive by the Roman Catholic population of the province, and appellant had been in the habit of providing bail for numerous members of the sect who had been arrested in connection with the sale of such literature. While his application for renewal of his annual liquor licence was before the Liquor Commission his existing licence was cancelled and his application for renewal was rejected with an added declaration that no future licence would ever be issued to him. Appellant was unable to operate the restaurant profitably without the liquor licence and eventually closed it down and sold the premises. An action against respondent for damages for causing the cancellation of his liquor licence without legal or statutory authority as an act of reprisal because of his having acted as surety or bondsman for the Witnesses of Jehovah was upheld by Mackinnon J. who found that respondent, the Attorney General and Prime Minister of the province, had ordered the cancellation of the licence and that as the result of such order the manager of the Commission had cancelled the licence accordingly. Appellant was awarded damages for loss of value of liquor seized by the Commission, for loss of profits from the date of cancellation of the licence to the date when it would normally have expired and for damage to his personal reputation. This decision was reversed by the Court of Appeal, Rinfret J. dissenting. On appeal from the decision of the Court of Appeal and from the refusal of the trial Judge to allow damages for loss of future profits and loss of goodwill and reputation of the business, held, the appeals should be allowed, and additional damages awarded for the diminution of the value of the goodwill and for the loss of future profits.

Liquor Control --- Liquor licensing and control boards — Powers and procedures — Appeal or review — Grounds — Fettering discretion

Discretion of tribunal under review — General -- Licensing.

Per Rand J.: "In public regulation of this sort there is no such thing as absolute and untrammelled `discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, execisable for any purpose, however capricious

or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions.".

***The Chief Justice*:**

1 No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal Side) [1] setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel the appellant's licence. A reading of the testimony of the respondent and of the person constituting the commission at the relevant time satisfies me that the trial judge correctly decided the point. As to the other questions, I agree with Mr. Justice Martland.

2 The appeals should be allowed with costs here and below and judgment directed to be entered for the appellant against the respondent in the sum of $33,123.53 with interest from the date of the judgment of the Superior Court, together with the costs of the action.

***Taschereau J.* (*dissenting*):**

3 L'intimé est Premier Ministre et Procureur Général de la province de Québec, et il occupait ces hautes fonctions dans le temps où les faits qui ont donné naissance à ce litige se sont passés.

4 L'appelant, un restaurateur de la Cité de Montréal, et porteur d'un permis de la Commission des Liqueurs pour la vente des spiritueux, lui a réclamé personnellement devant la Cour supérieure la somme de $118,741 en dommages. Il a allégué dans son action qu'il est licencié depuis de nombreuses années, qu'il a toujours respecté les lois de la Province se rapportant à la vente des liqueurs alcooliques, que son restaurant avait une excellente réputation, et jouissait de la faveur d'une clientèle nombreuse et recherchée.

5 Il a allégué en outre qu'il faisait et fait encore partie de la secte religieuse des "Témoins de Jéhovah", et que parce qu'il se serait rendu caution pour quelque 390 de ses coreligionnaires, traduits devant les tribunaux correctionnels de Montréal et accusés de distribution de littérature, sans permis, l'intimé serait illégalement intervenu auprès du gérant de la Commission pour lui faire perdre son permis, qui d'ailleurs lui a été enlevé le 4 décembre 1946. Ce serait comme résultat de l'intervention injustifiée de l'intimé que l'appelant aurait été privé de son permis, et aurait ainsi souffert les dommages considérables qu'il réclame.

6 La Cour supérieure a maintenu l'action jusqu'à concurrence de $8,123.53, et la Cour du banc de la reine [2], M. le Juge Rinfret étant dissident, aurait pour divers motifs maintenu l'appel et rejeté l'action.

7 L'intimé a soulevé plusieurs moyens à l'encontre de cette réclamation, mais je n'en examinerai qu'un seul, car je crois qu'il est suffisant pour disposer du présent appel. Le *Code de procédure civile* de la province de Québec contient la disposition suivante:

> *Art. 88 C.P.* — Nul officier public ou personne remplissant des fonctions ou *devoirs publics* ne peut être poursuivi pour dommages à raison d'un acte par lui fait *dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui à moins qu'avis de cette poursuite* ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

8 Le défaut de donner cet avis peut être invoqué par le défendeur, soit au moyen d'une exception à la forme ou soit par plaidoyer au fond. *Charland v. Kay* [3]; *Corporation de la Paroisse de St-David v. Paquet* [4]; *Houde v. Benoit* [5].

9 Les termes mêmes employés par le législateur dans l'art. 88 C.P.C., "*nul jugement ne peut être rendu*" contre le défendeur, indiquent aussi que la Cour a le devoir de soulever d'office ce moyen, si le défendeur omet ou néglige de le faire par exception à la forme, ou dans son plaidoyer écrit. La signification de cet avis à un *officier public, remplissant des devoirs publics*, est une condition préalable, essentielle à la réussite d'une procédure judiciaire. S'il n'est pas donné, les tribunaux ne peuvent prononcer aucune condamnation en dommages. Or, dans le cas présent, il est admis qu'aucun avis n'a été donné.

1. Assuring the observance of this Act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;

2. Conducting the suits or prosecutions for infringements of this Act or of the said Alcoholic Liquor Possession and Transportation Act. R.S. 1925, c. 37, s. 78a; 24 Geo. V, c. 17, s. 17.

The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony", and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

39 At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual necessity to a superior class restaurant but also its identification with the business carried on. The provisions for assignment of the permit are to this most pertinent and they were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

40 The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

41 In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

42 To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent: *McGillivray v. Kimber*[8]. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in *McGillivray*, there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

43 It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here

they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

44 The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an instrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas* [9] , and under art. 1053 of the *Civil Code*. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned.

45 It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.

46 "Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

47 I mention, in order to make clear that it has not been overlooked, the decision of the House of Lords in *Allen v. Flood* [10] , in which the principle was laid down that an act of an individual otherwise not actionable does not become so because of the motive or reason for doing it, even maliciously to injure, as distinguished from an act done by two or more persons. No contention was made in the present case based on agreed action by the respondent and Mr. Archambault. In *Allen v. Flood*, the actor was a labour leader and the victims non-union workmen who were lawfully dismissed by their employer to avoid a strike involving no breach of contract or law. Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In *Allen v. Flood* there were no such elements.

48 Nor is it necessary to examine the question whether on the basis of an improper revocation the appellant could have compelled the issue of a new permit or whether the purported revocation was a void act. The revocation was *de facto*, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

49 Mr. Scott argued further that even if the revocation were within the scope of discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally a fault. The proposition generalized is this: where, by a

TAB 18

2018 ABCA 339
Alberta Court of Appeal

Alberta Health Services v. Wang

2018 CarswellAlta 2314, 2018 ABCA 339, [2018] A.W.L.D. 4411, 297 A.C.W.S. (3d) 424

Alberta Health Services (Respondent / Plaintiff) and Xiaoli Lily Wang and Daiming Robert Li (Appellants / Respondents) and Attorney General of Alberta (Intervenor / Not a Party in the Trial Court)

Brian O'Ferrall J.A., Michelle Crighton J.A., Ritu Khullar J.A.

Heard: October 10, 2018
Judgment: October 16, 2018
Docket: Calgary Appeal 1701-0143-AC

Counsel: I. Bernardo, Q.C., for Respondent
M.J. Farrell, for Appellant
R.S. Wiltshire, for Intervenor

Subject: Property; Public
Related Abridgment Classifications
Health law
VII Miscellaneous
Headnote
Health law --- Miscellaneous
Chambers judge granted respondent's application for order to inspect rental properties pursuant to ss. 59 and 60 of Public Health Act — Appellants appealed chambers judge's determination of meaning of "owner" of rental accommodations for purposes of s. 61 of Act — Appeal dismissed — Section 59 applied to public places and did not require reasonable and probable grounds, while s. 60 applied to private places and required reasonable and probable grounds — Section 1(ii) defined public place as including any place in which public had interest arising out of need to safeguard public health and included all rental accommodation — Rental accommodation, including apartments or rental homes, were considered public spaces under Act and did not require reasonable and probable grounds before entering to inspect them — As chambers judge granted respondent's application for order to inspect rental properties under ss. 59 and 60, it could be inferred that she considered evidence that was before her to have been sufficient to justify order under either provision — There was no reviewable error in conclusion — Issue of ownership was not relevant — Record supported granting of order under either ss. 59 or 60 of Act.
Table of Authorities
Cases considered:
Doré c. Québec (Tribunal des professions) (2012), 2012 SCC 12, 2012 CarswellQue 2048, 2012 CarswellQue 2049, (sub nom. *Doré v. Barreau du Québec)* 343 D.L.R. (4th) 193, 34 Admin. L.R. (5th) 1, (sub nom. *Doré v. Barreau du Québec)* 428 N.R. 146, [2012] 1 S.C.R. 395, (sub nom. *Doré v. Barreau du Québec)* 255 C.R.R. (2d) 289 (S.C.C.) — followed
Roncarelli c. Duplessis (1959), [1959] S.C.R. 121, 16 D.L.R. (2d) 689, 1959 CarswellQue 37 (S.C.C.) — followed
Statutes considered:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to
Public Health Act, R.S.A. 2000, c. P-37
s. 1(ii) "public place" (viii) — considered

(viii) accommodation facilities, including all rental accommodation . . .

9 By definition, rental accommodation, including apartments or rental homes, are considered public spaces under the Act and Alberta Health Services (AHS) does not require reasonable and probable grounds before entering to inspect them.

10 The appellants are landlords and on appeal (though not in the court below) argue that an inspection of rental premises under s. 59 permits AHS to compromise the privacy rights of tenants without reasonable and probable grounds and cannot be tolerated.

11 The first chambers justice granted AHS's application for an order to inspect the rental properties under s. 59 and s. 60, from which it can be inferred that she considered the evidence that was before her to have been sufficient to justify an order under either provision. When the second justice was asked to set-aside the order of the first chambers justice, it is reasonable to infer that he reviewed the record that was before the first chambers justice. Based on that evidence, he similarly concluded that the evidence was sufficient to support the original order. There is no reviewable error in this conclusion. The question of ownership was not relevant to his disposition. For those reasons, the appeal is dismissed.

12 Notwithstanding our decision to dismiss the appeal, we note that the parties advanced extensive written and oral submissions to the interpretation of s. 59 and s. 60 of the *Public Health Act*. We make the following observations on this issue.

13 There is no doubt that s. 59 of the *Public Health Act* confers a broad discretion on an executive officer to conduct inspections on public property, including rental accommodation. However, the law limits this discretion in two ways. First, the executive officer must exercise the discretion for the purpose for which it was granted. ""Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption" : ***Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.) at 140.

14 Second, the discretion is constrained by the *Charter of Rights and Freedoms*. "[A]dministrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charte*r values": *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.) at para 24, [2012] 1 S.C.R. 395 (S.C.C.). Of course, the weighing of *Charter* values, including privacy, has to be done on a case by case basis in the particular factual and statutory context of the exercise of the discretion.

15 Moreover, s. 61 contemplates judicial oversight in the exercise of the broad discretion under either s. 59 or s. 60. In circumstances where the registered owner or someone in actual or apparent possession or control refuses to allow the executive officer to exercise the discretion conferred or hinders or interferes with its exercise, a judge can either decline to make the applied for order if there is good reason to do so or make an order enabling the executive officer to enter and inspect on terms which address the legitimate concerns of the owner or tenants.

16 The appeal is dismissed.

Appeal dismissed.

TAB 19

1999 SCC 699
Supreme Court of Canada

Baker v. Canada (Minister of Citizenship & Immigration)

1999 CarswellNat 1124, 1999 CarswellNat 1125, 1999 SCC 699, [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, [1999] S.C.J. No. 39, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777, J.E. 99-1412

Mavis Baker, Appellant v. Minister of Citizenship and Immigration, Respondent and The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees and the Charter Committee on Poverty Issues, Interveners

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache, Binnie, JJ.A.

Heard: November 4, 1998
Judgment: July 9, 1999
Docket: 25823

Proceedings: reversing *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.); affirming *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), [1995] F.C.J. No. 1441, 1995 CarswellNat 1244, 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 (Fed. T.D.)

Counsel: *Roger Rowe* and *Rocco Galanti*, for Appellant.
Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for Respondent.
Sheena Scott and *Sharryn Aiken*, for Interveners The Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees.
John Terry and *Craig Scott*, for Intervener the Charter Committee on Poverty Issues.
Barbara Jackman and *Marie Chen*, for Intervener the Canadian Council of Churches.

Subject: Immigration; Public; Human Rights
Related Abridgment Classifications
Administrative law
II Natural justice
II.1 Duty of fairness
II.1.a Procedural fairness
II.1.a.i Opportunity to respond and make submissions
Administrative law
II Natural justice
II.1 Duty of fairness
II.1.a Procedural fairness
II.1.a.vi Reasons for decision
Administrative law
II Natural justice
II.1 Duty of fairness
II.1.c Miscellaneous
Administrative law
II Natural justice

II.2 Bias
II.2.b Personal bias
Administrative law
III Standard of review
III.2 Reasonableness
III.2.a Reasonableness simpliciter
Administrative law
III Standard of review
III.2 Reasonableness
III.2.c Miscellaneous
Administrative law
V Discretion of decision maker under review
V.4 Miscellaneous
Immigration and citizenship
II Admission
II.4 Application for temporary resident or immigrant visa
II.4.d Inland applications
II.4.d.ii Application of humanitarian and compassionate considerations
II.4.d.ii.G Miscellaneous
Immigration and citizenship
II Admission
II.4 Application for temporary resident or immigrant visa
II.4.e Best interests of child
Immigration and citizenship
II Admission
II.5 Appeals and judicial review
II.5.b Judicial review
II.5.b.i Jurisdiction
Immigration and citizenship
VI Appeals to Federal Court of Appeal and Supreme Court of Canada
VI.4 Certification of questions by Federal Court Trial Division
VI.4.i Procedure
Statutes
II Interpretation
II.5 Extrinsic aids
II.5.d Statutes on same subject [in pari materia]

Headnote

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Inland applications — Application of humanitarian and compassionate considerations

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified regarding whether immigration authorities are required to treat best interests of child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Junior immigration officer's notes constituted decision and demonstrated reasonable apprehension of bias — Officer appeared to have drawn conclusions based not on evidence but on fact that applicant was single mother with several children and was diagnosed with mental illness — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding

deference that should be given to officer's decision — Reasons also failed to give sufficient weight or consideration to hardship that might be caused to applicant if returned to country of origin.

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Best interests of child

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power under s. 114(2) of Act requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Interests of children were minimized in manner inconsistent with Canadian humanitarian and compassionate tradition and Minister's guidelines — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Appeals to Federal Court of Appeal and Supreme Court of Canada — Certification of questions by Federal Court Trial Division

Section 83(1) of Immigration Act does not require Federal Court of Appeal to address only certified question — Once question has been certified, then Federal Court of Appeal may consider all aspects of appeal lying within its jurisdiction.

Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness

Duty of fairness is flexible and variable and depends on context of particular statute and rights affected — Participatory rights within that duty ensure that administrative decisions are made using fair and open procedure appropriate to decision being made and its statutory, institutional, and social context with opportunity for those affected by decision to put forward their views and evidence fully and have them considered by decision-maker — Factors for determining requirements of duty include nature of decision being made and process followed in making it, nature of statutory scheme and terms of statute pursuant to which body operates, importance of decision to individuals affected, legitimate expectations of person challenging decision, and choices of procedure made by agency itself — Other factors may also be important when considering aspects of duty of fairness unrelated to participatory rights — Duty of fairness applies to humanitarian and compassionate applications under Immigration Act.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness applies to H & C decisions — There was no legitimate expectation that specific procedural rights would be accorded above those normally required by duty of fairness — H & C application is different from judicial decision because it involves exercise of considerable discretion, requires consideration of multiple factors, and is exception to general principles of of Canadian immigration law — Duty of fairness requires that applicant and those whose important interests are affected by decision in fundamental way have meaningful opportunity to present evidence relevant to their case and have it fully and fairly considered — Lack of oral hearing or notice of such hearing does not violate procedural fairness — Opportunity to produce full and complete written documentation was sufficient.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness requires written

explanation for decision where decision has important significance for individual or where there is statutory right of appeal — Profound importance of H & C decisions to those affected militates in favour of requiring reasons to be provided — Requirement was satisfied by provision of junior immigration officer's notes — Individuals are entitled to fair procedures and open decision-making but in administrative context, this transparency may occur in various ways.

Administrative law --- Requirements of natural justice — Bias — Personal bias — Apprehended

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant alleged that there was reasonable apprehension of bias — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed — Procedural fairness requires decision to be made free from reasonable apprehension of bias by impartial decision-maker — Duty applies to all immigration officers playing role in decision-making — Immigration decisions require sensitivity and understanding by decision-makers — There must be recognition of diversity, understanding of others and openness to difference — Immigration officer's notes gave impression that conclusion may have been based not on evidence but on fact that applicant was single mother with several children and had been diagnosed with psychiatric illness — Reasonable and well-informed members of community would conclude that reviewing officer did not approach case with impartiality appropriate to decision made by immigration officer.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Review of substantive aspects of discretionary decisions is to be approached within pragmatic and functional framework given difficulty in making rigid classifications between discretionary and non-discretionary decisions — Relevant factors include expertise of tribunal, nature of decision being made, language of provision and surrounding legislation, whether decision is polycentric, intention revealed by statutory language, and amount of choice left by Parliament to decision-maker — Discretion must be exercised in accordance with boundaries imposed in statute, principles of rule of law, principles of administrative law, fundamental values of Canadian society, and principles of Canadian Charter of Rights and Freedoms.

Administrative law --- Discretion of tribunal under review — General principles

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power conferred by section requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Admission — Appeals and judicial review — Judicial review — Jurisdiction

"Reasonableness simpliciter » is standard of review of discretionary decision under s. 114(2) of Immigration Act and s. 2.1 of Immigration Regulations determining whether humanitarian and compassionate considerations warrant exemption from requirements of Act — Considerable deference should be given to immigration officers exercising powers conferred by Act, given fact-specific nature of inquiry, its role in statutory scheme as exception, fact that decision-maker is Minister of Citizenship and Immigration, and considerable discretion given by wording of statute — However, lack of privative clause, existence of judicial review, and nature of decision as individual rather than polycentric suggest that standard is not as deferential as "patent unreasonableness".

Statutes --- Interpretation — Extrinsic aids — Statutes in pari materia

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review —

Question was certified of whether, given that Immigration Act does not expressly incorporate language of Canada's international obligations under International Convention on the Rights of the Child, federal immigration authorities must treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Values in international human rights law assist in statutory interpretation and judicial review — Convention's values recognize importance of being attentive to children's rights and best interests when making decisions relating to and affecting their future — Convention's principles place special importance on protections for children and on consideration of their interests, needs, and rights — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children and did not consider them important factor in decision — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion.

Étrangers, immigration et citoyenneté --- Admission — Demande de visa à titre de visiteur ou immigrant — Demande effectuée sur le territoire — Demande pour des motifs d'ordre humanitaire

Requérante est entrée au Canada en 1981 et a subvenu à ses besoins pendant 11 ans avant d'être diagnostiquée comme souffrant de schizophrénie avec paranoïa, et d'obtenir de l'assistance sociale — Après l'ordonnance de déportation, l'agent d'immigration a refusé d'exercer le pouvoir discrétionnaire prévu au par. 114(2) de la Loi sur l'immigration, fondé sur des motifs d'ordre humanitaire — Demande de contrôle judiciaire de la requérante a été rejetée — Requérante a formé un pourvoi — Question a été certifiée quant à savoir si les autorités de l'immigration devaient traiter le meilleur intérêt des enfants comme la principale considération au moment d'évaluer la demande de la requérante en vertu du par. 114(2) de la Loi — Pourvoi de la requérante à l'égard de la question certifiée a été rejeté — Requérante a formé un pourvoi — Pourvoi accueilli — Question a reçu une réponse affirmative — Notes de l'agent de l'immigration constituaient une décision et démontraient une crainte raisonnable de partialité — Agent semble avoir tiré des conclusions non fondées sur la preuve mais sur le fait que la requérante était monoparentale, qu'elle avait plusieurs enfants et qu'elle était atteinte d'une maladie mentale — Omission de considérer sérieusement le meilleur intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire, sans tenir compte de la déférence à laquelle la décision de l'agent devrait avoir droit — Loi sur l'immigration, L.R.C. 1985, c. I-2, par. 114(2).

The applicant entered Canada as a visitor in 1981 and continued to remain in the country. She had four Canadian-born children. She supported herself illegally for 11 years before being diagnosed as paranoid schizophrenic. She subsequently collected welfare and underwent treatment at a mental health centre. In 1992 she was ordered deported. An immigration officer refused discretionary action under s. 114(2) of the *Immigration Act* based on humanitarian and compassionate grounds.

In dismissing the applicant's application for judicial review, the motions judge found that the *Convention on the Rights of the Child* did not apply and was not part of domestic law. The motions judge also found that the evidence showed the children were a significant factor in the decision-making process. The motions judge certified a question as to whether the immigration authorities were required to treat the best interests of the child as a primary consideration in assessing an applicant under s. 114(2) of the Act, given that the Act did not expressly incorporate the language of Canada's international obligations with respect to the Convention.

On appeal of the certified question, the court held that the Convention could not have legal effect in Canada as it had not been implemented through domestic legislation. The Convention could not be interpreted to impose an obligation upon the government to give primacy to the interests of the children in deportation proceedings. Finally, because the doctrine of legitimate expectations does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) of the Act would be to create a substantive right, the doctrine did not apply.

The applicant appealed.

Held: The appeal was allowed.

Per L'Heureux-Dubé J. (Gonthier, McLachlin, Bastarache and Binnie JJ. concurring): The Convention did not give rise to a legitimate expectation that when the decision on the applicant's humanitarian and compassionate grounds application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. The Convention is not the equivalent to a government representation about how such applications will be decided.

The lack of an oral hearing did not constitute a violation of the requirements of procedural fairness. The opportunity, which was accorded for the applicant or her children to produce full and complete written documentation in relation to all aspects of her application, satisfied the requirements of the participatory rights required by the duty of fairness.

The duty of procedural fairness required a written explanation for the decision, which was done. The junior immigration officer's notes constituted the decision and were provided to the applicant. However, the notes demonstrated a reasonable apprehension of bias. The notes appeared to link the applicant's mental illness, her training as a domestic worker and the fact that she had eight children in total to the conclusion that she would, therefore, be a strain on the social welfare system for the rest of her life. The conclusion drawn was contrary to the psychiatrist's letter, which stated that with treatment she could remain well and return to being a productive member of society. The statements gave the impression that the junior officer may have been drawing conclusions based not on the evidence before him, but on the fact that she was a single mother with several children, and had been diagnosed with a psychiatric illness.

The failure to give serious consideration to the interests of the applicant's children constituted an unreasonable exercise of discretion, notwithstanding the important deference that should be given to the immigration officer's decision. The reasons failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause the applicant, given that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from some of her children. Attentiveness and sensitivity to the importance of the rights of the children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for a humanitarian and compassionate decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values.

Per Iacobucci J. (Cory J. concurring): The certified question should be answered in the negative. An international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until it has been incorporated into domestic law by way of implementing legislation. The primacy accorded to the rights of children in the Convention is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.

La requérante est entrée au Canada en 1981 avec le statut de visiteur et y est restée par la suite. Elle a donné naissance à quatre enfants au Canada. Elle a illégalement subvenu à ses besoins pendant 11 ans, soit jusqu'au moment où l'on a diagnostiqué qu'elle souffrait de schizophrénie paranoïaque. Elle a par la suite touché de l'aide sociale et a suivi un traitement dans un établissement de santé. En 1992, une mesure d'expulsion a été prise contre elle. Un fonctionnaire de l'immigration a refusé d'exercer le pouvoir discrétionnaire qui lui était conféré par l'art 114(2) de la *Loi sur l'immigration* et qui était fondé sur des motifs d'ordre humanitaire.

En rejetant la requête en révision judiciaire de la requérante, la juge saisie de la requête a conclu que la *Convention relative aux droits de l'enfant* ne s'appliquait pas et que ses dispositions ne faisaient pas partie du droit interne canadien. Elle a également conclu qu'il ressortait de la preuve que les enfants avaient constitué un facteur important dans le cadre du processus décisionnel. La juge s'est également prononcée sur la question de savoir si, dans le cadre de l'examen d'une requête faite en vertu de l'art. 114(2) de la Loi, les autorités en matière d'immigration étaient tenues de considérer le meilleur intérêt des enfants comme constituant un élément primordial, même si la Loi n'incorporait pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention .

En se prononçant sur l'appel de la décision portant sur la question certifiée, la Cour d'appel a estimé que la Convention ne pouvait avoir d'effet juridique au Canada, puisqu'elle n'avait pas été intégrée dans la législation nationale. La Convention ne pouvait être interprétée comme imposant au gouvernement l'obligation d'accorder priorité à l'intérêt des enfants dans le cadre des procédures d'expulsion. Enfin, compte tenu que la doctrine de l'attente légitime ne crée pas de droits matériels et qu'imposer à un décideur l'obligation d'accorder la primauté au meilleur intérêt des enfants en vertu de l'art. 114(2) de la Loi serait de nature à créer un droit matériel, la doctrine était inapplicable.

La requérante a formé un pourvoi à l'encontre de la décision.

Held: Le pourvoi a été accueilli.

Le juge L'Heureux-Dubé (les juges Gonthier, McLachlin, Bastarache et Binnie y souscrivant) : La Convention n'a pas créé chez la requérante l'attente légitime que sa demande fondée sur des motifs d'ordre humanitaire et de compassion donnerait lieu à des droits procéduraux particuliers plus étendus que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, qu'une décision favorable serait rendue ou que des critères particuliers seraient appliqués. La Convention ne constituait pas l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes doivent être tranchées.

L'absence d'audience ne contrevenait pas aux exigences imposées en vertu de l'équité procédurale. La possibilité qui avait été donnée à la requérante ou à ses enfants de produire toute la documentation écrite se rapportant à tous les aspects de sa requête satisfaisait aux exigences relatives aux droits de participation imposées en vertu de l'obligation d'agir équitablement.
L'obligation d'équité procédurale exigeait que les motifs écrits de la décision soient fournis, ce qui a été fait. Les notes de l'agent subalterne constituaient les motifs de la décision et elles ont été fournies à la requérante. Les notes donnaient toutefois lieu à une crainte raisonnable de partialité. Elles semblaient relier les troubles mentaux de la requérante, sa formation comme domestique et le fait qu'elle avait au total huit enfants à la conclusion qu'elle constituerait, par conséquent, un fardeau pour le système d'aide sociale jusqu'à la fin de ses jours. La conclusion tirée allait à l'encontre de la lettre du psychiatre qui indiquait qu'à l'aide d'un traitement, l'état de la requérante pouvait s'améliorer et qu'elle pourrait redevenir un membre productif de la société. Ces notes donnaient l'impression que l'agent subalterne avait tiré ses conclusions, non pas en se fondant sur la preuve qu'il avait devant lui, mais plutôt sur le fait que la requérante était une mère célibataire avec plusieurs enfants et sur le fait qu'elle était atteinte de troubles psychiatriques.
Le défaut de prendre sérieusement en compte l'intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire et ce, malgré le degré élevé de retenue qu'il convient d'observer à l'égard de la décision de l'agent d'immigration. Les motifs n'accordaient pas un poids et une considération suffisants au préjudice qu'un retour en Jamaïque pouvait causer à la requérante compte tenu qu'elle avait vécu pendant 12 ans au Canada, qu'elle était malade, qu'elle ne pourrait probablement pas recevoir des soins en Jamaïque et qu'elle serait inévitablement séparée de certains de ses enfants. L'attention et la sensibilité manifestées à l'égard de l'importance des droits des enfants, à leur meilleur intérêt et au préjudice qu'ils pourraient subir en raison d'une décision rejettant la requête sont les éléments essentiels d'une décision qui doit être prise de façon raisonnable. Même si, dans le cadre des demandes de contrôle judiciaire, il convient de faire preuve de retenue à l'égard des décisions des agents d'immigration rendues en vertu de l'art. 114(2), leurs décisions ne peuvent être maintenues lorsque la façon dont la décision a été rendue et l'approche adoptée sont contraires aux valeurs humanitaires.
Le juge Iacobucci (le juge Cory y souscrivant) : Une réponse négative devrait être donnée à la question certifiée. Une convention internationale ratifiée par le pouvoir exécutif du gouvernement n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables. La primauté accordée aux droits des enfants par la Convention n'est d'aucune pertinence tant et aussi longtemps que ses dispositions n'ont pas été intégrées dans une loi adoptée par le Parlement.

Annotation

There is a lot of clarification material resulting from this unusual decision. One article entitled the "Shame of Shah" is presently being engrossed by the editor. I say "shame" because of the extraordinary encroachment on the Canadian notion of fairness created by the Federal Court of Appeal in *Muliadi v. Canada (Minister of Employment & Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 F.C. 205 (Fed. C.A.), and which was so casually proclaimed by the Court of Appeal in *Shah v. Canada (Minister of Employment & Immigration)* (1994), 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (Fed. C.A.). It was for the Supreme Court of Canada in *Baker* to lead the way in disposing of this negative virus manifested in *Shah*. If we are going to have an *Immigration Ac*t inviting applications with signposts such as "Humanitarian and Compassionate," it follows that there is not a limited duty of fairness. The *Shah* dictum of the three Court of Appeal judges was unceremoniously and quickly dumped by the Supreme Court of Canada, but not before this backward looking case was approved without hardly a murmur of dissent in more than a hundred cases that were to follow *Shah*. That is its shame. For if so noble a doctrine of fairness is said to exist by the Supreme Court, how is it that no one else could see it? What limitations were imposed on the juridical eyes and conscience of our jurists not to possess a similar vision that to the Supreme Court was so evident?

One of the corollary aspects of this case is that: where there is no fairness, it allows bias, prejudice and unfairness to creep in. Look at the findings of the Supreme Court of Canada in *Baker* at para. 48:

In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or the weighing of the particular circumstance of the case *free from stereotypes* . . . His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status.

[Emphasis mine]

The learned L'Heureux Dubé J. goes on to deal with the appropriate test of a choice of three when dealing with applications under s. 114(2) of the *Immigration Act*, and the test is reasonableness simpliciter.

She goes on to find that it must be reasonable to deal with the interests of the children of the applicant and that they are nowhere dealt with by the decision-makers. She states, at para. 65:

. . . I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer . . .

and later, at para. 76:

Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow the appeal.

Another matter arising out of *Baker* now being argued by justice lawyers is that the reasons and, indeed, the CAIPS notes can now be read in from the record as evidence. Justice lawyers are using any argument to avoid the making of an affidavit in judicial review applications and thus exposing immigration officers to cross-examination.

This matter was convincingly and clearly dealt with by the Court of Appeal in *Wang v. Canada (Minister of Employment & Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 F.C. 165, 40 F.T.R. 239 (note) (Fed. C.A.).

However, since the notes of Lorenz and the CAIPS notes were read by the court in the *Baker* case, can it be said that the law in *Wang* is now being overruled? I would submit not.

In a judicial review application, under the rules, an applicant can call for the record, and indeed it is often so done. This is not unlike productions required by parties, which occur in a superior court of a province. In such cases, when called upon under the rules, a defendant, or indeed a plaintiff, must submit to production and make an affidavit that the documents produced are totally those that are within the possession and power of the litigant to produce.

However, the productions are not evidence for the party producing such documentation, as he must prove the documents that are produced by him and not otherwise admitted. But this does not prevent the other party from producing and putting such documents into evidence, as these productions from the opponents' point of view constitute an admission.

Therefore, an applicant can put in such record as he requires without proving anything, but this does not mean that the respondent can call up such record as he requires, as evidence of the contents therein. It must be provided by affidavit of one who has personal knowledge.

Moreover, if the document is one that is necessary for the respondent to call into evidence and he fails to do so, then there is an adverse inference to be taken that, had he called the evidence in the ordinary way, it would not have been in his favour.

Commentaire

Cette décision particulière clarifie plusieurs éléments. Un article intitulé « La honte de Shah » est en voie de rédaction par l'éditeur. Je dis « honte » à cause de l'empiètement extraordinaire sur la notion canadienne d'équité créée par la Cour fédérale d'appel dans la cause *Muliadi c. Canada (Ministre de l'Emploi & de l'Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 C.F. 205 (C.A. féd.) et qui fut suivie sans retenue par la Cour d'appel dans *Shah c. Canada (Ministre de l'Emploi & de l'Immigration)*, [1994] 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (C.A. féd.). Il revenait à la Cour suprême du Canada, dans *Baker*, de disposer de ce virus négatif établi dans l'affaire *Shah*. Si nous avons une *Loi sur l'immigration* invitant les demandes en affichant des motifs « humanitaires et de compassion », il s'ensuit qu'il n'existe pas de limite à l'équité. La maxime de *Shah*

établie par trois juges de la Cour d'appel fut écartée rapidement et sans cérémonie par la Cour suprême du Canada, mais pas avant que ce jugement, qui représentait un pas en arrière, n'ait été appliqué dans une centaine de cas, sans même provoquer un murmure de dissidence. C'est là sa honte. Puisque cette noble doctrine de l'équité fut reconnue par la Cour suprême du Canada, comment se fait-il que personne d'autre ne l'ait reconnue? Quelle limite fut imposée sur la perception et la conscience juridique de nos juristes pour qu'ils ne possèdent pas une vision qui semble si évidente à la Cour suprême du Canada?

Un des aspects corollaires de cette cause est : lorsqu'il n'y a pas d'équité, cela fait place aux préjugés, à l'arbitraire et à l'injustice. Lisons cet énoncé du par. 48 de l'arrêt *Baker* de la Cour suprême du Canada :

Á mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une *absence de stéréotypes* dans l'évaluation des circonstances particulières de l'affaire. . . . L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de Mme Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande.

[notre emphase]

La savante Juge L'Heureux-Dubé établit la règle de trois appropriée lorsque confrontée à l'application de l'art. 114(2) de la *Loi sur l'immigration* et cette règle est établie simplement sur l'aspect raisonnable de la décision.

Elle détermine qu'il est raisonnable de considérer l'intérêt des enfants de la requérante et que les décideurs ne traitaient pas de cet aspect. Elle énonce, au par. 65 :

. . . j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. . . .

Plus loin, au para. 76 :

En conséquence, parce qu'il y a eu manquement aux principes d'quité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.

Un autre aspect émanant de l'affaire *Baker* est maintenant plaidé par les avocats du ministère de la justice est à l'effet que les motifs, et bien sûr les notes des CAIPS, peuvent être présentées à titre de preuve. Les avocats du ministère utilisent tous les arguments pour éviter le dépôt d'affidavits lors des demandes de contrôle judiciaire pour ainsi éviter de soumettre les officiers à un contre-interrogatoire.

Cette question fut réglée de façon claire et convaincante par la Cour d'appel dans l'affaire *Wang c. Canada (Ministre de l'Emploi & de l'Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 C.F. 165, 40 F.T.R. 239 (note) (C.A. féd.).

Par contre, pouvons-nous prétendre que la règle établie dans *Wang* est maintenant renversée puisque les notes de Lorenz et des CAIPS furent lues par la Cour dans l'affaire *Baker*? Je soumets que non.

Selon les règles, le requérant peut demander le dépôt du dossier lors d'une demande de contrôle judiciaire et ceci se fait fréquemment. Cet aspect est similaire à la production de documents par les parties lors de procédures devant la Cour supérieure d'une province. Dans ce cas, selon les règles, le défendeur ou le demandeur doit déposer un affidavit à l'effet que les documents produits représentent la totalité des pièces qu'il a en sa possession et qu'il peut produire.

Par ailleurs, le dépôt de documents ne constitue pas de la preuve pour la partie qui les produit puisqu'elle doit en établir la preuve s'ils ne sont pas autrement admis. Cela n'empêche pas l'autre partie au litige de produire ces documents en preuve puisque leur dépôt par l'adversaire constitue une admission.

En conséquence, un requérant peut déposer un tel dossier sans prouver quoi que ce soit. Mais cela ne veut pas dire que l'intimé peut invoquer ce dossier, s'il le désire, pour en établir le contenu. Ceci doit être fait par voie d'affidavit de la part de la personne qui a la connaissance personnelle des faits.

Cecil L. Rotenberg, Q.C.

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Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.) — considered

Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission) (1977), [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 18 N.R. 181, 36 C.P.R. (2d) 1 (S.C.C.) — considered

Cardinal v. Kent Institution, [1985] 2 S.C.R. 643, [1986] 1 W.W.R. 577, 24 D.L.R. (4th) 44, 63 N.R. 353, 69 B.C.L.R. 255, 16 Admin. L.R. 233, 23 C.C.C. (3d) 118, 49 C.R. (3d) 35 (S.C.C.) — considered

Chan v. Canada (Minister of Citizenship & Immigration) (1994), 87 F.T.R. 62 (Fed. T.D.) — referred to

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) — considered

Francis v. R., [1956] S.C.R. 618, 56 D.T.C. 1077, 3 D.L.R. (2d) 641 (S.C.C.) — considered

Gheorlan v. Canada (Secretary of State) (1995), 26 Imm. L.R. (2d) 170 (Fed. T.D.) — referred to

I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd., 42 Admin. L.R. 1, 68 D.L.R. (4th) 524, 105 N.R. 161, 38 O.A.C. 321, 90 C.L.L.C. 14,007, [1990] O.L.R.B. Rep. 369, (sub nom. *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*) [1990] 1 S.C.R. 282, 73 O.R. (2d) 676 (note) (S.C.C.) — referred to

Jiminez-Perez v. Canada (Minister of Employment & Immigration), [1984] 2 S.C.R. 565, [1985] 1 W.W.R. 577, 14 D.L.R. (4th) 609, 56 N.R. 215, 9 Admin. L.R. 280 (S.C.C.) — referred to

Kane v. University of British Columbia, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 31 N.R. 214, 110 D.L.R. (3d) 311 (S.C.C.) — considered

Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, 30 C.C.E.L. 237, 90 C.L.L.C. 14,010, 43 Admin. L.R. 157, 83 Sask. R. 81, 106 N.R. 17 (S.C.C.) — considered

Liyanagamage v. Canada (Secretary of State) (1994), (sub nom. *Liyanagamage v. Canada (Minister of Citizenship & Immigration))* 176 N.R. 4 (Fed. C.A.) — considered

Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2, 44 N.R. 354, 137 D.L.R. (3d) 558 (S.C.C.) — referred to

Marques v. Canada (Minister of Citizenship & Immigration) (1995), 27 Imm. L.R. (2d) 209, (sub nom. *Marques v. Canada (Minister of Citizenship & Immigration) (No. 1))* 116 F.T.R. 241 (Fed. T.D.) — considered

Mercier-Néron v. Canada (Minister of National Health & Welfare) (1995), (sub nom. *Mercier-Néron v. Canada (Ministre de la Santé nationale & du bien-être social))* 98 F.T.R. 36 (Fed. T.D.) — referred to

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 134 N.R. 241, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, 4 Admin. L.R. (2d) 121, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271 (S.C.C.) — considered

language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K.C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.) at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.); *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.); and *Pushpanathan*, *supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1947), [1948] 1 K.B. 223 (Eng. C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.)), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.)).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as" structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review

TAB 20

1972 CarswellOnt 236
Ontario High Court of Justice

Smith v. Vanier (Municipality)

1972 CarswellOnt 236, [1973] 1 O.R. 110, 30 D.L.R. (3d) 386

Re Smith and Municipality of Vanier et al.

Pennell, J.

Judgment: November 1, 1972

Counsel: *J. D. Crane*, for applicant.
R. L. Falby, for respondents.

Subject: Public; Municipal
Related Abridgment Classifications
Municipal law
X Attacks on by-laws and resolutions
X.1 Grounds
X.1.e Ultra vires
X.1.e.ii Beyond power of municipality
X.1.e.ii.A Indirect taxation

Headnote

Municipal Law --- Attacks on by-laws generally — Grounds — Ultra vires — Beyond power of municipality — Indirect taxation
Licence — Mini-cinema — Applicant renovating premises under building permit — Application for public hall licence approved by representative of city — Resolution by city council refusing licence — Good faith.
Applicant renovated his premises under a by-law of respondent city and applied for a licence to conduct a mini-cinema business. The application was approved by the representatives of the city except for the Chief of Police. The city council subsequently passed a resolution refusing the issue of the licence. On an application for mandamus, held, the order should be granted. If the application was refused on the ground of morality respondent exceeded its jurisdiction since matters of morality were generally dealt with by the Parliament of Canada. Furthermore, respondent did not act in good faith.

***Pennell, J.*:**

1 This is an application for *mandamus* directed to the Municipality of Vanier and its chief of police, Claude Dwyer, to issue a licence under By-law 1877 to operate a public hall.

2 Subject to what I have to say presently the question is mainly one of fact. In travelling through the affidavit material, I have extracted those allegations which are not in dispute. Accordingly, the facts upon which I have to pronounce are shortly as follows:

3 On or about April 15, 1972, the applicant leased premises known municipally as 151 Montreal Rd. in the City of Vanier. The applicant had plans prepared to renovate the premises in order to operate a public hall for the conduct of a mini-cinema enterprise. The proposal for a public hall was taken up with municipal authorities and on April 28, 1972, a building permit was issued to the applicant to do the renovations necessary to comply with the requirements of By-law 1877 of the City of Vanier. Renovations were done and equipment purchased at a combined cost of $4,000. On May 9, 1972, the matter of the licence was the subject of a discussion between the applicant and Robert Leduc, the treasurer and licensing officer of the City of Vanier. In the course of this discussion Mr. Leduc explained the requirements of By-law 1877.

21 It is of interest to notice that John Blackstone was not cross-examined on his affidavit. On the other hand the clerk-administrator was fairly firm in his recollection that the application was not discussed on a morals basis. All I can say is that although there is evidence to excite the suspicion of the Court I am not prepared to decide the question on affidavit material. The view which I have reached in this case renders it unnecessary to direct an issue whether or not the application had been refused by reason only of the Council's concept of morality and their anxiety to protect the citizens from an exhibition of immoral films. So much for the first point which has been argued at the bar.

22 It is further contended that there was a want of good faith on the part of the respondents. Such a claim being advanced I will make a general observation. In the house of good faith there are many mansions. Good faith or want of it is not an external fact but rather a state of mind that can be judged by verbal or physical acts. To my mind good faith is a composite thing referable to all the relevant circumstances. Included in the circumstances is the manner in which the discretion was exercised.

23 I find it desirable to recapitulate however shortly what actually happened. In May, 1972, the applicant applied for and was granted a building permit to renovate premises for the conduct of a mini-cinema enterprise; the matter of a public hall licence was discussed with the licensing officer of the municipality; certain renovations were carried out; the several representatives of the municipality including the assistant fire chief signified their approval of the premises by signing the application for a licence save and except the chief of police; on July 28, 1972, the applicant served a notice of motion for an order of *mandamus*. On August 4, 1972, the respondents filed the affidavit of its licensing officer setting forth that the premises did not meet the provisions of the relevant by-law in three respects. Two of these three deficiencies fell within the purview of the assistant fire chief who had already approved the premises. On August 4, 1972, the respondent filed the affidavit of its chief of police stating that he was aware of the fact that the premises did not measure up to the provisions of the by-law; presumably this affidavit was the explanation of the police chief for refusing to sign the application. On the return of the first motion for an order of *mandamus* the respondents founded their argument entirely on the three deficiencies. The applicant did not contest the fact of the three deficiencies but stated that he had done everything that was required of him at the time he made the application for the licence. The application of course was dismissed. By August 14, 1972, the applicant had remedied the three deficiencies. The premises were inspected once more and approved by the appropriate representatives of the municipality except the chief of police. On August 23, 1972, counsel for the applicant advised the solicitor for the respondents that unless the licence was granted a second *mandamus* motion would be launched. On August 23, 1972, the Municipal Council passed a resolution that a licence not be issued.

24 I have no doubt that the members of the Municipal Council had a belief that the refusal of the licence would be for the public benefit. As I have already indicated the Council is not bound to give any reason for refusing the licence. The remarks attributed to the mayor, however, have not been challenged. Allow me to say that I can sympathize with the feelings that prompted the remarks. But my personal feelings are irrelevant to the question which now falls to be decided.

25 Good faith in law is not to be measured always by a man's own standard of right, but that which the law has prescribed as a standard for the observance of all men in their dealings with each other. The good faith must be determined by what has been done. Would not a reasonable man be entitled to assume from the posture of the Municipal Council on return of the first motion that approval would be forthcoming if he remedied the deficiencies? In the present case the applicant ordered his affairs accordingly. Then, after completing the deficiencies with the financial consequences which that entailed he finds that the Council refused to issue the licence.

26 Under such circumstances I believe a Court is entitled to look beyond the resolution to refuse the licence. I am of opinion that there was a want of good faith in law and accordingly an order of *mandamus* may issue.

TAB 21

2004 SCC 48, 2004 CSC 48
Supreme Court of Canada

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)

2004 CarswellQue 1545, 2004 CarswellQue 1546, 2004 SCC 48, 2004 CSC 48, [2004] 2 S.C.R. 650, [2004] S.C.J. No. 45, 121 C.R.R. (2d) 261, 132 A.C.W.S. (3d) 3, 17 Admin. L.R. (4th) 165, 241 D.L.R. (4th) 83, 323 N.R. 1, 49 M.P.L.R. (3d) 157, J.E. 2004-1367, REJB 2004-66514

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine, Roberto Biagioni and Denis Léveillé, Appellants v. Municipality of the village of Lafontaine, Harold Larente and Attorney General of Quebec, Respondents and Seventh-Day Adventist Church in Canada, Evangelical Fellowship of Canada and Canadian Civil Liberties Association, Interveners

McLachlin C.J.C., Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps, Fish JJ.

Heard: January 19, 2004
Judgment: June 30, 2004
Docket: 29507

Proceedings: reversing (2002), 2002 CarswellQue 2160, [2002] R.J.Q. 3015 (C.A. Que.); affirming (1998), 1998 CarswellQue 4183 (C.S. Que.)

Counsel: André Carbonneau, David M. Gnam for Appellants
Michel Lalande, Jean-Pierre St-Amour for Respondents, Municipalité du village de Lafontaine, Harold Larente
Mario Normandin for Respondent, Attorney General of Quebec
Gerald D. Chipeur, Ivan Bernardo for Interveners, Seventh-Day Adventist Church in Canada, Evangelical Fellowship of Canada
Andrew K. Lokan, Megan Shortreed for Intervener, Canadian Civil Liberties Association

Subject: Public; Churches and Religious Institutions; Constitutional; Civil Practice and Procedure; Municipal

Related Abridgment Classifications

Administrative law
II Natural justice
II.1 Duty of fairness
II.1.a Procedural fairness
II.1.a.vi Reasons for decision
Municipal law
V Municipal council
V.7 Judicial review
V.7.b Grounds
V.7.b.ii Procedural fairness

Headnote

Municipal law --- Municipal council — Judicial review — Grounds — Procedural fairness

Municipality refused three times rezoning application by Jehovah's Witnesses in order to be able to build place of worship on parcel of land located outside designated zone for places of worship — Municipality gave reasons for first refusal but not for other two refusals — Duty of procedural fairness owed by municipality to congregation required municipality to carefully evaluate applications for zoning variance and to give reasons for refusing applications — By giving reasons for first refusal, municipality gave congregation legitimate expectations of fair process — By refusing to justify refusal, municipality breached heightened duty of procedural fairness owed to congregation, which duty was heightened by municipality's own conduct and by

importance of decision for congregation, impacting as it did on congregation's right to practise religion of choice — Municipality acted in arbitrary fashion, close to bad faith — Refusals were illegal and were set aside.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Municipality refused three times rezoning application by Jehovah's Witnesses in order to be able to build place of worship on parcel of land located outside designated zone for places of worship — Municipality gave reasons for first refusal but not for other two refusals — Duty of procedural fairness owed by municipality to congregation required municipality to carefully evaluate applications for zoning variance and to give reasons for refusing applications — By giving reasons for first refusal, municipality gave congregation legitimate expectations of fair process — By refusing to justify refusal, municipality breached heightened duty of procedural fairness owed to congregation, which duty was heightened by municipality's own conduct and by importance of decision for congregation, impacting as it did on congregation's right to practise religion of choice — Municipality acted in arbitrary fashion, close to bad faith — Refusals were illegal and were set aside.

Droit municipal --- Conseil municipal — Contrôle judiciaire — Motifs — Équité procédurale

Municipalité a refusé à trois reprises la demande de modification de zonage présentée par la Congrégation des témoins de Jéhovah afin de pouvoir construire son lieu de culte sur un terrain situé à l'extérieur de la zone désignée pour les lieux de culte — Municipalité a motivé son premier refus mais non les deux autres — Devoir d'équité procédurale de la municipalité envers la congrégation l'obligeait à examiner soigneusement les demandes de dérogation et à motiver ses refus d'acquiescer aux demandes de la congrégation — En motivant son premier refus, la municipalité a créé des attentes légitimes chez la congrégation quant au respect d'une procédure équitable — En refusant de justifier ses refus, la municipalité a manqué à l'obligation d'équité procédurale accrue qu'elle avait envers la congrégation, obligation accrue en raison des attentes créées par sa propre conduite et de l'importance de la décision pour la congrégation, compte tenu de son effet sur le droit de celle-ci de pratiquer la religion de son choix — Municipalité a agi de manière arbitraire, à la limite de la mauvaise foi — Refus étaient illégaux et étaient annulés.

Droit administratif --- Exigences de la justice naturelle — Droit à une audition — Droits procéduraux lors de l'audition — Motifs

Municipalité a refusé à trois reprises la demande de modification de zonage présentée par la Congrégation des témoins de Jéhovah afin de pouvoir construire son lieu de culte sur un terrain situé à l'extérieur de la zone désignée pour les lieux de culte — Municipalité a motivé son premier refus mais non les deux autres — Devoir d'équité procédurale de la municipalité envers la congrégation l'obligeait à examiner soigneusement les demandes de dérogation et à motiver ses refus d'acquiescer aux demandes de la congrégation — En motivant son premier refus, la municipalité a créé des attentes légitimes chez la congrégation quant au respect d'une procédure équitable — En refusant de justifier ses refus, la municipalité a manqué à l'obligation d'équité procédurale accrue qu'elle avait envers la congrégation, obligation accrue en raison des attentes créées par sa propre conduite et de l'importance de la décision pour la congrégation, compte tenu de son effet sur le droit de celle-ci de pratiquer la religion de son choix — Municipalité a agi de manière arbitraire, à la limite de la mauvaise foi — Refus étaient illégaux et étaient annulés.

After unsuccessfully trying to find land in zone P3, the designated zone under the municipality's zoning by-law for places of worship, the Jehovah's Witnesses' congregation, who wanted to build a Kingdom Hall, made an offer on a parcel of land located in a residential zone, conditional to the municipality's agreement to amend its zoning by-law. After assessing the matter, the municipality refused the application on the ground that it would increase the ratepayers' tax burden. The congregation continued its search and made an offer on a parcel of land located in a commercial zone, conditional to the municipality's amendment of the zoning by-law. The municipality refused the amendment once more, on the ground that land parcels were available in zone P3, but did not name which ones. The municipality did not reassess the demand. Having found nothing in zone P3, the congregation applied for the third time for an amendment of the zoning by-law, which the municipality refused without grounds and without making an assessment.

The congregation brought a motion for mandamus to force the municipality to amend its zoning by-law. The congregation alleged the municipality's refusal infringed its freedom of religion protected by s. 2(a) of the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms. It also sought a declaration that the provisions of the Act respecting land use planning and development (ALUPD) with respect to approval procedure by referendum were unconstitutional because a vote by the population would be contrary to freedom of religion.

The trial judge dismissed the motion after finding that land was in fact available in zone P3 and that the zoning by-law did not infringe the freedom of religion. By a majority, the Court of Appeal dismissed the congregation's appeal. The three judges concluded the trial judge made an unreasonable error in finding there was still land available in zone P3. The majority concluded

that the lack of land could not be attributed to the municipality and the municipality did not have any obligation to ensure religious communities had a place of worship on its territory. The congregation appealed.

Held: The appeal was allowed.

Per McLachlin C.J.C. (Iacobucci, Binnie, Arbour, Fish JJ. concurring): While the municipality's first refusal was in accordance with the law, such could not be said of its second and third refusals. In weighing the merits of the congregation's rezoning requests, the municipality was discharging a duty delegated to it by the legislature. It was bound to exercise the powers conferred upon it fairly, in good faith and with a view to the public interest. The municipality had a duty of fairness towards the congregation because its decision refusing the amendment affected the congregation's rights. The content of the duty of fairness owed by a public body depends on five factors stated in *Baker v. Canada (Minister of Citizenship & Immigration)*. The application of the first four factors to the facts of this case showed; the elected municipal officials could not arbitrarily deny a rezoning application; the municipality had to have greater solicitude for fairness since the ALUPD did not provide for any right of appeal; the municipality's decision was important for the congregation as it affected its practice of its religion; and the municipality, in following an involved process to answer the first rezoning application, created for the congregation a legitimate expectation that its applications would be thoroughly vetted and carefully considered. As for the fifth factor, the acknowledgment that the public body might better positioned to decide the matter, it did not carry much weight here since nothing indicated the municipality had actually used its expertise. The five factors indicated that the municipality's duty of procedural fairness to the congregation required the municipality to carefully evaluate the applications for a zoning variance and to give reasons for refusing them. This duty applied to the first application, and was complied with. The duty was therefore stronger on the second and third applications, where legitimate expectations of fair process had been established by the municipality itself.

The municipality's duty existed independent of the congregation's own conduct. The municipality's duty of procedural fairness to the congregation was not contingent upon the interactions of the congregation with third parties, such as the owner of the land available in zone P3. By refusing to justify its refusals, the municipality breached the heightened duty of procedural fairness it owed to the congregation, a duty heightened by its own conduct and by the importance of the decision to the congregation, impacting as it did on the right of the congregation to practise the religion of its choice. The municipality acted in an arbitrary fashion and close to bad faith. The last two refusals were illegal and were set aside. The appeal was allowed and the matter sent back to the municipality for a new evaluation of the congregation's application for rezoning. It was unnecessary to consider the constitutionality of the impugned provisions of the ALUPD and to answer the constitutional questions.

Per LeBel J. (dissenting) (Bastarache, Deschamps JJ. concurring): The Court of Appeal's finding concerning the availability of the land was wrong, in spite of the fact that their opinion that there was no land available for construction of the congregation's place of worship was agreed with. That finding resulted from an impermissible interference with the trial judge's assessment of the facts and even with his assessment of certain witnesses' credibility. While the judge committed a reviewable error as to the availability of the land, it was not a palpable and overriding error within the meaning of the Supreme Court's case law. Consequently, the Court of Appeal could not reassess the evidence in order to determine whether that finding was reasonable. Since the finding was valid and the Court of Appeal should have shown it deference, the finding justified the dismissal of the congregation's motion because it precluded any conclusion of infringement of the freedom of religion.

The zoning by-law was not prohibitive since it did not prohibit places of worship everywhere within the boundaries of the municipality. Freedom of religion includes a positive aspect, which in turn includes the right to proselytize, that is, to teach and disseminate one's beliefs. This fundamental freedom imposes on the state and public authorities a duty of religious neutrality that assures individual or collective tolerance, thereby safeguarding the dignity of every individual and ensuring equality for all. The State therefore does not have to give active support to any one particular religion; it must respect a variety of faiths whose values are not always easily reconciled. Rights protected by s. 2(a) of the Charter are, however, not absolute. Freedom of religion is limited by the rights and freedoms of others. In order to prove a violation of freedom of religion, it must first be shown that the interference with the religious belief or practice in question is not trivial or insubstantial. Churches and their members are not exempted from making any effort, or even sacrifice in the exercise of their freedom of worship. In view of the conclusion that there was available land, the congregation could not complain that the zoning by-law violated its freedom of religion because it made it impossible for them to establish a place of worship in the municipality. While the municipality is required to be neutral in matters of religion and to structure its by-laws in such a way as to avoid placing unnecessary obstacles in the way of the exercise of religious freedoms, this does not mean that it has to actively help them resolve any difficulties they might encounter in their negotiations with third parties. The municipality did not have to provide the appellants with access

to a lot that corresponded better to their criteria. Moreover, the limited zone determined by the zoning by-law is necessary to protect security and order, and ensure proper land use, and does not constitute a violation of freedom of religion. Neither the by-law nor its application violated the congregation's freedom of religion. The congregation was not exempted from respecting municipal by-laws because of its religious beliefs or practices. The appeal should be dismissed.

In the event that no land had been in fact available, the zoning by-law, as it was drafted, combined with the municipality's refusal to amend it, would have constituted an infringement of the congregation's freedom of religion. The congregation would therefore be unable to build its place of worship anywhere within the boundaries of the municipality because of the lack of land. But freedom of religion includes the right to have a place of worship, and thus the right to build one. The congregation, having shown that their Kingdom Hall was necessary to the manifestation of their religious faith, should therefore be free to establish such a facility within the boundaries of the municipality. The infringement of the freedom of religion would result not from the existence of the zoning by-law, but from the refusal to adapt it to evolving community needs. The Charter does not require the State to take positive steps in support of the exercise of the fundamental freedoms provided for in s. 2(a). The State must even refrain from implementing measures that could favour one religion over another. However, the State's restraint will not always be sufficient; a positive governmental action may sometimes be required to give meaning to a fundamental freedom. This case would be one of these exceptional situations. The municipality would therefore need to amend its by-law in order to allow the congregation to enjoy its fundamental freedom.

In case of a finding of violation, the Supreme Court could have ordered the municipality to amend its by-law, but it could not have imposed a particular location. Zoning by-laws must be drafted in light of a large number of factors, and it is ordinarily only those with political power who are in a position to measure the impact of those factors. It would have been up to the municipality to determine in which zone the place of worship could have been built. The only appropriate remedy would have been an order to the municipality to review its zoning by-law so as to make land available to the congregation on which it could build its place of worship. It would not have been appropriate to suspend the operation of the ALUPD and its process for approval by way of referendum. It could not be assumed that this democratic process, which was consistent with the nature of municipal government in Canada, in any way infringed the freedom of religion guaranteed by the Charter or that it was considered suspect in relation to the values enshrined in the Charter.

The present appeal had administrative law implications. The application of the five factors determined in *Baker v. Canada (Minister of Citizenship & Immigration)* placed the municipality under an obligation to give reasons for its repeated refusals, which it did not do for the last two. If the municipality had given reasons for its refusals, the congregation would have had a better understanding of the decision and would also have given the municipality's decision-making process the required transparency and the appearance of procedural fairness.

Per Major J. (dissenting): LeBel J.'s result was agreed with, but only as regards his conclusions on the findings of fact of the trial judge and the absence of any infringement of freedom of religion.

Après avoir tenté sans succès de trouver un terrain dans la zone P3, la zone communautaire régionale désignée par le règlement de zonage pour l'établissement d'édifices de culte, afin d'y construire sa Salle du Royaume, la Congrégation des témoins de Jéhovah a fait une offre sur un terrain situé dans une zone résidentielle, conditionnelle à l'acception par la municipalité de modifier son règlement de zonage. Après évaluation, la municipalité a refusé la demande de modification du zonage de la congrégation au motif que cela donnerait lieu à une augmentation du fardeau fiscal des contribuables. La congrégation a poursuivi ses recherches et a fait une offre sur un terrain situé dans une zone commerciale, conditionnelle à la modification du zonage par la municipalité. La municipalité a refusé à nouveau la modification, invoquant cette fois-ci la disponibilité de terrains dans la zone P3, sans toutefois préciser lesquels. Elle n'a procédé à aucune nouvelle évaluation du cas. N'ayant trouvé aucun terrain dans la zone P3, la congrégation a présenté une troisième demande à la municipalité, qui l'a refusée sans motif et sans faire d'évaluation.

La congrégation a présenté une requête en mandamus, afin de forcer la municipalité à modifier son règlement de zonage. Elle a allégué que le refus de la municipalité était contraire à la liberté de religion protégée par l'art. 2a) de la Charte canadienne des droits et libertés et par la Charte des droits et libertés de la personne du Québec. La congrégation a aussi demandé à ce que les dispositions de la Loi sur l'aménagement et l'urbanisme (LAU) relatives à la procédure d'approbation référendaire d'une modification à un règlement de zonage soient déclarées inconstitutionnelles, parce qu'un vote populaire serait contraire à la liberté de religion.

Le juge de première instance a rejeté la requête après avoir conclu que des terrains étaient effectivement disponibles dans la zone P3 et que le règlement de zonage ne portait pas atteinte à la liberté de religion. La Cour d'appel a rejeté le pourvoi de la

congrégation à la majorité. Les trois juges ont conclu que le premier juge avait commis une erreur déraisonnable en décidant qu'il y avait toujours des terrains disponibles dans la zone P3. Les juges majoritaires ont conclu que l'absence de terrains n'était pas imputable à la municipalité et que celle-ci n'avait pas l'obligation d'assurer aux communautés religieuses un lieu de culte sur son territoire. La congrégation a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

McLachlin, J.C.C. (Iacobucci, Binnie, Arbour, Fish, JJ., souscrivant à l'opinion de McLachlin, J.C.C.): Bien que le premier refus de la municipalité ait été conforme à la loi, tel n'était pas le cas pour ce qui était de ses deuxième et troisième refus.

En appréciant le bien-fondé des demandes de modification de la congrégation, la municipalité s'acquittait d'une fonction qui lui avait été déléguée par le législateur. Elle était donc tenue d'exercer ses pouvoirs équitablement, de bonne foi et en tenant compte de l'intérêt public. La municipalité avait une obligation d'équité envers la congrégation puisque sa décision refusant la demande de modification touchait les droits de cette dernière. Le contenu de cette obligation d'équité qui incombe à un organisme public varie en fonction de cinq facteurs énoncés dans l'arrêt *Baker v. Canada (Minister of Citizenship & Immigration)*. L'application des quatre premiers facteurs aux faits de l'espèce indiquait que les élus municipaux ne pouvaient refuser de manière arbitraire d'acquiescer à une demande de modification de zonage; que la municipalité devait faire preuve d'un plus grand souci d'équité parce que la LAU ne prévoyait aucun droit d'appel; que la décision de la municipalité était importante pour la congrégation puisqu'elle touchait l'exercice par celle-ci de sa religion; et que la municipalité, en suivant un processus complexe pour répondre à la première demande de modification, avait crée chez la congrégation une attente légitime que ses demandes seraient examinées rigoureusement et soigneusement. Quant au cinquième facteur, soit la reconnaissance que l'organisme public est peut-être mieux placé pour décider, il ne jouait guère en l'espèce, puisque rien n'indiquait que la municipalité avait utilisé son expertise. Les cinq facteurs indiquaient que le devoir d'équité procédurale de la municipalité envers la congrégation l'obligeait à examiner soigneusement les demandes de dérogation et à motiver ses refus d'acquiescer à la deuxième et à la troisième demandes de la congrégation. La municipalité était assujettie à cette obligation lors de la première demande et s'en était acquittée. Son obligation était donc plus rigoureuse lors des deuxième et troisième demandes, car la municipalité avait elle-même créé des attentes légitimes quant au respect d'une procédure équitable.

Le devoir de la municipalité existait indépendamment de la conduite de la congrégation. L'obligation d'équité procédurale de la municipalité envers la congrégation n'était pas tributaire des rapports entre celle-ci et les tiers, comme la propriétaire du terrain disponible dans la zone P3. En refusant de justifier ses refus, la municipalité a manqué à l'obligation d'équité procédurale accrue qu'elle avait envers la congrégation, accrue en raison des attentes créées par sa propre conduite et l'importance de la décision pour la congrégation, compte tenu de son effet sur le droit de celle-ci de pratiquer la religion de son choix. La municipalité a agi de manière arbitraire, à la limite de la mauvaise foi. Les deux derniers refus était illégaux et étaient annulés. Le pourvoi était accueilli et l'affaire était renvoyée à la municipalité pour qu'elle examine de nouveau la demande de modification de zonage de la congrégation. Il n'était pas nécessaire d'examiner la constitutionnalité des dispositions de la LAU et de répondre aux questions constitutionnelles.

LeBel, J. (dissident) (Bastarache, Deschamps, JJ.): La conclusion de la Cour d'appel relativement au terrain disponible était mal fondée, et ce, même si leur opinion quant à la non-disponibilité du terrain pour la construction du lieu du culte de la congrégation était partagée. Cette conclusion résultait d'une intervention inadmissible dans l'appréciation des faits par le juge de première instance et, même, de l'évaluation de la crédibilité de certains témoins. Le premier juge avait certes commis une erreur révisable quant au terrain disponible, mais il ne s'agissait pas d'une erreur manifeste et dominante au sens de la jurisprudence de la Cour suprême. Ce faisant, la Cour d'appel ne pouvait analyser une seconde fois la preuve pour déterminer si cette conclusion était raisonnable. Puisque la conclusion était bien fondée et que la Cour d'appel aurait dû faire preuve de retenue à son égard, la conclusion justifiait le rejet de la requête de la congrégation puisque qu'elle interdit toute conclusion d'atteinte à la liberté de religion.

Le règlement de zonage n'était pas prohibitif puisqu'il n'interdisait pas l'usage d'édifices de culte sur l'ensemble du territoire de la municipalité. La liberté de religion comprend un aspect négatif et un aspect positif, lequel inclut le droit au prosélytisme, soit celui d'enseigner et de propager ses croyances. Cette liberté fondamentale impose à l'État et aux pouvoirs publics une obligation de neutralité religieuse garante de la tolérance individuelle ou collective, préservatrice de la dignité de chacun et de l'égalité de tous. L'État n'a donc pas à donner un appui actif à une religion particulière; il est tenu au respect de confessions diverses dont les valeurs ne se concilient pas toujours aisément. Par ailleurs, les droits protégés par l'art. 2a) de la Charte canadienne ne sont pas absolus. La liberté de religion est limitée par les droits et libertés d'autrui. La diversité des opinions et des convictions exige

la tolérance mutuelle et le respect d'autrui. Avant de conclure à une violation de la liberté de religion, il faut démontrer que l'atteinte à la pratique ou à la croyance religieuse n'est pas insignifiante ou négligeable. Les Églises et leurs membres ne sont pas dispensés de tout effort, voire de tout sacrifice, dans l'exercice de la liberté du culte. Vu la conclusion qu'il y avait un terrain disponible, la congrégation ne pouvait se plaindre que le règlement de zonage contrevenait à sa liberté de religion parce qu'il rendait impossible leur implantation d'un lieu de culte dans la municipalité. Si la municipalité, tenue de faire preuve de neutralité religieuse, devait veiller à aménager sa règlementation afin d'éviter d'imposer des obstacles inutiles à l'exercice des libertés religieuses, elle n'avait cependant pas à aider activement les groupes religieux à régler toutes les difficultés qu'ils pouvaient éprouver dans leurs négociations avec des tiers. La municipalité n'avait pas à assurer à la congrégation l'accès à un terrain répondant davantage à ses critères. De plus, la zone limitée prévue par le règlement de zonage était nécessaire à la préservation de la sécurité et de l'ordre au sein de la municipalité et au bon usage de son territoire et ne violait pas la liberté de religion. Ni le règlement ni son application ne portaient atteinte à la liberté de religion de la congrégation. Les croyances et pratiques religieuses de celle-ci ne l'exemptait pas de se conformer à la règlementation municipale. Le pourvoi devrait être rejeté.

Par ailleurs, dans l'hypothèse où il n'y aurait eu aucun terrain de disponible, la rédaction du règlement de zonage combinée au refus de la municipalité de le modifier aurait constitué une atteinte à la liberté de religion de la congrégation. L'absence de terrain mettrait la congrégation dans l'impossibilité de construire son lieu de culte sur l'ensemble du territoire de la municipalité. Or, la liberté de religion inclut le droit de bénéficier d'un lieu de culte, et donc celui d'en construire un. La congrégation ayant démontré que la Salle du Royaume était nécessaire à la manifestation de sa foi religieuse, elle devait alors être libre d'implanter un tel lieu sur le territoire de la municipalité. L'atteinte à la liberté de religion résulterait non pas de l'existence du règlement, mais du refus de l'adapter à l'évolution des besoins collectifs. La Charte n'oblige pas l'État à prendre des mesures positives pour assurer l'exercice des libertés fondamentales prévues à l'art. 2a), et celui-ci doit même s'abstenir de favoriser une religion ou une autre. Cependant, il ne sera pas toujours suffisant que l'État agisse avec réserve; une mesure gouvernementale positive pourrait parfois être nécessaire pour donner un sens à la liberté fondamentale. L'espèce serait l'une ces situations exceptionnelles. La municipalité devrait donc alors modifier le règlement pour permettre à la congrégation de jouir de sa liberté de religion.

En cas de conclusion de violation, la Cour suprême aurait certes pu ordonner à la municipalité de modifier son règlement, mais elle n'aurait pu lui imposer un lieu d'implantation en particulier. L'élaboration des règlements de zonage nécessite la prise en considération de nombreux facteurs dont seul le pouvoir politique est habituellement capable de mesurer l'impact. C'est la municipalité qui aurait eu à décider dans quelle zone le lieu de culte pouvait être construit. La seule réparation appropriée aurait été d'ordonner à la municipalité de procéder au réexamen de son règlement de zonage afin de rendre accessibles à la congrégation des terrains où elle pouvait construire son lieu de culte. Il n'y aurait par ailleurs pas eu lieu d'écarter l'application de la LAU et de sa procédure d'approbation référendaire. On ne pouvait présumer que cette procédure démocratique, conforme à la nature des régimes municipaux du Canada, portait une quelconque atteinte à la liberté de religion protégée par la Charte ou qu'elle devait être considérée comme suspecte par rapport aux valeurs consacrées par celle-ci.

Le présent pourvoi avait une incidence sur le droit administratif. L'application des cinq facteurs de l'arrêt *Baker v. Canada (Minister of Citizenship & Immigration)* engendrait au moins un obligation pour la municipalité de motiver ses refus répétés, ce qu'elle n'a pas fait à l'égard des deux derniers. Si la municipalité avait motivé ses refus, la congrégation aurait mieux compris sa décision et aurait également permis la nécessaire transparence et l'apparence d'équité du processus décisionnel de la municipalité.

Major, J. (dissident): La conclusion du juge LeBel était partagée, mais seulement quant à ses conclusions sur les constatations de fait du premier juge et sur l'absence d'atteinte à la liberté de religion.

Annotation

"[H]igh-handed or outrageous conduct as that of the Municipality" are strong words reminding municipalities that all citizens, including discreet minorities, are entitled to fair treatment and respect. *Congrégation des Témoins de Jéhovah de St-Jerome-Lafontaine v. Lafontaine (Village)*, demonstrates how difficult the road to justice can be for citizens who are victims of arbitrary decisions from elected officials (The Village of Lafontaine has since merged with three other municipalities to form the City of St-Jerome). It also shows the value of persisting all the way to the Supreme Court of Canada. In this case, persistence paid off with important legal principles that illuminate the authority and responsibility of a municipal council and the place of religion in public (municipal) space.

This judgment of the Supreme Court of Canada enunciates four basic principles. First, a municipality is "bound to exercise the powers conferred upon it fairly, in good faith and with a view to the public interest." Second, freedom of religion includes the

right to have a place of worship. Third, state and public authorities have a duty of religious neutrality that assures individual or collective tolerance. Fourth, when the state creates a situation that interferes with the exercise of a freedom, it could be required to take positive steps to put an end to that interference. The first two principles are *ratio decidendi*, the second two principles are *obiter dictum* of three members of the court.

The 'dissent' by Justice LeBel adds to the analysis. The Quebec Court of Appeal unanimously overturned a finding of fact made by the trial judge that no land was available within the municipality for a place of worship. The municipality in effect admitted in its Supreme Court factum no land was available. The Supreme Court, in deference to the trial judge, held land was available (but not as much as the trial judge originally stated). Notwithstanding, the majority allowed the appeal and remitted the congregation's re-zoning application to the municipality to be reconsidered in light of the reasons given. The four dissenting judges felt with the availability of land there was no infringement of the congregation's freedom of religion and therefore dismissed the appeal. Major J. dismissed the appeal without comments on the merits. LeBel J., writing on behalf of himself, Bastarache and Deschamps JJ. continued the legal analysis "because of the nature of the debate that has taken place in the Quebec courts and in this Court and the importance of the constitutional questions raised."

The analysis by three of the dissenting judges makes an otherwise narrow 5-4 decision much more authoritative and instructive. For example, the *unanimous* court agreed, "[f]reedom of religion includes the right to have a place of worship," as worded by Lebel J. in the portion of dissent agreed to by Major J. The majority said: "The right to freely adhere to a faith and to congregate with others in doing so is of primary importance, as attested to by its protection in the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*."

The decision was 8-1 on the principle a municipality must "exercise the powers conferred upon it fairly, in good faith and with a view to the public interest," written by McLachlin C.J.C. for five judges. LeBel J. wrote municipalities must ensure "decisions are made using a fair, impartial and open process appropriate to their statutory, institutional and social context (*Baker*, at paras. 22 and 28)." While agreeing on this principle, and agreeing the municipality failed in its duty of procedural fairness, the three judges in LeBel J.'s dissent chose not to join the majority in their administrative law remedy to this legal wrong by remitting the rezoning application back to the municipality for reconsideration. Although recognizing the congregation had claimed the municipality exercised its discretion unreasonably, arbitrarily and in bad faith, they did not feel the Appellants sufficiently focused their argument on administrative law to allow the Court to give an administrative law remedy.

This was not entirely unforeseen. The congregation had a long and tortuous history with the municipality stretching back twelve years to their first rezoning application in 1992. They realized a strict administrative argument was their strongest suit. However, it would yield the less than satisfactory administrative remedy. After twelve years, the congregation wanted a building permit, not to begin the process all over again. They focused their argument on freedom of religion and the municipality's arbitrariness and bad faith. Justice Iacobucci held the door open during oral argument when he asked: "is it part of your argument that you're saying the failure to give reasons was an independent wrong that was committed in this case apart from freedom of religion . . . ?" Counsel for the congregation replied: "What we are saying is the conduct of the Municipal Council towards the Appellants was in bad faith and was not open, fair and impartial administration." That seems to parallel what Justice LeBel ultimately wrote.

The congregation's concentration on freedom of religion and arbitrariness paid off. Although granting an administrative remedy, the reasoning of the Court, both majority and dissent, beneficially illustrates the interaction between administrative fairness and respect for freedom of religion. The Court's reasons reassure the congregation they (and other religious communities) should not be caught again in an arduous, fruitless process. This interaction will be explored momentarily.

The majority's principle that a municipality must "exercise the powers conferred upon it fairly, in good faith and with a view to the public interest" is an elegant distillation of decades of case law. Joining these three duties into one principle corrects the fixation of courts and municipalities on the simplistic maxim that municipal councils can regulate but not prohibit. McLachlin C.J.C. held the Court must examine the conduct of the municipality in denying the congregation's rezoning application. In her view, availability of land for a place of worship provided justification to refuse the rezoning; it did not justify playing cat and mouse with the congregation.

The municipality continuously referred the congregation back to the same four P-3 zones without any further information or direction, notwithstanding the congregation's good faith efforts, including confirming in writing with the owners in the four P3 zones their properties were not available. Both McLachlin C.J.C. and LeBel J. detail the congregation's efforts. The congregation specifically asked the municipality in writing, "If [the municipality] is aware of any property available in the community zone, please communicate this information to us as soon as possible." No information was forthcoming. When the municipality alleged the congregation had refused an available property, the congregation wrote, denying such a refusal, and asked what available property had allegedly been refused. No information was given. Five years later, on the last day of trial, the municipality brought out a 'surprise' witness — Mrs. Jolicoeur testified she would have been willing to sell part of her land.

During oral argument, counsel for the municipality confirmed his client planned Mrs. Jolicoeur's testimony before the trial began. Arbour J. quickly asked, "why didn't the municipality not say back then, no it is not necessary to rezone because you know very well Mrs. Jolicoeur has a property to sell?" Counsel responded: "I admit it would have been a lot easier to say it is the property of so and so that is available. Unfortunately, that is not what happened."

The majority in the Supreme Court, and Lebel J. (at para. 92), realized the importance of the municipality's conduct in denying the rezoning application. A little more fairness, a little more good faith, a little more respect for the public interest on the part of the municipality would have avoided 12 years of friction, expense and delay. As the majority concluded: "The Municipality acted in a manner that was arbitrary and straddled the boundary separating good from bad faith."

The elegance of the Chief Justice's principle is further understood when considered from the standpoint of a municipal council. It does not impose a heavy burden on their administrative and political function. In fact, it explicitly recognized as the Chief Justice wrote: "What is in the public interest is a matter of discretion to be determined solely by the municipality." That discretion enjoys a healthy deference in any reviewing court — so long as the municipal council does not act arbitrarily. Arbitrariness by public authorities is anathema to democratic societies (and minorities like Jehovah's Witnesses) as Rand J. articulated in *Roncarelli v. Duplessis*, 1959 CarswellQue 37, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.), and quoted by McLachlin C.J.C.

Justice LeBel's *obiter dicta* on the interaction between freedom of religion and municipalities is enlightening. The majority does not disassociate itself from his comments. This opinion comes close to the American concept of separation of church and state, but with a distinct Canadian accent on tolerance and dignity. That accent is neither an afterthought nor a quaint Canadianization. The balancing of interests in LeBel J.'s advice for municipalities is a practical, workable approach to situations that arise in the municipal context. It gets us beyond the intransigence imposed by a trite recitation of, "freedom of religion is not absolute."

LeBel J. imposes on public authorities "a duty of religious neutrality that assures individual or collective tolerance, thereby safeguarding the dignity of every individual and ensuring equality for all." How does a municipality exercise that duty of religious neutrality? LeBel J. says that means "refraining from implementing measures that could favour one religion over another or that might simply have the effect of imposing one particular religion." (Perhaps this signals an end to such practices as a municipally sponsored nativity scene at Christmas?) He also speaks in terms of setting up a "social and legal framework" wherein tolerance reigns and religion is respected subject to the time-honoured limits necessary "to protect public safety, order, health or morals."

However, this conception of tolerance and dignity is more than a hands off, live and let live philosophy. LeBel J. states municipalities must structure their by-laws "in such a way as to avoid placing unnecessary obstacles in the way of the exercise of religious freedoms." In the context of this case, as LeBel J. found, a municipality could not refuse to zone any land for a place of worship or only zone land that lay in a swamp. Such a by-law would be an unnecessary obstacle to the exercise of religious freedom. However, what about the situation where appropriately-zoned land exists, but the problem is private owners are unable or unwilling to sell to the religious community? That leads us to the fourth principle in this judgment.

The majority in the Quebec Court of Appeal, quoting from *Dunmore v. Ontario (Attorney General)*, 2001 CarswellOnt 4434, 2001 CarswellOnt 4435, [2001] 3 S.C.R. 1016 (S.C.C.), at para. 19, said the *Charter* imposes no positive duty on the municipality to do anything in such a circumstance. Justice LeBel disagreed. Also referring to *Dunmore*, he said the state

couldn't hide behind private actors, and in the circumstance, "when the state creates a situation that interferes with the exercise of a freedom, it may be required to take positive steps to put an end to the interference." Such positive steps could be as simple as adapting the zoning by-law to the evolving needs of the community by zoning additional land appropriately (over 83% of the municipality of Lafontaine is not urbanized) or by interpreting the zoning regulation liberally to allow places of worship in zones with a similar land use (such as social clubs, performance halls or sports centres).

Just as a municipality must act fairly, in good faith and with a view to the public interest, so must the religious community seeking to build a place of worship. It cannot build wherever it chooses, or whatever size and shape it chooses. It must conform to the neutral social and legal framework established by the municipality to protect public safety, order and health. Such is the nature of Canadian tolerance and respect for the dignity of all citizens. We work cooperatively, in the public interest. It will be interesting to see the collaborative solution arrived at by the new municipality of St-Jerome and the Lafontaine congregation of Jehovah's Witnesses.

David M. Gnam

André Carbonneau

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***McLachlin C.J.C.*:**

I. Summary

1 The issue in this case is whether the municipality of the village of Lafontaine (the "Municipality") lawfully denied an application for rezoning to permit the Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine (the "Congregation") to build a place of worship. Unlike my colleague Justice LeBel, I conclude the Municipality did not. Although the Municipality's first denial of permission to rezone complied with the law, the second and third did not, in my view, because the Municipality gave no reasons for its denial, instead taking the position that it enjoyed absolute discretion to refuse the zoning variance with no explanation to the Congregation.

2 In weighing the merits of the Congregation's rezoning requests, the Municipality was discharging a duty delegated to it by the Legislature. It was bound to exercise the powers conferred upon it fairly, in good faith and with a view to the public interest. Here, on the facts as found by the trial judge, the Municipality failed to do so. Accordingly, I would remit the matter to the Municipality for reconsideration.

II. The Duty on the Municipality

3 A public body like a municipality is bound by a duty of procedural fairness when it makes an administrative decision affecting individual rights, privileges or interests: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.); *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). The decision to deny the application for rezoning affected the Congregation's rights and interests. There can thus be no question that the Municipality owed the Congregation a duty of fairness.

4 At issue in this case is the *content* of this duty. More particularly and on the facts as found, does the duty require the Municipality to give the Congregation reasons for refusing the rezoning application? Or does it clothe the Municipality with absolute discretion to refuse the Congregation's application?

5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.). In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

6 The first factor -- the nature of the decision and the process by which it is reached -- merges administrative and political concerns. The decision to propose a draft by-law rezoning municipal territory is made by an elected council accountable to its constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to their own: *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 51. This decision is moreover tempered by the municipality's charge to act in the public interest: *Toronto (City) Roman Catholic Separate School Board v. Toronto (City)* (1925), [1926] A.C. 81 (Ontario P.C.), at p. 86. What is in the public interest is a matter of discretion to be determined solely by the municipality. Provided the municipality acts honestly and within the limits of its statutory powers, the reviewing court is not to interfere with the municipal decision unless "good and sufficient reason be established": *Kuchma v. Tache (Rural Municipality)*, [1945]

S.C.R. 234 (S.C.C.), at p. 243 (*per* Estey J.); see also *Norfolk v. Roberts* (1914), 50 S.C.R. 283 (S.C.C.), at p. 293; *Glover v. Kee* (1914), 20 B.C.R. 219 (B.C. C.A.), at pp. 221-22; *Howard v. Toronto (City)*, [1928] 1 D.L.R. 952 (Ont. C.A.), at p. 965.

7 However, the elected councillors cannot deny a rezoning application in an arbitrary manner. Where the municipal council acts in an arbitrary fashion in the discharge of its public function, "good and sufficient reason" exists to warrant intervention from the reviewing court in order to remedy the proven misconduct. The need for judicial oversight of arbitrary municipal decision making is only heightened by the aggravated potential for abuse of discretionary statutory authority. As Rand J. has made clear in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140, no discretion casts a net wide enough to shield an arbitrary or capricious municipal decision from judicial review:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

8 The second factor is the statutory scheme and its provisions, in this case the *Act respecting Land Use Planning and Development*, R.S.Q., c. A-19.1, which grants the Municipality authority to consider a rezoning application. Even so, the absence of an appeal provision demands greater municipal solicitude for fairness. Enhanced procedural protections "will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted": *Baker*, *supra*, at para. 24, *per* L'Heureux-Dubé J.

9 The third factor requires us to consider the importance of the decision to the Congregation. The stringency of procedural protection is directly proportional to the importance of the decision to the lives of those affected and the nature of its impact on them: *Baker*, *supra*, at para. 25; see also *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.), at p. 1113. Here, it becomes important that the municipal decision affects the Congregation's practice of its religion. The right to freely adhere to a faith and to congregate with others in doing so is of primary importance, as attested to by its protection in the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*.

10 The fourth factor -- the legitimate expectations of the Congregation -- also militates in favour of heightened procedural protection. Where prior conduct creates for the claimant a legitimate expectation that certain procedures will be followed as a matter of course, fairness may require consistency: *Baker*, *supra*, at para. 26; see also *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.); *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.). Here, the Municipality followed an involved process in responding to the Congregation's first rezoning application, in so doing giving rise to the Congregation's legitimate expectation that future applications would be thoroughly vetted and carefully considered.

11 The fifth factor -- the nature of the deference due to the decision maker -- calls upon the reviewing court to acknowledge that the public body may be better positioned than the judiciary in certain matters to render a decision, and to examine whether the decision in question falls within this realm. Municipal decisions on rezoning fall within the sphere in which municipalities have expertise beyond the capacity of the judiciary, thus warranting deference from reviewing courts. However, this factor may not carry much weight where, as here on the second and third applications for rezoning, there is no record to indicate that the Municipality has actually engaged its expertise in evaluating the applications.

12 The five *Baker* factors suggest that the Municipality's duty of procedural fairness to the Congregation required the Municipality to carefully evaluate the applications for a zoning variance and to give reasons for refusing them. This conclusion is consistent with the Court's recent decision in *Prud'homme c. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85 (S.C.C.), at para. 23, holding that municipal councillors must always explain and be prepared to defend their decisions. It is also consistent with *Baker*, *supra*, where it was held, at para. 43 dealing with a ministerial decision, that if an organ of the state has a duty to give reasons and refuses to articulate reasons for exercising its discretionary authority in a particular fashion, the public body may be deemed to have acted arbitrarily and violated its duty of procedural fairness.

TAB 22

Being a Good Sport: A Comparative Analysis of Good Faith as a Statutory Obligation in Insolvency Proceedings

*Julien Morissette, Ilia Kravtsov and Cristina Cosneanu**

I. INTRODUCTION

On 8 April 2019, Bill C-97[1] was introduced and read for the first time in the House of Commons. It received Royal Assent on 21 June 2019. Among the various measures of this omnibus bill, Division Five of Part Four amended a number of statutes, including the *Bankruptcy and Insolvency Act* (*BIA*)[2] and the *Companies' Creditors Arrangement Act* (*CCAA*).[3]

Bill C-97 notably incorporated an overarching duty to act in good faith for all parties involved in *BIA* or *CCAA* proceedings and empowered the courts to enforce this duty. The declared purpose of this amendment is to ensure that all parties act "honestly, reasonably, and candidly" throughout the insolvency proceedings, the failure of which may be appropriately sanctioned.[4]

The legislative provisions came into force on 1 November 2019. Sections 4.2 of the *BIA* and 18.6 of the *CCAA* (the "amendments"), which are identical, read as follows:

> Duty of Good Faith
>
> **Good faith**
> **(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 any interested person, the court may make any order that it considers appropriate in the circumstances.

These amendments have not gone unnoticed in the Canadian insolvency world.

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[1] Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019) [Bill C-97].

[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

[3] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

[4] Canada, Parliament, House of Commons, Standing Committee on Finance, *Evidence*, 42nd Parl, 1st Sess, No 207 (2 May 2019) at 13:35 (Mark Schaan).

The takeaways from the Bluberi Case are as follows: (1) the good faith requirement established by *Century Services* is now expressly enacted at section 18.6 of the *CCAA* (and section 4.2 of the *BIA*); (2) an improper purpose is one that is not aligned with the purposes of the *CCAA* and *BIA*; (3) acting for an improper purpose is equivalent to acting contrary to section 18.6 of the *CCAA* and section 4.2 of the *BIA*; and (4) creditors, and other stakeholders, may pursue their personal interest. However, appropriate regard should be given to the rights of all other parties in the proceedings, notably by not overriding clearly expressed wishes of the stakeholders and undercutting the democratic structure of creditor voting provided by the statutes.

2. Common Law Provinces[161]

i. Ontario

Justice Morawetz was among the first to comment on the amendments in *Lydian.*[162] In that case, the applicants were seeking an initial order under the *CCAA* and other relief. Discussing the recent amendment to sections 11.02(1) and 11.001 of the *CCAA*, Justice Morawetz made the following comment with respect to the good faith amendment:

> [30] The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments [sections 11.02(1) and 11.001 of the *CCAA*]. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.
>
> [31] In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.[163]

In that case, Justice Morawetz linked the recent amendments of sections 11.02(1) and 11.001 to the new section 18.6 of the *CCAA*, as manifestations of the legislator's objective to encourage cooperation of all stakeholders in restructuring proceedings.

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[161] While relevant cases were only identified in Ontario, Alberta and British Columbia, the authors have canvassed cases from all provinces.
[162] *Re Lydian International Limited*, 2019 ONSC 7473.
[163] *Ibid* at paras 30–31.

TAB 23

Good Faith in Insolvency and Restructuring: At The Intersection of Civilian and Common Law Paradigms, at a Fork in the Road or in a Merging Lane?

Ari Y Sorek and Charlotte Dion[*]

There is no question that the legal notion of "good faith" means one thing to Québec civilian jurists and another to common law jurists—at least for the purists among them. In 2019, after decades of incremental and uneven praetorian articulation of the duty of good faith in civil law, at common law, in equity and—with its own discrete contours—in insolvency matters, Parliament promulgated amendments to the *Bankruptcy and Insolvency Act* (*BIA*),[1] the *Companies' Creditors Arrangement Act* (*CCAA*)[2] and the *Canada Business Corporations Act (CBCA*),[3] sprinkling the term "good faith" across these statutes to make it an overarching, standalone imperative.

Thus, some 25 years after the National Assembly entrenched good faith in the Québec Civil Code, the same words—"good faith"—find themselves in the federal statutes governing insolvency law from coast to coast.

But are we in the presence of *faux amis*?

The idea for this paper began germinating at the 2020 Annual Review of Insolvency Law ("ARIL") conference and in the wake of these amendments. Many practitioners, especially in Québec, welcomed the amendments with little more than a shrug, viewing them as an almost-redundant codification of a very familiar *jus commune* or, at most, as a long-overdue codification of *Century Services*.[4] However, the first thought pieces out of the gate and, to a greater extent, the commentary and questions that floated during the 2020 ARIL conference, elicited what appeared to be—at least from the vantage point of jurists from *la belle province*—a rather curious level of confusion and uncertainty.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

[2] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

[3] *Canada Business Corporations Act*, RSC 1985, c C-44.

[4] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 [*Century Services*].

It is also reminiscent of the duty of consistency ("*devoir de cohérence*"): to not frustrate the legitimate expectations of a counterparty that have been created through prior actions, as enunciated in *Kiewit* and *Sintra*.[226]

ii. The claims process

The claims process *per se* is another phase of the proceedings during which consistency, timeliness and dispatch can affect substantive rights. Stakeholders are entitled to draw conclusions, organize their affairs or assert positions on the basis of the prevailing *modus vivendi*; failing to follow established predicates and deadlines in insolvency proceedings can be particularly prejudicial. Accordingly, for example, a creditor wishing to assert a claim after the claims bar date will have to prove that the delay is not the result of negligence and that it did act in good faith;[227] and that the failure to abide by the claims process order is "due to inadvertence or incomplete information being available to the creditors".[228] In *Enron Canada Corp v National Oil-Well Canada Ltd* the Court found that the criterion applicable to *CCAA* proceedings falls somewhere between the *BIA* criterion and the one applicable in US Bankruptcy Rules, distinguishing the facts from those at play in *Lindsay v Transtec Canada Ltd*:

> Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.[229]

The process of asserting, gathering, assessing and adjudicating claims, whether within or outside a formal claims process, requires transparency, dialogue, cooperation and due diligence.[230] Inherent in these requirements is the recognition that the various actors—the debtor, creditors, the monitor and the court—require foreseeability, reliability and predictability with respect to the various claims and positions that compete with each other in a typical restructuring process.

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[226] *Kiewit*, *supra* note 95; *Sintra*, *supra* note 72.
[227] *Enron Canada Corp v National Oil-Well Canada Ltd*, 2000 ABCA 285 at paras 14, 26 [*Enron*].
[228] *Ibid* at para 13, citing *Re Mount Jamie Mines (Québec) Ltd* (1980), 110 DLR (3rd) 80 (ONSC).
[229] *Ibid* at para 18, citing *Lindsay v Transtec Canada Ltd*, 1994 CanLII 1539 (BCSC).
[230] *Re Mid-Bowline Group Corp*, *supra* note 208.

Given the famously "incremental nature" of *CCAA* proceedings, and even while accounting for the fast pace and inherently unpredictable nature of restructurings, the parties cannot unduly add to this unpredictability through tactical or negligent withholding of information or positions. If they do, the court's discretionary authority allows it to ensure that delinquent stakeholders not benefit from their own turpitude.

iii. Proposals and plans of arrangement: Fairness, reasonableness and improper purpose

The substance of any proposals and plans of arrangement must be fair and reasonable. Dr Sarra has written that "fairness is assessed by whether the plan is feasible, whether it fairly balances the interests of all the creditors, the company and its stakeholders".[231] She adds that "the plan must be inherently fair, reasonable and equitable, and in exercising its discretion to approve an agreement, the court will consider the relationship between the debtor corporation and the stakeholders".[232]

The assessment of the fairness of a plan of arrangement is a balancing act, where the interests of various stakeholders are balanced against each other in a holistic manner.[233] This does not mean that all stakeholders are entitled to be treated equally. In *Re Canadian Red Cross Society*, the Court found as follows:

> To be "fair and reasonable" a proposed Plan does not have to be perfect. No Plan can be. They are by nature and definition "plans of compromise and arrangement". The Plan should be approved if it is inherently fair, inherently reasonable and inherently equitable […].[234]

Houlden and Morawetz write that the fairness and reasonableness test entails an assessment of good faith:

> A person seeking court approval of a proposal must be acting in good faith. Good faith requires full disclosure of the assets of the debtor and the

[231] Sarra, *Rescue!*, *supra* note 225 at 530.
[232] *Ibid* at 531. For the criteria the court may consider in assessing the fairness and the reasonableness of a plan of arrangement, see *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 21.
[233] *Re Canadian Red Cross Society*, 2000 CanLII 22488 at para 20 (ONSC) [*Canadian Red Cross*].
[234] *Ibid* at para 22. See also: Sarra, *Rescue!*, *supra* note 225 at 535.

TAB 24

2015 QCCS 4353
Superior Court of Quebec

Marcoux c. St-Charles-de-Bellechasse (Municipalité)

2015 CarswellQue 13772, 2015 CarswellQue 9070, 2015 QCCS 4353, 261 A.C.W.S. (3d) 203, J.E. 2015-1597, EYB 2015-256883

Rénald Marcoux, Serge Gonthier, Denis Marcoux, Bertrand Bilodeau et Louis-Daniel Blais, Appelants, c. Municipalité Saint-Charles-de-Bellechasse, Intimée, et La Procureure générale du Québec et le Procureur général du Canada, Mis en cause

Ruel J.C.S.

Heard: June 22, 2015
Judgment: September 23, 2015
Docket: C.S. Qué. Montmagny 300-36-000002-145

Counsel: *Mtre Philippe Dumaine*, for the appellants
Mtre Martin Bouffard, Mtre Ghislain Otis, for the respondent
Mtre Marc Ribeiro, Mtre Michelle Kellam, for the Attorney General of Canada, impleaded party
Mtre Patricia Blair, for the Attorney General of Quebec, impleaded party

Subject: Constitutional; Environmental; Public

Table of Authorities

Cases considered by *Ruel*:

ABC Extrusion Co. v. Signtech Inc. (1987), 14 C.I.P.R. 108, 17 C.P.R. (3d) 365, 14 F.T.R. 309, 1987 CarswellNat 660 (Fed. T.D.) — referred to

Bank of Montreal v. Hall (1990), 9 P.P.S.A.C. 177, 46 B.L.R. 161, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, 104 N.R. 110, [1990] 2 W.W.R. 193, 82 Sask. R. 120, 1990 CarswellSask 25, 1990 CarswellSask 405 (S.C.C.) — referred to

Bell Canada c. Québec (Commission de la santé & de la sécurité du travail) (1988), 21 C.C.E.L. 1, (sub nom. *Bell Can. v. Québec (Comm. de la santé & de la sécurité du travail))* [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161, (sub nom. *Bell Can. v. Québec (Comm. de la santé & de la sécurité du travail))* 85 N.R. 295, 15 Q.A.C. 217, 1988 CarswellQue 100, 1988 CarswellQue 136 (S.C.C.) — considered

British Columbia (Attorney General) v. Canada (Attorney General) (1913), [1914] A.C. 153, 5 W.W.R. 878, 15 D.L.R. 308, 13 E.L.R. 536, 1913 CarswellBC 125, 26 W.L.R. 347, 25 W.L.R. 347 (Jud. Com. of Privy Coun.) — referred to

Bruyère c. Québec (Commission de la santé & de la sécurité du travail) (2011), 2011 SCC 60, 2011 CarswellQue 13253, 2011 CarswellQue 13254, 94 C.C.P.B. 1, (sub nom. *Canada (Ministere des Ressources humaines & Développement social) v. Bruyère)* 339 D.L.R. (4th) 473, D.T.E. 2011T-812, (sub nom. *A.G. (Quebec) v. Canada (H.R.S.D.))* 2012 C.L.L.C. 240-002, (sub nom. *Quebec (Attorney General) v. Canada (Minister of Human Resources & Social Development))* 424 N.R. 198, (sub nom. *Quebec (Attorney General) v. Canada (Human Resources & Social Development))* [2011] 3 S.C.R. 635, 99 C.C.E.L. (3d) 1 (S.C.C.) — considered

Burrardview Neighbourhood Assn. v. Vancouver (City) (2007), 2007 SCC 23, 2007 CarswellBC 1194, 2007 CarswellBC 1195, [2007] 6 W.W.R. 197, 34 M.P.L.R. (4th) 1, 66 B.C.L.R. (4th) 203, 362 N.R. 208, 281 D.L.R. (4th) 54, 241 B.C.A.C. 1, 399 W.A.C. 1, (sub nom. *British Columbia (Attorney General) v. Lafarge Canada Inc.)* [2007] 2 S.C.R. 86 (S.C.C.) — considered

Canadian Western Bank v. Alberta (2007), 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 49 C.C.L.I. (4th) 1, [2007] 8 W.W.R. 1, 362 N.R. 111, 75 Alta. L.R. (4th) 1, 281 D.L.R. (4th) 125, [2007] I.L.R. I-4622, 409 A.R. 207, 402 W.A.C. 207, [2007] 2 S.C.R. 3 (S.C.C.) — referred to

6 On appeal before this Court, the Attorney General of Canada has taken up the interest of the appellants, arguing that sections 8 and 9 of By-law 09-214 are constitutionally invalid, inapplicable, or inoperative.

7 To decide this appeal, the Court must answer three questions. *First*, do the impugned provisions of By-law 09-214 constitute a *valid* provincial regulation pursuant to the ancillary powers doctrine? In this respect, the Court must consider whether the impugned provisions, which fall within exclusive federal power over navigation, are sufficiently integrated into a regulatory scheme that falls within provincial jurisdiction.

8 *Second*, are the impugned provisions in By-law 09-214 *inapplicable* pursuant to the doctrine of interjurisdictional immunity? In this respect, the Court must consider whether the impugned provisions trenches upon the core of the federal power over navigation.

9 *Third*, insofar as the impugned provisions of By-law 09-214 are valid and applicable, are they *inoperative* pursuant to the doctrine of federal paramountcy? In this respect, the Court must consider essentially whether the impugned provisions are inconsistent with the objective of the *Vessel Operation Restriction Regulations*. If so, the federal scheme is paramount, and the impugned provisions of By-law 09-214 are inoperative.

10 In its analysis of the questions submitted, the Court will deal with the notion of "cooperative federalism", which recognizes that the integration of the federal and provincial legislative schemes must be promoted in accordance with the constitutional power of each level of government, with a view to addressing important public interest issues, particularly in the area of the environment.

10 *BY-LAW 09-214 OF THE MUNICIPALITY OF SAINT-CHARLES-DE-BELLECHASSE AND THE CONTEXT OF ITS ENACTMENT*

11 Wishing to ensure the preservation and survival of the lakes on its territory, Lake Saint-Charles in particular, the town of Saint-Charles-de-Bellechasse put in place a multifaceted strategy over a twenty-year period.

12 As early as 1981, the province passed the *Regulation respecting waste water disposal systems for isolated dwellings*,[4] enacted pursuant to the *Environment Quality Act*.[5] The *Regulation* prohibited the disposal of waste water into the environment unless treated and provided the necessary framework to authorize treatment devices for isolated residences.

13 On the strength of this authority, the municipality undertook to ensure that the septic systems of riverside property owners were compliant, with a view to ensuring the quality of the water of the lakes on its territory.

14 In 1994, the municipality passed a resolution authorizing the analysis of the water of Lake Saint-Charles and asked the MRC de Bellechasse [TRANSLATION] "to engage the services of a person who would carry out a study, make recommendations, and follow up" with a view to improving the waste water treatment equipment of landowners near Lake Saint-Charles.[6]

15 Over the following years, the municipality adopted an action plan for the assessment of riverside properties and took coercive action against owners with inadequate septic systems.[7]

16 In August of 2006, still concerned with the quality of the lake water, the municipality commissioned Groupe Hémisphères to characterize the natural environment of Lake Beaumont and Lake Saint-Charles.[8]

17 In March of 2007, Group Hémishphères submitted its study entitled "Caractérisation du milieu naturel des lacs Saint-Charles et Beaumont" [TRANSLATION: Characterization of the natural environment of Lake Saint-Charles and Lake Beaumont] to the Municipality.[9] The highlights of the study were the following:

46 The *James Bay Agreement* is a treaty between the Cree and Inuit nations and the governments of Canada and Quebec that addresses a multitude of issues regarding the James Bay territory, including social, economic, natural resource development, and environmental conservation.

47 In this complex, modern treaty, provincial and federal jurisdictions "fit comfortably together" to give the *James Bay Agreement* its full effect, within the respective fields of jurisdiction. [47]

48 As the Supreme Court indicated in *Quebec (Attorney General) v. Moses*, the *James Bay Agreement* constitutes an intergovernmental agreement that is an "example of what [the] Court has repeatedly called 'cooperative federalism'". [48]

49 The Court will undertake the analysis of this case with these considerations in mind.

49 *FIRST, DO THE IMPUGNED PROVISIONS OF BY-LAW 09-214 CONSTITUTE A VALID PROVINCIAL REGULATION PURSUANT TO THE ANCILLARY POWERS DOCTRINE?*

49 *LEGAL CONSIDERATIONS*

The pith and substance of the Act

50 The first step of the analysis of the division of powers consists in identifying the "pith and substance" of the impugned legislation or regulation, [49] or in this case, sections 8 and 9 of By-law 09-214.

51 The purpose of this stage is to identify the "primary purpose" or "dominant characteristic" of the legislation or regulation at issue so as to identify its substantive "matter", which involves an analysis of its purposes and effects. [50] The true purpose of the legislation or regulation must be considered, not its mere stated or apparent purpose. [51]

52 The pith and substance analysis may concern the legislation or regulation as a whole, or only certain of its provisions. [52]

Classification of constitutional power

53 Once the "matter" of the legislation or regulation has been established, the next stage is to classify it under one of the heads of power enumerated in sections 91 and 92 of the *Constitution Act, 1867* [53] attributed to federal Parliament or the provincial legislatures.

54 Where a provincial law or regulation is at issue, if the matter comes within one of the heads of power allocated to the provinces in section 92 of the *Constitution Act, 1867*, it is valid. [54] If not, the law or regulation is considered to be *prima facie* invalid.

Ancillary powers doctrine

55 Where the impugned law or regulation is *prima facie* invalid, the next step requires a consideration of whether it may be saved by the application of the doctrine of ancillary powers or jurisdictions. [55]

56 This doctrine recognizes that "a degree of jurisdictional overlap is inevitable in our constitutional order". [56] Indeed, legislative or regulatory measures that exceed the jurisdiction of one level of government may be saved if they are "integral" to or "sufficiently integrated" in a legislative scheme within its jurisdiction. [57]

57 A *prima facie* invalid provision may be saved "where it is an important part of a broader legislative scheme" that is within the jurisdiction of the enacting level of government. [58]

TAB 25

2013 ONSC 2223
Ontario Superior Court of Justice [Commercial List]

iMarketing Solutions Group Inc., Re

2013 CarswellOnt 4465, 2013 ONSC 2223, 227 A.C.W.S. (3d) 314

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

And In the Matter of a Plan of Compromise or Arrangement of iMarketing Solutions Group Inc. and the Companies referred to in Schedule "A" (the "Applicants")

Newbould J.

Heard: April 12, 2012
Judgment: April 15, 2013
Docket: CV-13-10067-00CL

Counsel: Robert I. Thornton, Danny M. Nunes for Applicants
Matthew P. Gottlieb for Duff & Phelps Canada Restructuring Inc.
Virginie Gauthier, Daniel Pearlman for Shotgun Fund Limited Partnership III
Clifton P. Prophet for Canadian Imperial Bank of Commerce

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles
Applicant insolvent corporation and number of its subsidiaries (applicants) were one of largest participants in telemarketing and fundraising industry in North America — Applicants were facing intense liquidity challenge such that they could not pay all liabilities as they became due — Liabilities included ongoing operating costs and legacy costs incurred as result of previous operational restructuring initiatives already undertaken — Without immediate stay of proceedings, applicants' businesses could not survive — Applicants brought application for protection under Companies' Creditors Arrangement Act — Application granted — Applicants had implemented initiatives to lower operating costs through process efficiencies and higher productivity — However, restructuring plan was taking longer than expected to implement, resulting in applicants' costs being higher than expected and savings being delayed — Initial order and stay under s. 11 of Act was made based on record and report from proposed monitor — Corollary orders were made.
Table of Authorities
Cases considered by *Newbould J.*:
Cinram International Inc., Re (2012), 91 C.B.R. (5th) 46, 2012 CarswellOnt 8413, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) — referred to
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
Statutes considered:

27 The rationale for the enactment of section 11.4 is explained in the Industry Canada Clause by Clause Briefing Book as follows:

> Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

28 The critical suppliers have been identified in the affidavit material of the applicants.

29 It is appropriate that the Initial Order contain a provision that the IMSG Group will be permitted to make such pre-filing payments owing to customers and to suppliers as determined by the IMSG Group in consultation with the Monitor to be necessary to permit them to proceed with the restructuring.

Chapter 15 proceedings

30 IMSG Group intends to commence proceedings under Chapter 15 of the U.S. *Bankruptcy Code* pursuant to which they will seek to have these CCAA proceedings recognized as a foreign main proceeding and the Initial Order enforced in the US. IMSG will be named as the Foreign Representative in respect of the application. This would appear appropriate in light of the cross-border scope of the business, assets and operations of the applicants. The applicants are of the view that the center of main interests of the IMSG Group is in Ontario for a number of reasons set out in paragraph 21 of the affidavit of Mr. Langhorne. The proposed Monitor shares that view. They may well be correct, but it must be recognized that it is the function of the receiving court in the United States to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15. See *Cinram International Inc., Re* (2012), 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]), per Morawetz J.

31 The Initial Order signed on April 12, 2013 contains the provisions discussed in this endorsement.

Application granted.

05.22a-2398

TAB 26

2007 ANNREVINSOLV 3

Annual Review of Insolvency Law
Editor: Janis P. Sarra

3 — Selecting the Judicial Tool to get the Job Done: **An Examination** of **Statutory Interpretation**, Discretionary Power and Inherent Jurisdiction in Insolvency Matters

Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters

Madam Justice Georgina R. Jackson and Dr. Janis Sarra. [1]

I. — Introduction

The judicial tools used by Canadian courts to advance the enabling objectives of corporate commercial law, and in particular, insolvency law, are the focus of this paper. We address the recurring case where an insolvent corporation, creditor or other interested party asks a court to apply or extend the terms of legislation to circumstances not previously contemplated. A number of tools have been used by the courts to meet the evolving needs of corporate commercial law. These tools include: statutory interpretation, both in determining the extent of judicial authority and the basis of any exercise of judicial discretion to decide a particular case or grant a particular remedy; the gap-filling power of judges; the common law or the evolution of the common law to meet modern cases; equitable jurisdiction; and inherent jurisdiction. We examine the nature of these tools and their appropriate use in the insolvency law context.

The paper advances the thesis that in addressing the problem of under-inclusive or skeletal legislation, there is a hierarchy or appropriate order of utilization of judicial tools. First, the courts should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal the authority. We suggest that it is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Examination of the statutory language and framework of the legislation may reveal a discretion, and statutory interpretation may determine the extent of the discretion or statutory interpretation may reveal a gap. The common law may permit the gap to be filled; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority to fill the gap. The exercise of inherent jurisdiction may fill the gap; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority revealed by the discovery of inherent jurisdiction. This paper considers these issues at some length.

In the past 25 years, we have seen a burgeoning interest in the judicial role in the economy. The resolution of commercial disputes through judicial pronouncements has facilitated commercial activity in Canadian society, and the courts' willingness to recognize the need for practical, effective and expeditious proceedings has been a hallmark of recent developments. One of the first Canadian pronouncements to note and speak of this new reality comes from Saskatchewan on an application to lift the stay on a judgment obtained in a contracts case. Tallis J.A. wrote:

> [10] I am of the opinion that recent authorities in Western Canada display a willingness to re-examine the older authorities in the light of modern economic conditions and commercial practices: vide *Rockwood Enterprises Ltd. v. Grain Ins. & Guar Co.*, [1980] M.J. No. 20, [1980] 4 W.W.R. 319; *Powell v. Guttman*, [1977] M.J. No. 3, [1977] 6 W.W.R. 106; *Robitaille v. Vancouver Hockey Club Ltd.*, [1980] B.C.J. No. 872; (1981), 26 B.C.L.R. 1; *Morrison-Knudsen Co. v. B.C. Hydro & Power Authority* (March 15, 1976) (B.C.C.A.) (unreported). [2]

> way to require the defendants here to do such acts as may be necessary as to effectively remove the assignment in question from the title to the lands. Here the defendants seek to invoke the Court's equitable jurisdiction by asserting a claim for lien against the lands to secure the return of the moneys which they have paid. [52] [Emphasis added.]

It may be that with the increased codification in statutes, courts have lost sight of their general jurisdiction where there is a gap in the statutory language. Where there is a highly codified statute, courts may conclude that there is less room to undertake gap-filling. This is accurate insofar as the Parliament or Legislative Assembly has limited or directed the court's general jurisdiction; there is less likely to be a gap to fill. However, as the Ontario Court of Appeal observed in the above quote, the court has unlimited jurisdiction to decide what is necessary to do justice between the parties except where legislators have provided specifically to the contrary.

The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. [53] The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. [54] The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights-based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations in the context of a dynamic, forward moving process that is seeking an outcome to the debtor's financial distress. [55]

C. — Conclusions to be Drawn with respect to Statutory Interpretation

The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

III. — Judicial Discretion as a Means of Filling the Gap

There can be no more chameleon concept in law than judicial discretion. Its meaning is variable and derived almost exclusively from context; but despite its myriad meanings and purposes, judicial discretion is another tool to be considered when addressing the fact pattern of under-inclusive or skeletal legislation. The *Oxford Companion to Law* gives the most common definition of discretion, building on it to define "a question of judicial discretion":

> *Discretion*. The faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable, and reasonable in those circumstances. Rules of law frequently vest in a judge the power or duty to exercise his [her] discretion in certain circumstances, sometimes if he [she] finds certain requisites satisfied, and sometimes a discretion within stated limits only.
>
> A question of judicial discretion is accordingly a question not determined, like a question of fact, by evidence, nor one determined, like a question of law, by authorities and argument, but one determined by an exercise of

TAB 27

2005 CarswellOnt 1188
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 1188, [2005] O.J. No. 1171, 138 A.C.W.S. (3d) 222, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 2 B.L.R. (4th) 238, 75 O.R. (3d) 5, 9 C.B.R. (5th) 135

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

And In the Matter of a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other Applicants listed in Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Goudge, Feldman, Blair JJ.A.

Heard: March 18, 2005
Judgment: March 31, 2005
Docket: CA M32289

Proceedings: reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List])); reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 743, [2005] O.J. No. 730, 7 C.B.R. (5th) 310 ((Ont. S.C.J. [Commercial List])); additional reasons to *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List]))

Counsel: Jeffrey S. Leon, Richard B. Swan for Appellants, Michael Woollcombe, Roland Keiper
Kenneth T. Rosenberg, Robert A. Centa for Respondent, United Steelworkers of America
Murray Gold, Andrew J. Hatnay for Respondent, Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., Welland Pipe Ltd.
Michael C.P. McCreary, Carrie L. Clynick for USWA Locals 5328, 8782
John R. Varley for Active Salaried Employee Representative
Michael Barrack for Stelco Inc.
Peter Griffin for Board of Directors of Stelco Inc.
K. Mahar for Monitor
David R. Byers (Agent) for CIT Business Credit, DIP Lender

Subject: Corporate and Commercial; Insolvency; Property; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.b Appointment
III.1.b.i General principles
Headnote
Business associations --- Specific corporate organization matters — Directors and officers — Appointment — General principles

Corporation entered protection under Companies' Creditors Arrangement Act — K and W were involved with companies who made capital proposal regarding corporation — Companies held approximately 20 per cent of corporation's shares — K and W, allegedly with support of over 30 per cent of shareholders, requested to fill two vacant directors' positions of corporation, and be appointed to review committee — K and W claimed that their interest as shareholders would not be represented in proceedings — K and W appointed directors by board, and made members of review committee — Employees' motion for removal of K and W as directors was granted and appointments were voided — Trial judge found possibility existed that K and W would not have best interests of corporation at heart, and might favour certain shareholders — Trial judge found interference with business judgment of board was appropriate, as issue touched on constitution of corporation — Trial judge found reasonable apprehension of bias existed, although no evidence of actual bias had been shown — K and W appealed — Appeal allowed — K and W reinstated to board — Court's discretion under s. 11 of Act does not give authority to remove directors, which is not part of restructuring process — Trial judge erred in not deferring to corporation's business judgment — Trial judge erred in adopting principle of reasonable apprehension of bias.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Corporation entered protection under Companies' Creditors Arrangement Act — K and W were involved with companies who made capital proposal regarding corporation — Companies held approximately 20 per cent of corporation's shares — K and W, allegedly with support of over 30 per cent of shareholders, requested to fill two vacant directors' positions of corporation and be appointed to review committee — K and W claimed that their interest as shareholders would not be represented in proceedings — K and W appointed directors by board, and made members of review committee — Employees' motion for removal of K and W as directors was granted and appointments were voided — Trial judge found possibility existed that K and W would not have best interests of corporation at heart, and might favour certain shareholders — Trial judge found interference with business judgment of board was appropriate, as issue touched on constitution of corporation — Trial judge found reasonable apprehension of bias existed, although no evidence of actual bias had been shown — K and W appealed — Appeal allowed — K and W reinstated to board — Court's discretion under s. 11 of Act does not give authority to remove directors, which is not part of restructuring process — Trial judge erred in not deferring to corporation's business judgment — Trial judge erred in adopting principle of reasonable apprehension of bias.

Table of Authorities

Cases considered by *Blair J.A.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99, 1991 CarswellBC 494 (B.C. S.C.) — referred to

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — considered

Algoma Steel Inc. v. Union Gas Ltd. (2003), 2003 CarswellOnt 115, 39 C.B.R. (4th) 5, 169 O.A.C. 89, 63 O.R. (3d) 78 (Ont. C.A.) — referred to

Babcock & Wilcox Canada Ltd., Re (2000), 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — referred to

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — referred to

Blair v. Consolidated Enfield Corp. (1995), 128 D.L.R. (4th) 73, 187 N.R. 241, 86 O.A.C. 245, 25 O.R. (3d) 480 (note), 24 B.L.R. (2d) 161, [1995] 4 S.C.R. 5, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179 (S.C.C.) — considered

Brant Investments Ltd. v. KeepRite Inc. (1991), 1 B.L.R. (2d) 225, 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1991 CarswellOnt 133 (Ont. C.A.) — considered

Catalyst Fund General Partner I Inc. v. Hollinger Inc. (2004), 1 B.L.R. (4th) 186, 2004 CarswellOnt 4772 (Ont. S.C.J.) — referred to

Country Style Food Services Inc., Re (2002), 2002 CarswellOnt 1038, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) — considered

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, *(sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — referred to

Ivaco Inc., Re (2004), 3 C.B.R. (5th) 33, 2004 CarswellOnt 2397 (Ont. S.C.J. [Commercial List]) — referred to

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]) — considered

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

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

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

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

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

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines Inc.*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc., Re*, [2005] O.J. No. 251 (Ont. S.C.J. [Commercial List]).

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

> . . . the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. . . . This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and

objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, [2] rather than the integrity of their own process.

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

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

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose". [3] Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

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

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

> **Powers of court**
>
> 11. (1) Notwithstanding anything in the *Bankruptcy* and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> **Initial application court orders**
>
> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> **Other than initial application court orders**

