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Fasken Martineau DuMoulin LLP
Barristers and Solicitors
3400 First Canadian centre
350 – 7th Avenue SW
Calgary, AB, T2P 3N9

Attention: Robyn Gurofsky / Tiffany Bennett
Phone: (403) 261-9469 / (403) 261 5355
Email: rgurofsky@fasken.com / tbennett@fasken.com
File Number.: 304091.00008

BOOK OF AUTHORITIES OF THE RECEIVER IN SUPPORT OF APPLICATION FOR APPROVAL OF CLAIMS PROCESS, INTERIM DISTRIBUTION AND ANCILLARY RELIEF

Scheduled to be Heard August 12, 2025 at 2:00 p.m.

Before the Honourable Justice R. W. Armstrong

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	*Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41, 2022 CSC 41.
2.	*Re Ted Leroy Trucking [Century Services] Ltd*, 2010 SCC 60, 2010 CSC 60.
3.	*Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc,* 2019 ONCA 508, [2019] OJ No 3211.
4.	*BA Energy Inc, Re,* 2010 ABQB 507, [2010] AWLD 4793.
5.	*Companies' Creditors Arrangement Act,* RSC 1995, c C-36.
6.	*Bul River Mineral Corp (Re),* 2014 BCSC 1732, [2014] BCWLD 6764.
7.	*Soccer Express Trading Corp (Re),* 2020 BCSC 749, 319 ACWS (3d) 17.
8.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3.
9.	*Syndic de Chronometriq inc.,* 2023 QCCA 1295, 2023 CarswellQue 14729.
10.	*Residential Warranty Co. of Canada Inc., Re,* 2006 ABCA 293, [2006] AWLD 3143.
11.	*Steels Industrial Products Ltd (Re),* 2012 BCSC 1501, [2013] BCWLD 1452.
12.	*1057863 B.C. Ltd. (Re),* 2024 BCSC 1111, 2024 CarswellBC 1828.
13.	*Toys "R" Us (Canada) Ltd (Re),* 2018 ONSC 609, 288 ACWS (3d) 16.
14.	*SemCanada Crude Co, Re,* 2009 ABQB 90, [2009] AWLD 1593.
15.	*Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd,* 2014 BCSC 1855, [2014] BCWLD 7241.
16.	*Re Regal Constellation Hotel Ltd,* [2004] OJ No 365 at para 11, 128 ACWS (3d) 646 (ONCJ).

TAB 1

2022 SCC 41, 2022 CSC 41
Supreme Court of Canada

Peace River Hydro Partners v. Petrowest Corp.

2022 CarswellBC 3142, 2022 CarswellBC 3143, 2022 SCC 41, 2022 CSC 41, [2022] 12 W.W.R. 371, 2022 A.C.W.S. 2631, 29 C.L.R. (5th) 203, 34 B.L.R. (6th) 165, 3 C.B.R. (7th) 163, 475 D.L.R. (4th) 1, 68 B.C.L.R. (6th) 1

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation (Appellants) and Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. and Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd. (Respondents) and Canadian Commercial Arbitration Center, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and Canadian Federation of Independent Business (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer, Jamal JJ.

Heard: January 19, 2022
Judgment: November 10, 2022
Docket: 39547

Proceedings: affirming *Petrowest Corporation v. Peace River Hydro Partners* (2020), 5 C.L.R. (5th) 31, 9 B.L.R. (6th) 16343 B.C.L.R. (6th) 884 C.B.R. (6th) 1742020 BCCA 339[2021] 7 W.W.R. 195452 D.L.R. (4th) 5352020 CarswellBC 3008, Bennett J.A., Dickson J.A., Grauer J.A. (B.C. C.A.); affirming *Petrowest Corporation v. Peace River Hydro Partners* (2019), 5 C.L.R. (5th) 14, 74 C.B.R. (6th) 53100 B.L.R. (5th) 1282019 BCSC 22212019 CarswellBC 3819, Iyer J. (B.C. S.C.)

Counsel: David de Groot, Joanne Luu, Robert Martz, Alison Scott, for Appellants
Kelsey Meyer, Ciara Mackey, Stephanie Clark, Paul Romaniuk, for Respondents
Laurent Debrun, Charles Côté-De Lagrave, for Intervener, Canadian Commercial Arbitration Center
Lisa C. Munro, Cynthia B. Kuehl, for Intervener, Arbitration Place
Christina Doria, Michael Nowina, Brendan O'Grady, for Intervener, Chartered Institute of Arbitrators (Canada) Inc.
Kibben Jackson, Tom Posyniak, Glen Nesbitt, for Intervener, Insolvency Institute of Canada
Anthony Daimsis, for Intervener, Canadian Federation of Independent Business

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.b Discretion of court to grant stay
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings

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Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — Discretion of court to grant stay

Partnership was formed to build hydroelectric dam — Defendant members of partnership agreed to subcontract certain work to plaintiffs — Parties executed clauses providing that disputes were to be resolved through arbitration — Plaintiffs fell into dire financial straits, and court ordered them into receivership — Receiver brought civil claim to collect accounts receivable allegedly owed to plaintiffs by defendants — Defendants brought application to stay civil proceedings under s. 15 of Arbitration Act ("AA") — Chambers judge dismissed application — Defendants appealed unsuccessfully to Court of Appeal — Defendants appealed to Supreme Court of Canada — Appeal dismissed — Court of Appeal erred in concluding that s. 15 of AA was not engaged because receiver was not "party" to arbitration agreements — Permitting court-appointed receiver to avoid arbitration on basis that it was not party to debtor's pre-existing agreement to arbitrate was inconsistent with proper reading of s. 15 of AA, ordinary principles of contract law, party autonomy, and this Court's longstanding jurisprudence with respect to arbitration — Nor could disclaimer or doctrine of separability permit receivers to unilaterally render otherwise valid arbitration agreements "inoperative" or "incapable of being performed" within meaning of s. 15 of AA — Chambers judge was entitled to refuse to grant stay under s. 15(2) of AA; arbitration agreements were inoperative within meaning of s. 15(2) — Sections 243 and 183 of Bankruptcy and Insolvency Act authorized courts to do what practicality demanded in context of receivership — Here, practicality demanded that arbitration agreements not be enforced, in interest of orderly and efficient resolution of receivership.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Partnership was formed to build hydroelectric dam — Defendant members of partnership agreed to subcontract certain work to plaintiffs — Parties executed clauses providing that disputes were to be resolved through arbitration — Plaintiffs fell into dire financial straits, and court ordered them into receivership — Receiver brought civil claim to collect accounts receivable allegedly owed to plaintiffs by defendants — Defendants brought application to stay civil proceedings under s. 15 of Arbitration Act ("AA") — Chambers judge dismissed application — Defendants appealed unsuccessfully to Court of Appeal — Defendants appealed to Supreme Court of Canada — Appeal dismissed — Chambers judge was entitled to refuse to grant stay under s. 15(2) of AA — Otherwise, valid arbitration agreement could, in some circumstances, be inoperative or incapable of being performed — Party seeking to avoid arbitration had to establish, on balance of probabilities, that stay in favour of arbitration would compromise integrity of parallel insolvency proceedings — Chambers judge correctly dismissed stay application — Arbitration agreements were inoperative within meaning of s. 15(2) of AA — Sections 243 and 183 of Bankruptcy and Insolvency Act ("BIA") authorized courts to do what practicality demanded in context of receivership — In this case, practicality demanded that arbitration agreements not be enforced, in interest of orderly and efficient resolution of receivership — Chaotic nature of arbitral proceedings bargained for by parties would compromise integrity of receivership, to detriment of affected creditors and contrary to purposes of BIA Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 183; Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 243.

Résolution alternative des conflits --- Lien entre l'arbitrage et les procédures judiciaires — Procédures visant le sursis d'une instance — Discrétion du tribunal pour accorder le sursis

Société de personnes a été constituée en vue de la construction d'un barrage hydroélectrique — Défendeurs étaient des membres de la société qui ont accepté de sous-traiter certains travaux aux demandeurs — Parties ont prévu des clauses stipulant que les différends découlant de leur relation seraient réglés par voie d'arbitrage — Demandeurs ont éprouvé des difficultés financières et un tribunal a ordonné la mise sous séquestre des demandeurs — Séquestre a intenté une poursuite civile en vue de recouvrer des créances qu'il estimait être dues aux demandeurs par les défendeurs — Défendeurs ont demandé la suspension de l'instance civile en vertu de l'art. 15 de l'Arbitration Act (« AA ») — Juge en chambre a rejeté la demande — Défendeurs ont interjeté appel devant la Cour d'appel, sans succès — Défendeurs ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Cour d'appel a commis une erreur en concluant que l'art. 15 de l'AA n'entrait pas en jeu parce que le séquestre n'était pas une « partie » aux conventions d'arbitrage — Permettre au séquestre nommé par le tribunal d'éviter l'arbitrage au motif qu'il n'est pas une partie à la convention d'arbitrage préexistante du débiteur était incompatible avec une interprétation adéquate de l'art. 15 de l'AA, les principes ordinaires du droit des contrats, l'autonomie des parties ainsi que la jurisprudence de longue date de la Cour en matière d'arbitrage — Renonciation ou la doctrine de la séparabilité ne permettent pas non plus aux séquestres d'unilatéralement rendre des conventions d'arbitrage par ailleurs valides « inopérante[s] » ou « non susceptible[s] d'être exécutée[s] » au sens de l'art. 15 de l'AA — Il était loisible à la juge en chambre de rejeter la demande de suspension d'instance en vertu de l'art. 15(2)

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de l'AA; les conventions d'arbitrage étaient inopérantes au sens de l'art. 15(2) — Articles 243 et 183 de la Loi sur la faillite et l'insolvabilité autorisaient les tribunaux à répondre aux considérations pratiques qui surviennent dans le contexte d'une mise sous séquestre — En l'espèce, ces considérations exigeaient que les conventions d'arbitrage ne soient pas exécutées, et ce, afin de favoriser le règlement ordonné et efficace de la mise sous séquestre.

Faillite et insolvabilité --- Procédure devant les tribunaux — Sursis des procédures

Société de personnes a été constituée en vue de la construction d'un barrage hydroélectrique — Défendeurs étaient des membres de la société qui ont accepté de sous-traiter certains travaux aux demandeurs — Parties ont prévu des clauses stipulant que les différends découlant de leur relation seraient réglés par voie d'arbitrage — Demandeurs ont éprouvé des difficultés financières et un tribunal a ordonné la mise sous séquestre des demandeurs — Séquestre a intenté une poursuite civile en vue de recouvrer des créances qu'il estimait être dues aux demandeurs par les défendeurs — Défendeurs ont demandé la suspension de l'instance civile en vertu de l'art. 15 de l'Arbitration Act (« AA ») — Juge en chambre a rejeté la demande — Défendeurs ont interjeté appel devant la Cour d'appel, sans succès — Défendeurs ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Il était loisible à la juge en chambre de rejeter la demande de suspension d'instance en vertu de l'art. 15(2) de l'AA — Dans certaines circonstances, une clause d'arbitrage par ailleurs valide peut être inopérante ou non susceptible d'être exécutée — Partie qui cherche à éviter l'arbitrage doit établir, selon la prépondérance des probabilités, qu'une suspension d'instance en faveur de l'arbitrage compromettrait l'intégrité de la procédure d'insolvabilité parallèle — Juge en chambre a eu raison de rejeter la demande — Conventions d'arbitrage étaient inopérantes en vertu de l'art. 15 de l'AA — Articles 243 et 183 de la Loi sur la faillite et l'insolvabilité (« LFI ») autorisaient les tribunaux à répondre aux considérations pratiques qui surviennent dans le contexte d'une mise sous séquestre — En l'espèce, ces considérations exigeaient que les conventions d'arbitrage ne soient pas exécutées, et ce, afin de favoriser le règlement ordonné et efficace de la mise sous séquestre — Nature chaotique de la procédure arbitrale négociée par les parties compromettrait l'intégrité de la mise sous séquestre, au détriment des créanciers touchés et contrairement aux objectifs visés par la LFI.

A partnership was formed to build a hydroelectric dam. The defendant members of the partnership agreed to subcontract certain work to the plaintiffs. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration ("arbitration agreements"). The plaintiffs fell into dire financial straits, and a court ordered them into receivership pursuant to s. 243 of the Bankruptcy and Insolvency Act ("BIA"). A receivership order was granted pursuant to s. 243(1) of the BIA. The court-appointed receiver brought a civil claim in superior court seeking to collect accounts receivable allegedly owed to the plaintiffs by the defendants.

The defendants brought an application to stay the civil proceedings under s. 15 of the Arbitration Act ("AA"). Under s. 15(2) of the AA, a court would be required to stay the proceedings in favour of arbitration unless it found the arbitration agreements void, inoperative or incapable of being performed. The receiver opposed the stay application, arguing that the BIA authorized the court to assert centralized judicial control over the matter rather than send the receiver to multiple arbitral forums. The chambers judge agreed with the receiver and dismissed the stay application. The chambers judge found that the court had inherent jurisdiction, flowing from s. 183 of the BIA, to override arbitration agreements governed by s. 15 of the AA. The defendants appealed.

The Court of Appeal upheld the chambers judge's ruling on the basis that the receiver was not a "party" to the arbitration agreements within the meaning of s. 15(1) of the AA. It held that the doctrine of separability allowed the receiver to disclaim the arbitration agreements and to sue on the underlying contracts to recover payment for past performance. The defendants appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Côté J. (Wagner C.J.C., Moldaver, Rowe, Kasirer JJ. concurring): The Court of Appeal erred in concluding that s. 15 of the AA was not engaged because the receiver was not a "party" to the arbitration agreements. Permitting a court-appointed receiver to avoid arbitration on the basis that it was not a party to the debtor's pre-existing agreement to arbitrate was inconsistent with a proper reading of s. 15 of the AA, ordinary principles of contract law, party autonomy, and this Court's longstanding jurisprudence with respect to arbitration. Nor could disclaimer or the doctrine of separability permit receivers to unilaterally render otherwise valid arbitration agreements "inoperative" or "incapable of being performed" within the meaning of s. 15 of the AA. Only a court could make a finding that an arbitration agreement was inoperative or incapable of being performed.

Although s. 15 of the AA was engaged, the chambers judge was entitled to refuse to grant a stay under s. 15(2). An otherwise valid arbitration agreement could, in some circumstances, be inoperative or incapable of being performed. For example, it could be inoperative if enforcing it would compromise court-ordered receivership proceedings under s. 243 of the BIA. This could

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occur where the arbitration agreed to by the parties would preclude the orderly and efficient resolution of the receivership, contrary to the purposes of the BIA. The fact that a party had entered receivership or insolvency proceedings or was financially impecunious was not, on its own, a sufficient basis for a court to find an arbitration agreement inoperative. The party seeking to avoid arbitration had to establish, on the balance of probabilities, that a stay in favour of arbitration would compromise the integrity of the parallel insolvency proceedings. A non-exhaustive list of factors could assist in the court's analysis: the effect of arbitration on the integrity of the insolvency proceedings, which were intended to minimize economic prejudice to creditors; the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; the urgency of resolving the dispute; the effect of the stay of proceedings arising from the bankruptcy or insolvency proceedings, if applicable; and any other factors the court considered material in the circumstances.

Applying these factors, it was appropriate to find that the chambers judge correctly dismissed the stay application. The arbitration agreements were inoperative within the meaning of s. 15(2) of the AA. Sections 243 and 183 of the BIA authorized courts to do what practicality demanded in the context of a receivership. In this case, practicality demanded that the arbitration agreements not be enforced, in the interest of an orderly and efficient resolution of the receivership. The chaotic nature of the arbitral proceedings bargained for by the parties would compromise the integrity of the receivership, to the detriment of affected creditors and contrary to the purposes of the BIA. This result was context-specific. The unique facts of this case, which pitted the public policy objectives underlying the BIA against freedom of contract and party autonomy, justified departing from the legislative and judicial preference for holding parties to their arbitration agreements. As was found by the courts below, the defendants' application for a stay of proceedings under s. 15 of the AA had to be dismissed.

Per Jamal J. (concurring) (Karakatsanis, Brown, Martin JJ. concurring): There was agreement with the majority that the appeal should be dismissed because the arbitration agreements were inoperative under s. 15(2) of the AA. The point of departure concerned the primary basis for finding the arbitration agreements to be inoperative. By suing in court to collect the accounts receivable allegedly owing, as authorized under the receivership order, the receiver disclaimed the arbitration agreements. The arbitration agreements were thereby rendered inoperative. The analysis should start with the terms of the receivership order itself. There was also disagreement with the majority's view that reliance on the terms of the receivership order was precluded by the plaintiffs' and the receiver's position before the Court of Appeal and this Court that the receiver "had not expressly disclaimed" the arbitration agreements. The legal effect of a receiver suing in court and not before an arbitrator to collect the accounts receivable was undoubtedly to disclaim reliance on the arbitration agreements, conduct which was authorized by the receivership order itself.

Une société de personnes a été constituée en vue de la construction d'un barrage hydroélectrique. Les défendeurs étaient des membres de la société qui ont accepté de sous-traiter certains travaux aux demandeurs. Les parties ont prévu plusieurs clauses stipulant que les différends découlant de leur relation seraient réglés par voie d'arbitrage (les « conventions d'arbitrage »). Les demandeurs ont éprouvé des difficultés financières et un tribunal a ordonné la mise sous séquestre des demandeurs en vertu de l'art. 243 de la Loi sur la faillite et l'insolvabilité (« LFI »). Une ordonnance de mise sous séquestre en vertu de l'art. 243(1) de la LFI a été prononcée. Le séquestre nommé par le tribunal a intenté une poursuite civile en cour supérieure en vue de recouvrer des créances qu'il estimait être dues aux demandeurs par les défendeurs.

Les défendeurs ont demandé la suspension de l'instance civile en vertu de l'art. 15 de l'Arbitration Act (« AA »). En vertu de l'art. 15(2) de l'AA, un tribunal serait tenu de suspendre l'instance en faveur de l'arbitrage, à moins de conclure que les conventions d'arbitrage sont nulles, inopérantes ou non susceptibles d'être exécutées. Le séquestre s'est opposé à la demande de suspension d'instance, faisant valoir que la LFI autorisait le tribunal à exercer un contrôle judiciaire centralisé sur l'affaire au lieu de référer le séquestre devant de nombreux tribunaux arbitraux. La juge en chambre a exprimé son accord avec le séquestre et a rejeté la demande de suspension d'instance. La juge en chambre a conclu que le tribunal avait une compétence inhérente, découlant de l'art. 183 de la LFI, pour écarter des conventions d'arbitrage régies par l'art. 15 de l'AA. Les défendeurs ont interjeté appel.

La Cour d'appel a confirmé la décision de la juge en chambre au motif que le séquestre n'était pas une « partie » aux conventions d'arbitrage au sens de l'art. 15(1) de l'AA. Elle a conclu que la doctrine de la séparabilité permettait au séquestre de renoncer aux conventions d'arbitrage et d'intenter une poursuite fondée sur les contrats sous-jacents pour recouvrer le paiement pour une prestation antérieure. Les défendeurs ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Côté, J. (Wagner, J.C.C., Moldaver, Rowe, Kasirer, JJ., souscrivant à son opinion) : La Cour d'appel a commis une erreur en concluant que l'art. 15 de l'AA n'entrait pas en jeu parce que le séquestre n'était pas une « partie » aux conventions d'arbitrage.

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Permettre au séquestre nommé par le tribunal d'éviter l'arbitrage au motif qu'il n'est pas une partie à la convention d'arbitrage préexistante du débiteur était incompatible avec une interprétation adéquate de l'art. 15 de l'AA, les principes ordinaires du droit des contrats, l'autonomie des parties ainsi que la jurisprudence de longue date de la Cour en matière d'arbitrage. La renonciation ou la doctrine de la séparabilité ne permettent pas non plus aux séquestres d'unilatéralement rendre des conventions d'arbitrage par ailleurs valides « inopérante[s] » ou « non susceptible[s] d'être exécutée[s] » au sens de l'art. 15 de l'AA. Seul un tribunal peut conclure qu'une convention d'arbitrage est inopérante ou non susceptible d'être exécutée.

Bien que l'art. 15 de l'AA entrait en jeu, la juge en chambre pouvait, en vertu de l'art. 15(2) de l'AA, refuser la demande de suspension d'instance. Dans certaines circonstances, une clause d'arbitrage par ailleurs valide peut être inopérante ou non susceptible d'être exécutée. Par exemple, une telle clause peut être inopérante si le fait de l'exécuter est susceptible de compromettre l'intégrité d'une procédure de mise sous séquestre ordonnée par le tribunal en vertu de l'art. 243 de la LFI. Cela peut se produire lorsque l'arbitrage convenu par les parties est susceptible d'empêcher le règlement ordonné et efficace de la mise sous séquestre, contrairement aux objectifs visés par la LFI. Le fait qu'une partie fasse l'objet d'une ordonnance de mise sous séquestre ou d'une procédure d'insolvabilité, ou qu'elle éprouve des difficultés financières, ne constitue pas, en soi, un motif suffisant pour qu'un tribunal puisse conclure qu'une convention d'arbitrage est inopérante. La partie qui cherche à éviter l'arbitrage doit établir, selon la prépondérance des probabilités, qu'une suspension d'instance en faveur de l'arbitrage compromettrait l'intégrité de la procédure d'insolvabilité parallèle. Une liste non exhaustive de facteurs peut éclairer le tribunal dans son analyse : l'effet de l'arbitrage sur l'intégrité de la procédure d'insolvabilité, laquelle vise à minimiser le préjudice économique que peuvent subir les créanciers; le préjudice relatif pour les parties à la convention d'arbitrage et les parties prenantes du débiteur; l'urgence de régler le différend; l'effet d'une suspension d'instance découlant de la procédure de faillite ou d'insolvabilité, s'il y a lieu; et tout autre facteur que le tribunal estime significatif dans les circonstances

Appliquant ces facteurs, il était approprié de conclure que la juge en chambre a, à bon droit, rejeté la demande de suspension d'instance. Les conventions d'arbitrage étaient inopérantes au sens de l'art. 15(2) de l'AA. Les art. 243 et 183 de la LFI autorisaient les tribunaux à répondre aux considérations pratiques qui surviennent dans le contexte d'une mise sous séquestre. En l'espèce, ces considérations exigeaient que les conventions d'arbitrage ne soient pas exécutées, et ce, afin de favoriser le règlement ordonné et efficace de la mise sous séquestre. La nature chaotique de la procédure arbitrale négociée par les parties compromettrait l'intégrité de la mise sous séquestre, au détriment des créanciers touchés et contrairement aux objectifs visés par la LFI. Ce résultat était tributaire du contexte. Les faits particuliers de la présente affaire, qui opposaient les objectifs de politique publique sous-tendant la LFI, d'une part, et la liberté contractuelle et l'autonomie des parties, d'autre part, justifiaient de s'écarter de la préférence législative et judiciaire qui consiste à obliger les parties à respecter leurs conventions d'arbitrage. Comme l'ont conclu les tribunaux inférieurs, la demande des défendeurs en vue de l'obtention d'une suspension des procédures en vertu de l'art. 15 de l'AA devait être rejetée.

Jamal, J. (souscrivant à l'opinion des juges majoritaires) (Karakatsanis, Brown, Martin, JJ., souscrivant à son opinion) : On convenait avec les juges majoritaires que le pourvoi devrait être rejeté parce que les conventions d'arbitrage étaient inopérantes en vertu de l'art. 15(2) de l'AA. Le point sur lequel résidait le désaccord avait trait au fondement principal de la conclusion selon laquelle les conventions d'arbitrage étaient inopérantes. En intentant une poursuite en justice pour recouvrer les créances qu'il estimait être dues, comme le lui permettait l'ordonnance de mise sous séquestre, le séquestre a renoncé aux conventions d'arbitrage. Ces dernières ont ainsi été rendues inopérantes. L'analyse devrait partir des conditions de l'ordonnance de mise sous séquestre elle-même. Il y avait également désaccord avec l'opinion exprimée par les juges majoritaires que la position qu'ont fait valoir les demandeurs et le séquestre devant la Cour d'appel et la présente Cour selon laquelle le séquestre « n'a pas expressément renoncé » aux conventions d'arbitrage empêchait de se fonder sur les conditions de l'ordonnance de mise sous séquestre. La procédure intentée par le séquestre devant les tribunaux, et non devant un arbitre, pour recouvrer les créances a sans aucun doute eu pour effet juridique d'entraîner une renonciation à se fonder sur les conventions d'arbitrage, une conduite qui était autorisée par l'ordonnance de mise sous séquestre elle-même.

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ABN Amro Bank Canada v. Krupp MaK Maschinenbau GmbH (1996), 135 D.L.R. (4th) 130, 49 C.P.C. (3d) 212, *(*sub nom. *ABN Ambro Bank Canada v. Krupp Mak Maschihnenbau GmbH)* 91 O.A.C. 229, 1996 CarswellOnt 1815 (Ont. Div. Ct.) — referred to

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Statutes considered by *Côté J.*:

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Generally — referred to

s. 1 "arbitration agreement" — referred to

s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

s. 22 — referred to

Arbitration Act, S.B.C. 2020, c. 2

s. 4(a) — referred to

Arbitration Act, 1991, S.O. 1991, c. 17

s. 7(2) — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

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Generally — referred to

s. 71 — referred to

s. 72(1) — considered

s. 183 — considered

s. 183(1) — considered

s. 183(1)(c) — referred to

s. 243 — considered

s. 243(1) — referred to

s. 243(1)(c) — considered

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

Generally — referred to

International Commercial Arbitration Act, R.S.B.C. 1996, c. 233

Generally — considered

s. 2(1) "party" — considered

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

Generally — referred to

Statutes considered by *Jamal J.*:

Arbitration Act, R.S.B.C. 1996, c. 55

s. 15 — referred to

s. 15(2) — considered

Arbitration Act, 1991, S.O. 1991, c. 17

s. 17(2) — referred to

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Generally — referred to

s. 183 — considered

s. 243 — considered

Treaties considered by *Côté J.*:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 330 U.N.T.S. 3; T.I.A.S. No. 6997; C.T.S. 1986/43

Generally — referred to

Article II ¶ 3 — referred to

UNCITRAL Model Law on International Commercial Arbitration, 1985, 24 I.L.M. 1302

Generally — referred to

Article 8(1) — referred to

Article 16 — referred to

Words and phrases considered:

party

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[Per Côté J. (Wagner C.J.C. and Moldaver, Rowe and Kasirer JJ. concurring):] The second interpretive issue concerns the term "party" in s. 15(1) of the *Arbitration Act* [R.S.B.C. 1996, c. 55]. Can a court-appointed receiver be a party to the debtor's pre-existing arbitration agreement?

The Receiver says no. It agrees with the Court of Appeal that a court-appointed receiver cannot be a party because it is a legal entity separate from the debtor with a fiduciary duty to the appointing court.

[The defendant] disagrees. It says that a court-appointed receiver, like other non-signatories, may be a party to the debtor's pre-receivership arbitration agreement through the operation of ordinary contract law.

I agree with [the defendant].

[T]he Receiver's narrow interpretation of the term "party" conflicts with basic principles of contract law.

. . . . .

Nor am I persuaded that a receiver's duty as an officer of the court precludes it from being considered a party to an arbitration agreement within the meaning of s. 15(1) of the *Arbitration Act*.

. . . . .

[A]ccepting the Receiver's interpretation would be inconsistent with a central purpose of the *Arbitration Act*: ensuring that parties abide by valid arbitration agreements.

. . . . .

. . . [A] court-appointed receiver may be a party within the meaning of s. 15(1) of the *Arbitration Act* by claiming through or under a party to a valid arbitration agreement. . . . [A] receiver, like other non-signatories, may become bound by an arbitration agreement in accordance with ordinary principles of contract law.

step in the proceedings

[Per Côté J. (Wagner C.J.C. and Moldaver, Rowe and Kasirer JJ. concurring):] [T]he Receiver resurrects its submission before the chambers judge that undertaking to file a defence may constitute a "step in the proceedings" within the meaning of s. 15(1) [of the *Arbitration Act*, R.S.B.C. 1996, c. 55]. This proposed interpretation was explicitly rejected by the chambers judge and not pursued before the Court of Appeal.

. . . . .

I acknowledge that the Receiver now argues in this Court, for the first time, that requesting the other party's consent to an extension of time to file a defence constitutes a step in the proceedings. Assuming, without deciding, that this submission is properly before our Court, I reject it. In my view, requesting an extension of time cannot be considered a "step".

void

[Per Côté J. (Wagner C.J.C. and Moldaver, Rowe and Kasirer JJ. concurring):] The terms "void", "inoperative", and "incapable of being performed" are not defined in the *Arbitration Act* [, R.S.B.C. 1996, c. 55], nor in the Model Law or the New York Convention from which they originate. It is therefore necessary to briefly define each term.

The meaning of the term "void" is relatively settled. An arbitration agreement will be considered void only in the rare circumstances where it is "intrinsically defective" (and therefore void ab initio) according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation . . . The Supreme Court of British Columbia has confirmed that the term "void" in s. 15(2) of the *Arbitration Act* provides a court

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with a narrow discretion to decline a stay where there are "sufficient materials before the court on which to base a summary determination that the arbitration agreement itself is void" on one or more of the recognized grounds . . .

Less settled — and more significant to the case at bar — is the proper interpretation of the terms "inoperative" and "incapable of being performed", particularly in the context of a bankruptcy or insolvency. I turn first to the meaning of "inoperative".

The term "inoperative" has no universal common law definition . . . . In arbitration law, however, the term has been used to describe arbitration agreements which, although not void ab initio, "have ceased for some reason to have future effect" or "have become inapplicable to the parties and their dispute" . . .

. . . . .

The application of this exception where the defendant in litigation that has been commenced is subject to bankruptcy or insolvency protection is straightforward. For instance, the making of a winding-up order or a receivership order may be grounds for a court to find an arbitration agreement inoperative . . . . Indeed, in either scenario, all proceedings against the debtor are stayed under the applicable bankruptcy or insolvency legislation. Accordingly, an agreement to arbitrate ceases, in most circumstances, to have effect for the future and may not be relied upon. It is inoperative, and the matter is left to be resolved in the relevant bankruptcy or insolvency proceedings.

[T]he court must assess, in light of all the circumstances, whether to refer the matter to arbitration or to maintain centralized judicial oversight.

. . . . .

An arbitration agreement is considered "incapable of being performed" where "the arbitral process cannot effectively be set in motion" because of a physical or legal impediment beyond the parties' control . . .

. . .

[P]racticality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Said differently, ss. 243(1)(c) and 183(1) [of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] provide a statutory basis on which a court may, in certain circumstances, find an arbitration agreement inoperative within the meaning of s. 15(2) of the *Arbitration Act*. [references omitted]

Termes et locutions cités:

agir dans l'instance

[Côté, J. (Wagner, J.C.C., Moldaver, Rowe, Kasirer, JJ., souscrivant à son opinion):] Tout d'abord, le Séquestre ravive l'argument qu'il a fait valoir devant la juge en chambre selon lequel le fait de s'être engagé à produire une défense peut revenir à avoir « agi dans l'instance » au sens [de l'art.] 15(1) [de l'*Arbitration Act*, R.S.B.C. 1996, c. 55]. Cette interprétation a été explicitement rejetée par la juge en chambre et n'a pas été avancée devant la Cour d'appel.

(...)

Je reconnais que le Séquestre soutient maintenant pour la première fois devant notre Cour que le fait de demander à l'autre partie de consentir à une prorogation du délai pour produire une défense revient à agir dans l'instance. À supposer, sans en décider, que notre Cour soit dûment saisie de cet argument, je le rejette. À mon avis, solliciter une prorogation de délai ne saurait être considéré comme tel.

nul

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[Côté, J. (Wagner, J.C.C., Moldaver, Rowe, Kasirer, JJ., souscrivant à son opinion):] Les mots « nulle », « inopérante » et « non susceptible d'être exécutée » ne sont pas définis dans l'*Arbitration Act* [R.S.B.C. 1996, c. 55], ni dans la Loi type ou dans la Convention de New York d'où ils émanent. Il est donc nécessaire de définir brièvement chacun de ces termes.

(...)

Le sens du terme « nulle » est relativement établi. Une convention d'arbitrage ne sera considérée nulle que dans les rares circonstances où elle est [TRADUCTION] « intrinsèquement défectueuse » (et donc nulle *ab initio*) conformément aux règles habituelles du droit des contrats, notamment lorsqu'elle est minée par la fraude, l'abus d'influence, l'iniquité, la contrainte, l'erreur ou la fausse représentation (...). La Cour suprême de la Colombie-Britannique a confirmé que le mot « nulle » figurant [à l'art.] 15(2) de l'*Arbitration Act* confère au tribunal un pouvoir discrétionnaire limité qui lui permet de refuser une suspension d'instance quand il [TRADUCTION] « dispose de suffisamment de preuve pour rendre un jugement sommaire selon lequel la convention d'arbitrage est en soi nulle » pour un ou plusieurs des motifs reconnus (...).

(...)

Ce qui est moins évident -- et ce qui est plus important en l'espèce -- se rapporte à l'interprétation qu'il convient de donner aux termes « inopérante » et « non susceptible d'être exécutée », en particulier dans le contexte d'une faillite ou d'une insolvabilité. Je me penche d'abord sur le sens à donner au mot « inopérante ».

Le terme « inopérante » n'a aucune définition universelle en common law (...). Cependant, en droit de l'arbitrage, le terme est employé pour décrire les conventions d'arbitrage qui, bien qu'elles ne soient pas nulles ab initio, [TRADUCTION] « ont cessé, pour une raison quelconque, de produire leurs effets dans le futur » ou « sont devenues inapplicables aux parties et à leur différend » (...).

(...)

L'application de cette exception est peu controversée lorsque le défendeur dans une poursuite bénéficie de la protection en matière de faillite ou d'insolvabilité. Par exemple, le tribunal peut conclure qu'une convention d'arbitrage est inopérante au motif qu'une ordonnance de mise en liquidation ou de mise sous séquestre a été rendue (...). En effet, dans l'une ou l'autre de ces hypothèses, toutes les procédures engagées *contre* le débiteur sont suspendues en vertu des dispositions législatives applicables en matière de faillite ou d'insolvabilité. Par conséquent, la convention d'arbitrage cesse, dans la plupart des cas, de produire ses effets pour l'avenir et ne peut être invoquée. Elle est inopérante et la question doit être tranchée dans le cadre de la procédure de faillite ou d'insolvabilité.

(...)

[L]e tribunal doit évaluer, à la lumière de toutes les circonstances, s'il convient de renvoyer l'affaire à l'arbitrage ou de maintenir une surveillance judiciaire centralisée.

(...)

Une convention d'arbitrage est considérée comme « non susceptible d'être exécutée » lorsque [TRADUCTION] « le processus arbitral ne peut être efficacement mis en oeuvre » en raison d'un obstacle physique ou juridique indépendant de la volonté des parties (...).

(...)

[D]es considérations pratiques exigent que, dans certaines circonstances particulières, le tribunal ait la capacité de refuser l'exécution d'une convention d'arbitrage dans le contexte d'une insolvabilité commerciale. Autrement dit, l'[art]. 243(1)c) et [l'art.]. 183(1) [de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3] fournissent un fondement législatif permettant

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au tribunal, dans certaines circonstances, de conclure qu'une convention d'arbitrage est inopérante au sens du par. 15(2) de l'*Arbitration Act*. (citations omises)

partie

[Côté, J. (Wagner, J.C.C., Moldaver, Rowe, Kasirer, JJ., souscrivant à son opinion):] La deuxième question d'interprétation porte sur le terme « partie » figurant [à l'art.] 15(1) de l'*Arbitration Act* [R.S.B.C. 1996, c. 55]. Le séquestre nommé par le tribunal peut-il être considéré comme une partie à la convention d'arbitrage du débiteur à laquelle il n'est pas signataire?

Le Séquestre soutient que non. À l'instar de la Cour d'appel, il estime que le séquestre nommé par le tribunal ne peut être une partie, car il est une entité juridique distincte du débiteur et a une obligation fiduciaire envers le tribunal qui l'a nommé.

[La défenderesse] n'est pas de cet avis. Elle affirme que tout comme d'autres non-signataires, le séquestre nommé par le tribunal peut, par l'effet du droit commun des contrats, être une partie à la convention d'arbitrage conclue par le débiteur avant la mise sous séquestre.

Je suis d'accord avec [la défenderesse], et ce, pour trois raisons.

[L]'interprétation restrictive que propose le Séquestre quant au terme « partie » va à l'encontre des principes fondamentaux du droit des contrats.

(...)

Je ne suis pas non plus convaincue que la fonction d'officier de justice qu'occupe le séquestre l'empêche d'être considéré comme une partie à une convention d'arbitrage au sens du par. 15(1) de l'*Arbitration Act*.

(...)

[R]etenir l'interprétation du Séquestre est incompatible avec l'objectif principal de l'Arbitration Act : veiller à ce que les parties respectent les conventions d'arbitrage valides.

(...)

[L]e séquestre nommé par le tribunal peut être considéré comme une partie au sens du par. 15(1) de l'*Arbitration Act* lorsqu'il fait une réclamation par l'entremise ou au nom d'une partie à une convention d'arbitrage valide. (...) [C]onformément aux principes ordinaires du droit des contrats, un séquestre, tout comme d'autres non-signataires, peut se voir lié par une convention d'arbitrage.

APPEAL by defendants from judgment reported at *Petrowest Corporation v. Peace River Hydro Partners* (2020), 2020 BCCA 339, 2020 CarswellBC 3008, 84 C.B.R. (6th) 174, 9 B.L.R. (6th) 163, 43 B.C.L.R. (6th) 8, 452 D.L.R. (4th) 535, 5 C.L.R. (5th) 31, [2021] 7 W.W.R. 195 (B.C. C.A.), dismissing appeal from judgment dismissing application to stay civil proceedings under *Arbitration Act*.

POURVOI formé par les défendeurs à l'encontre d'un jugement publié à *Petrowest Corporation v. Peace River Hydro Partners* (2020), 2020 BCCA 339, 2020 CarswellBC 3008, 84 C.B.R. (6th) 174, 9 B.L.R. (6th) 163, 43 B.C.L.R. (6th) 8, 452 D.L.R. (4th) 535, 5 C.L.R. (5th) 31, [2021] 7 W.W.R. 195 (B.C. C.A.), ayant rejeté l'appel interjeté à l'encontre d'un jugement ayant rejeté une demande de suspension d'instance civile en vertu de l'*Arbitration Act*.

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

I. Overview

1 This appeal calls upon our Court to clarify whether and in what circumstances a contractual agreement to arbitrate governed by the *Arbitration Act*, R.S.B.C. 1996, c. 55 ("*Arbitration Act*"), should give way to the public interest in the orderly and efficient resolution of a court-ordered receivership under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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2 A construction dispute underlies this appeal. The appellant Peace River Hydro Partners is a partnership formed to build a hydroelectric dam in northeastern British Columbia. Two members of that partnership, and their parent corporations, are also appellants in this Court (collectively, "Peace River"). The respondent Petrowest Corporation ("Petrowest") is an Alberta-based construction company. In December 2015, Peace River agreed to subcontract certain work to Petrowest and its affiliates ("Petrowest Affiliates"), which are also respondents in this appeal. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration ("Arbitration Agreements").

3 But Petrowest soon found itself in dire financial straits. The Alberta Court of Queen's Bench ordered Petrowest and the Petrowest Affiliates into receivership pursuant to s. 243 of the *BIA*. The respondent Ernst & Young Inc. acts as their court-appointed receiver and manager ("Receiver"). The Receiver brought a civil claim in the Supreme Court of British Columbia seeking to collect accounts receivable allegedly owed to Petrowest and the Petrowest Affiliates by Peace River. The latter applied to stay the civil proceedings under s. 15 of the *Arbitration Act* on the ground that the Arbitration Agreements governed the dispute. The Receiver opposed the stay application on behalf of Petrowest and the Petrowest Affiliates, arguing that the *BIA* authorized the court to assert centralized judicial control over the matter rather than send the Receiver to multiple arbitral forums.

4 The chambers judge agreed with the Receiver and dismissed the stay application. The Court of Appeal upheld the chambers judge's ruling on the basis that the Receiver was not a "party" to the Arbitration Agreements within the meaning of s. 15(1) of the *Arbitration Act*. It held that the doctrine of separability allowed the Receiver to disclaim the Arbitration Agreements and sue on the underlying contracts to recover payment for past performance. Peace River now asks this Court to set aside both decisions below and stay the court proceedings in favour of arbitration.

5 I would dismiss the appeal and affirm the dismissal of the stay application by the courts below. The civil claim brought by the Receiver on behalf of Petrowest and the Petrowest Affiliates may proceed. This conclusion flows from the following two-part analysis, which is mandated by s. 15 of the *Arbitration Act* and outlined in further detail later in these reasons.

6 First, the Court of Appeal erred in concluding that s. 15 was not engaged because the Receiver was not a "party" to the Arbitration Agreements. Permitting a court-appointed receiver to avoid arbitration on the basis that it is not a party to the debtor's pre-existing agreement to arbitrate is inconsistent with a proper reading of s. 15, ordinary principles of contract law, party autonomy, and this Court's longstanding jurisprudence with respect to arbitration. Nor can disclaimer or the doctrine of separability permit receivers to unilaterally render otherwise valid arbitration agreements "inoperative" or "incapable of being performed" within the meaning of s. 15. Only a court can make a finding that an arbitration agreement is inoperative or incapable of being performed.

7 Second, although s. 15 is engaged, the chambers judge was entitled to refuse to grant a stay under s. 15(2). An otherwise valid arbitration agreement may, in some circumstances, be inoperative or incapable of being performed. For example, an arbitration agreement may be inoperative if enforcing it would compromise court-ordered receivership proceedings under s. 243 of the *BIA*. This may occur where the arbitration agreed to by the parties would preclude the orderly and efficient resolution of the receivership, contrary to the purposes of the *BIA*.

8 To be clear, the fact that a party has entered receivership or insolvency proceedings or is financially impecunious is not, on its own, a sufficient basis for a court to find an arbitration agreement inoperative. The party seeking to avoid arbitration must establish, on a balance of probabilities, that a stay in favour of arbitration would compromise the integrity of the parallel insolvency proceedings. The following non-exhaustive list of factors, discussed further below, may assist in the court's analysis: (a) the effect of arbitration on the integrity of the insolvency proceedings, which are intended to minimize economic prejudice to creditors; (b) the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; (c) the urgency of resolving the dispute; (d) the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings, if applicable; and (e) any other factors the court considers material in the circumstances.

9 Applying the above factors, I find that the chambers judge correctly dismissed the stay application. The Arbitration Agreements are inoperative within the meaning of s. 15(2) of the *Arbitration Act*. Sections 243 and 183 of the *BIA* authorize

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courts to do what practicality demands in the context of a receivership. In this case, practicality demands that the Arbitration Agreements not be enforced, in the interest of an orderly and efficient resolution of the receivership. In short, the chaotic nature of the arbitral proceedings bargained for by the parties would compromise the integrity of the receivership, to the detriment of affected creditors and contrary to the purposes of the *BIA*.

10 I stress that this result is context-specific. The unique facts of this case, which pit the public policy objectives underlying the *BIA* against freedom of contract and party autonomy, justify departing from the legislative and judicial preference for holding parties to their arbitration agreements. Contrary to conventional wisdom, however, arbitration law and insolvency law need not always exist at "polar extremes". They have much in common, including an emphasis on efficiency and expediency, procedural flexibility, and expert decision-making. These shared interests often converge through arbitration, such that granting a stay in favour of arbitration will promote the objectives of both provincial arbitration legislation *and* federal insolvency legislation. It is for this reason that courts should generally hold parties to their agreements to arbitrate, even if one of them has become insolvent. To do otherwise would not only threaten the important public policy served by enforcing arbitration agreements and thus Canada's position as a leader in commercial arbitration, but also jeopardize the public interest in the expeditious, efficient, and economical clean-up of the aftermath of a financial collapse.

II. Background

11 Peace River was formed to design and construct works at the Site C Project, a major dam and hydroelectric generating station on the Peace River in northeastern British Columbia. The partnership includes the appellants Acciona Infrastructure Canada Inc. and Samsung C&T Canada Ltd., which are the Canadian subsidiaries of the appellants Acciona Infraestructuras S.A. and Samsung C&T Corporation.

12 Petrowest is the third member of the partnership. The following agreements between the parties are relevant to this appeal (collectively, "Main Agreements"):

- a general partnership agreement dated December 17, 2015, between Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., and Petrowest, creating Peace River ("Partnership Agreement");

- a guarantee and cross-indemnity agreement dated December 17, 2015, between Acciona Infraestructuras S.A., Samsung C&T Corporation, and Petrowest, guaranteeing the obligations of the subsidiary partners to the Partnership Agreement ("Guarantee");

- purchase orders under which Peace River subcontracted certain work to Petrowest and the Petrowest Affiliates ("Purchase Orders"); and

- a subcontract dated June 1, 2016, between a Petrowest Affiliate and Peace River, awarding further subcontracted work.

13 The Main Agreements contain the Arbitration Agreements in which the parties agree to refer disputes to arbitration. It should be noted, however, that the wording of each Arbitration Agreement differs. [1] Each applies to a different set of potential disputes and provides for different arbitration procedures. And some of the Purchase Orders do not contain arbitration clauses.

14 Less than two years into the partnership, Petrowest encountered financial difficulties. It entered receivership on August 15, 2017. The Alberta Court of Queen's Bench granted a receivership order pursuant to s. 243(1) of the *BIA* ("Receivership Order"). The Receivership Order appointed the Receiver to manage the assets and property of the debtors, Petrowest and the Petrowest Affiliates. It authorized the Receiver to do the following, among other things: (a) disclaim, abandon or renounce the debtors' interest in property; (b) initiate the prosecution of "any and all proceedings" with respect to the debtors and their property; (c) assign the debtors into bankruptcy, become their trustee in bankruptcy, and take all steps reasonably required to carry out its role as trustee in bankruptcy; (d) "cease to perform any contracts of the Debtors"; and (e) "receive and collect all monies and accounts" owing to the debtors (A.R., vol. XI, at pp. 2900-2903).

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15 On April 3, 2018, the Receiver assigned the Petrowest Affiliates into bankruptcy and became their trustee in bankruptcy. It is important to note that Petrowest itself is not bankrupt.

16 On August 29, 2018, the Receiver brought a civil claim against Peace River in the Supreme Court of British Columbia on behalf of Petrowest and the Petrowest Affiliates. The Receiver sought to collect funds allegedly owing to Petrowest and the Petrowest Affiliates for performance of work subcontracted under the Main Agreements.

17 On August 30, 2018, Peace River was served with the notice of civil claim. In a letter dated September 28, 2018, counsel for Peace River undertook to file a defence. Instead, Peace River ultimately applied under s. 15 of the *Arbitration Act* for a stay of proceedings on the ground that the Arbitration Agreements governed the dispute. The Receiver resisted the application on behalf of Petrowest and the Petrowest Affiliates.

III. Statutory Provisions

18 This appeal concerns the interplay between two statutes: the *Arbitration Act* and the *BIA*. The key sections of these two statutes are set out below.

Arbitration Act

Definitions

1 In this Act:

. . . . .

"arbitration agreement" means a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the *International Commercial Arbitration Act* applies;

. . . . .

Stay of proceedings

15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

BIA

General Provisions

Application of other substantive law

72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

. . . . .

Jurisdiction of Courts

Courts vested with jurisdiction

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> **183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> . . . . .
>
> **(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
>
> . . . . .
>
> ***Secured Creditors and Receivers***
>
> *Court may appoint receiver*
>
> **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

IV. Decisions Below

A. British Columbia Supreme Court, 2019 BCSC 2221, 100 B.L.R. (5th) 128 (Iyer J.)

19 The first issue before the chambers judge was whether s. 15 of the *Arbitration Act* was engaged. If so, the second issue was whether the court had jurisdiction to decline a stay notwithstanding the application of s. 15(1) of the *Arbitration Act*. Under s. 15(2), the court would be required to stay the proceedings in favour of arbitration unless it found the Arbitration Agreements "void, inoperative or incapable of being performed".

20 On the first issue, the chambers judge held that s. 15 was engaged. She analyzed the four requirements for a mandatory stay contemplated in s. 15.

21 First, the chambers judge found that the Receiver was a "party to an arbitration agreement" within the meaning of s. 15(1). She stated that the Receiver was "the trustee in bankruptcy of Petrowest and the Petrowest Affiliates", such that it had acquired their contractual rights to sue on the Main Agreements pursuant to s. 71 of the *BIA* (paras. 16-17). She concluded that by suing on the Main Agreements "in its own name as the trustee", the Receiver became a party to the Arbitration Agreements within the meaning of s. 15(1) (para. 19).

22 Second, the chambers judge rejected the argument that Peace River had taken a "step in the proceedings" before bringing its stay application. She held that undertaking to file a defence without invoking the rules of court did not constitute a step in the proceedings (*Commonwealth Insurance Co. v. Larc Developments Ltd.*, 2010 BCCA 18, 315 D.L.R. (4th) 242).

23 Third, the chambers judge concluded that at least some of the contractual claims advanced by the Receiver were captured under the broadly worded Arbitration Agreements.

24 Finally, the chambers judge was "prepared to assume" that at least some of the Arbitration Agreements at issue were not void, inoperative, or incapable of performance within the meaning of s. 15(2) (para. 33).

25 On the second issue before her, the chambers judge concluded that the court had "inherent jurisdiction", flowing from s. 183 of the *BIA*, to override arbitration agreements governed by s. 15 of the *Arbitration Act*. She noted that the exercise of this

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power could function in one of two ways: (a) it could render an arbitration clause incapable of being performed or inoperative within the meaning of s. 15(2); or (b) if s. 15(2) did not admit of that interpretation, s. 183 of the *BIA* could prevail over s. 15 of the *Arbitration Act* based on the principle of paramountcy. The chambers judge did not address this question because it had not been argued before her (para. 42).

26 The chambers judge went on to exercise her "inherent jurisdiction" to dismiss the stay application. She found that s. 183 of the *BIA* empowers superior courts to disrupt private contractual rights where doing so is necessary to achieve fairness in the bankruptcy or insolvency process and to promote the underlying objectives of the *BIA*, such as the proper administration and protection of a bankrupt's estate.

27 The chambers judge noted that enforcing the Arbitration Agreements would entail multiple overlapping arbitrations and potential litigation, resulting in "significant cost and delay" when compared with a single judicial proceeding (para. 60). She emphasized that the parties agreed that overriding the Arbitration Agreements "would promote the efficient and inexpensive resolution of their dispute" (para. 56). On this basis, the chambers judge concluded that granting a stay would "significantly compromise achievement of the objectives of the *BIA*" (para. 61). She dismissed Peace River's stay application and allowed the civil claim to proceed.

B. British Columbia Court of Appeal, 2020 BCCA 339, 452 D.L.R. (4th) 535 (Bennett, Dickson and Grauer JJ.A.)

28 Peace River appealed the chambers judge's decision, primarily on the basis that courts do not have inherent jurisdiction under s. 183 of the *BIA* to decline a stay mandated by s. 15 of the *Arbitration Act*.

29 The Court of Appeal dismissed the appeal but did not endorse the chambers judge's reasoning. It cautioned that inherent jurisdiction should be invoked only rarely and cannot be used to negate an unambiguous expression of legislative will (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABCA 293, 275 D.L.R. (4th) 498; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141). However, the Court of Appeal found it unnecessary to consider whether the chambers judge had discretion under the *BIA* to refuse to grant a stay notwithstanding the application of s. 15 of the *Arbitration Act*.

30 The Court of Appeal relied on the doctrine of separability in arbitration law, which permits an arbitration clause to be treated as a "self-contained contract collateral to the containing contract" (*Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 3 W.L.R. 42 (C.A.), at p. 49; see also *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at paras. 221-25, per Côté J., dissenting, but not on this point). According to the Court of Appeal, separability allows a receiver, as a court-appointed fiduciary, to disclaim an otherwise valid arbitration agreement even though it has adopted the containing contract for the purpose of suing on it (para. 55).

31 Applying the doctrine of separability, the Court of Appeal found that the Receiver had disclaimed the Arbitration Agreements by bringing the civil claim on behalf of Petrowest and the Petrowest Affiliates. Accordingly, the Receiver was not a party to those agreements and s. 15 of the *Arbitration Act* did not apply. In any event, if the Receiver was a party, its disclaimer rendered the Arbitration Agreements inoperative or incapable of being performed within the meaning of s. 15(2) (para. 56). Accordingly, the Court of Appeal dismissed the appeal, upholding the chambers judge's decision to refuse to grant a stay in favour of arbitration.

V. Issues

32 This appeal raises the following question:

- In what circumstances is an otherwise valid arbitration agreement unenforceable under s. 15(2) of the *Arbitration Act* in the context of a court-ordered receivership under the *BIA*?

33 This question raises the following sub-questions:

(a) Did the Court of Appeal err in concluding that s. 15 of the *Arbitration Act* is not engaged?

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(b) If s. 15 is engaged, did the chambers judge err in finding that a court nevertheless has jurisdiction to refuse a stay of proceedings in the context of a court-ordered receivership under the *BIA*?

(c) If a court has jurisdiction to refuse to grant a stay in the context of a court-ordered receivership, how should this jurisdiction be exercised in this case?

34 In brief, I conclude that s. 15 of the *Arbitration Act* does not require a court, in every case, to stay a civil claim brought by a court-appointed receiver where the claim is subject to a valid arbitration agreement. A court may decline to grant a stay where the party seeking to avoid arbitration establishes that the arbitration agreement at issue is "void, inoperative or incapable of being performed" within the meaning of s. 15(2). In the context of a court-ordered receivership, an arbitration agreement may be inoperative if enforcing it would compromise the orderly and efficient resolution of the receivership. This analysis necessarily turns on the particular factual scenario before the court.

35 Applying the foregoing, I find that the Receiver, on behalf of Petrowest and the Petrowest Affiliates, has established that the Arbitration Agreements are inoperative. I see no basis on which to interfere with the chambers judge's finding that a single judicial process "will be faster and less expensive" than the multiple overlapping proceedings required by the Arbitration Agreements (para. 56). The parties agreed before the chambers judge that proceeding through the courts, rather than by arbitration, "would promote the efficient and inexpensive resolution of their dispute" (para. 56). On this basis, I conclude that arbitration would compromise the orderly and efficient resolution of the receivership, contrary to the objectives of the *BIA*.

36 Therefore, the chambers judge was entitled to refuse Peace River's request for a stay in favour of arbitration under s. 15(2) of the *Arbitration Act*. I would accordingly dismiss the appeal.

VI. Analysis

37 My analysis below proceeds as follows. First, I explain and apply the "competence-competence" principle. Second, I discuss the relationship between arbitration law and insolvency law, including key commonalities between these bodies of law. Third, I outline the general two-part framework applicable on stay applications brought under domestic arbitration legislation in Canada. Fourth, I interpret s. 15 of the *Arbitration Act* and resolve the four interpretive issues raised. Finally, I apply the two-part s. 15 stay framework to this case.

A. Competence-Competence Principle

38 I begin with a discussion of the competence-competence principle in Canadian arbitration law, as it is germane to the issues in this appeal.

(1) General Principle

39 Competence-competence is a principle that gives precedence to the arbitration process. It holds that, generally speaking, "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction" (*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 70). This preference for arbitration is a departure from the traditional approach in Canada, which favoured an interventionist judicial role (*Dell* , at para. 69). Historically, judges took a dim view of arbitration, "treating it as a 'second-class method of dispute resolution'" (*TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 48; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at para. 96).

40 However, in 1986, Canada acceded to the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43 ("New York Convention"), which established a single, uniform set of rules for international commercial arbitration that applied worldwide. Canada also adopted the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I, June 21, 1985 ("Model Law"), prepared by the United Nations Commission on International Trade Law. The Model Law was intended to guide legislative development in jurisdictions seeking to establish a modern legal framework in order to encourage commercial arbitration (J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at § 1:4). Article 16 of the Model Law articulates

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the competence-competence principle. British Columbia adopted the principle, as set out in the Model Law, through s. 22 of the *Arbitration Act* (*Seidel* , at para. 28).

41 In light of the foregoing, it is well established in Canada that a challenge to an arbitrator's jurisdiction should generally be decided at first instance by the arbitrator (see *Uber* , at paras. 31-34; *Seidel* ; *Dell* ; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921). This reflects the presumption that arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement (McEwan and Herbst, at § 5:10).

(2) Exceptions to the Competence-Competence Principle

42 The competence-competence principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record (*Uber* , at para. 32; *Dell* , at paras. 84-85). This exception is justified by the particular expertise that courts have in deciding such questions. Further, it allows a legal argument relating to the arbitrator's jurisdiction "to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate" (*Dell* , at para. 84).

(3) Application of the Principle in This Case

43 The questions in this appeal are of mixed fact and law. In the circumstances of this case, all that is required is the interpretation of arbitration and insolvency legislation and a superficial consideration of the evidentiary record. Accordingly, a court is entitled to resolve the question of arbitral jurisdiction without offending the competence-competence principle.

B. Relationship Between Arbitration Law and Insolvency Law

44 To decide this appeal, I must determine the effect, if any, that the receivership of Petrowest and the Petrowest Affiliates under the federal *BIA* has on the Arbitration Agreements, which are governed by British Columbia's *Arbitration Act*. Before I do so, it is helpful to explain the interaction between arbitration law and insolvency law more generally.

45 Arbitration law and insolvency law have long been understood to embody "opposing interests" (see, e.g., W. Kühn, "Arbitration and Insolvency" (2011), 5 *Disp. Res. Int'l* 203, at p. 203; M. A. Salzberg and G. M. Zinkgraf, "When Worlds Collide: The Enforceability of Arbitration Agreements in Bankruptcy" (2007), 27 *Franchise L.J.* 37; P. F. Kirgis, "Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis" (2009), 17 *Am. Bankr. Inst. L. Rev.* 503; D. Chan and S. Rajagopal, "To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes" (2021), 38 *J. Int'l Arb.* 457). In an oft-cited passage, the United States Court of Appeals for the Second Circuit described the interaction between arbitration law and insolvency law as "a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution" (*In re U.S. Lines, Inc.*, 197 F.3d 631 (1999), at p. 640; see also *Societe Nationale Algerienne v. Distrigas Corp.*80 B.R. 606 (D. Mass. 1987), at p. 610).

46 Recently, two trends have thrown this tension into sharp relief. First, arbitration has become an increasingly popular mechanism for resolving commercial disputes, both in Canada and abroad (*Wellman* , at para. 54; *Seidel* , at para. 23). Today, parties and counsel alike recognize the potential strategic and tactical advantages of arbitration as compared to traditional litigation. These may include privacy and confidentiality, efficiency and timeliness, relaxed rules of evidence, freedom to determine procedural rules and select decision makers with relevant expertise, and cross-border enforceability of awards (J. B. Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at ch. 1.6).

47 Second, economic shocks, including the 2008 financial crisis and the disruptions resulting from the COVID-19 pandemic, have placed increased demands on our insolvency laws (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), at § 1:6; H. Esslinger, "Creditors Over Contract: A Case Comment on *Chandos*", in J. Corraini and D. B. Nixon, eds., *Annual Review of Insolvency Law 2021* (2022), 747; V. W. DaRe and T. Prpa, "Imagine One Restructuring Act in Canada" (2021), 36 *B.F.L.R.* 363, at p. 364).

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48 It is thus not unusual now for a commercial party to find itself in a dispute governed by an arbitration agreement with an insolvent or bankrupt counterparty. In this scenario, there is a tension between arbitration law and insolvency law as regards the forum in which the dispute is to be resolved. To understand this tension, it is necessary to briefly outline the characteristics of arbitration and insolvency proceedings. Despite clear differences, these two bodies of law have much in common. Accordingly, as I will explain, courts must assess the enforceability of arbitration agreements in the context of parallel insolvency proceedings on a case-by-case basis. Below, I provide guidance in this regard.

(1) Dispute Resolution by Arbitration

49 The modern view expressed in Canadian arbitration legislation is that parties should be held to their contractual agreements to arbitrate. This gives effect to the concept of "party autonomy", according to which parties are free to "charter a private tribunal" to resolve their disputes (*Wellman* , at para. 52, citing *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87; M. Pavlovi[cacute] and A. Daimsis, "Arbitration", in J. C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies* (4th ed. 2016), 483, at p. 485). Party autonomy is closely related to freedom of contract (*Hofer v. Hofer*, [1970] S.C.R. 958, at p. 963). Modern arbitration legislation is premised on these principles, which inform the policy choices embodied in provincial arbitration statutes like the *Arbitration Act* (*Wellman* , at para. 52).

50 Party autonomy and freedom of contract go hand in hand with the principle of limited court intervention in arbitral proceedings. This latter principle is "fundamental" to modern arbitration law and "finds expression throughout modern Canadian arbitration legislation" (*Wellman* , at paras. 52-55; McEwan and Herbst, at § 10:2; Casey, at ch. 7.1). For instance, s. 4(a) of British Columbia's new *Arbitration Act*, S.B.C. 2020, c. 2, provides that "[i]n matters governed by this Act, *a court must not intervene* unless so provided in this Act". Similar expressions of principle are found in provincial arbitration legislation across the country. It follows that, generally speaking, judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule.

(2) Dispute Resolution in Insolvency

51 On the other hand, insolvency proceedings are creatures of statute subject to close judicial oversight.

52 Insolvency engages broad public interests. It "affects all of the stakeholders of the insolvent business enterprise", including creditors, employees, landlords, suppliers, shareholders, and customers (K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at ¶1.1). In the case of very large companies, an insolvency may even "threaten the existence of whole communities" (¶1.1). Canadian legislation therefore offers stakeholders a wide range of judicial procedures to resolve problems presented by an insolvency (¶¶1.1-1.12).

53 This procedural flexibility has allowed Canadian courts to become instrumental in (a) providing a forum for the orderly resolution of the competing rights and objectives of individual stakeholders of insolvent business enterprises, and (b) creating mechanisms for the preservation of the value of the insolvent business or its assets for the benefit of all stakeholders (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 2 and 22; McElcheran, at ¶¶1.1-1.14). I elaborate on these two points below.

(a) Single Proceeding Model

54 The central role of courts in ensuring the equitable and orderly resolution of insolvency disputes is reflected in the "single proceeding model".

55 This model favours the enforcement of stakeholder rights through a centralized judicial process. The legislative policy in favour of "single control" is reflected in Canadian bankruptcy, insolvency, and winding-up legislation (*Century Services* , at paras. 22-23). The single proceeding model is intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights. In other words, the single proceeding model protects the clear "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (*Sam*

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Lévy & Associés Inc. v. Azco Mining Inc., 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 27, citing *Stewart v. LePage*, (1916), 53 S.C.R. 337). This Court has held that s. 183(1) of the *BIA* confers a "broad scope of authority" on superior courts to deal with most bankruptcy disputes, as "[a]nything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs" (*Sam Lévy* , at para. 38).

(b) Court-Ordered Receiverships Under the BIA

56 Court-ordered receiverships under s. 243 of the *BIA*, like the receivership in the present case, are one available tool for enhancing the judicial oversight and flexibility underlying Canadian insolvency law. Section 243(1) of the *BIA* confers broad authority on a court to appoint a receiver if the court "considers it to be just or convenient to do so". Under s. 243(1), a court may appoint a receiver to do any of the following, with a view to enhancing and facilitating the preservation and realization of the debtor's assets for the benefit of all creditors: (a) take possession of all or substantially all of the debtor's inventory, accounts receivable or other property that was acquired for or used in relation to a business carried on by the debtor; (b) exercise any control that the court considers advisable over that property and over the debtor's business; or (c) take "any other action that the court considers advisable" (R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 553-54).

57 Given the breadth of their powers, court-appointed receivers are necessarily subject to close judicial oversight. Receivers represent neither a security holder nor the debtor; they are officers of the court whose "sole authority is derived from ... Court appointment and from the directions given [to them] by the Court" (*Ostrander v. Niagara Helicopters Ltd.*, (1973), 1 O.R. (2d) 281 (H.C.), at p. 286). In most cases, including the one at bar, a court order under s. 243 of the *BIA* gives a receiver wide-ranging powers.

58 Despite this flexibility, court-appointed receivers have a fiduciary duty to act honestly and in the best interests of *all* interested parties. For example, a receiver is generally not permitted to terminate existing contracts between third parties and the debtor, but must apply to the court to discharge onerous contracts, such as those which would be unduly costly to perform (F. Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 42; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.), per Viscount Haldane L.C.). This demonstrates the key supervisory role that courts play in receivership proceedings.

(3) Commonalities Between Arbitration Law and Insolvency Law

59 Notwithstanding the differences just described, arbitration law and insolvency law also have much in common. Below, I address three commonalities that are particularly relevant to this appeal.

(a) Efficiency and Expediency

60 First and foremost, arbitration law and insolvency law each prioritize efficiency and expediency.

61 Commercial arbitration is a "process designed to enable parties to deal with disputes efficiently, effectively and economically" (McEwan and Herbst, at § 2:1, citing *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 1). As such, it is expected to be "less formal, more expeditious and therefore faster than a court determination of issues" (*Rosenberg v. Minster*, 2014 ONSC 845, 119 O.R. (3d) 27, at para. 58).

62 Likewise, the *raison d'être* of the single proceeding model in Canadian insolvency law is the "expeditious, efficient and economical clean-up of the aftermath of a financial collapse". To maximize global recovery for creditors, this model avoids "inefficiencies and chaos" by "favouring an orderly collective process" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 33; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 7).

63 As noted, the single proceeding model applies to proceedings under the *BIA*, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and other insolvency legislation. For example, s. 243 of the *BIA* authorizes a court to appoint a receiver with the power to act nationally. This promotes efficiency "by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located" (Houlden, Morawetz and Sarra, at § 12:3).

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(b) Procedural Flexibility

64 Further, procedural flexibility is a hallmark of both arbitration law and insolvency law.

65 Chief among the reputed advantages of arbitration is the freedom of parties to choose their own procedural rules rather than being bound by rules of court (*Seidel* , at para. 22; *Wellman* , at paras. 48-56; L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143). This enhances expediency and cost-effectiveness in arbitral proceedings, where discovery procedures can be curtailed, written submissions can be used instead of witness testimony, and strict evidentiary rules can be relaxed (McEwan and Herbst, at §§ 2:1 and 7:12).

66 Flexibility is likewise a characteristic of Canadian insolvency law. But in the insolvency context, both the court *and* the parties can tailor proceedings to fit a particular case. Indeed, the *BIA* and the *CCAA* both accord broad judicial discretion to, among other things, authorize the assignment and disclaimer of contracts and the sale of assets, impose and lift stays of proceedings, grant extensions of time, terminate proceedings, and approve creditor proposals (Wood, at pp. 432-33). Much like arbitration law does for arbitrating parties, Canadian insolvency law thus allows debtors, creditors, and courts "to design a process and [an] outcome that is appropriate for individual ... cases" (McElcheran, at ¶¶5.11-5.12).

(c) Decision Makers With Specialized Expertise

67 Finally, both arbitration law and insolvency law often rely on specialized decision makers to achieve their respective objectives.

68 One "great merit" of arbitration is that parties are able to select a decision maker with "special expertise in the field of their dispute" (*3GS Inc. v. Altus Group Ltd.*, 2011 ONSC 5755, 96 B.L.R. (4th) 268, at para. 19; McEwan and Herbst, at § 4:1).

69 Similarly, specialized judicial expertise is essential to meet the challenges of complex restructuring and insolvency proceedings, often called the "hothouse of real-time litigation" (*Century Services* , at para. 58, quoting 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).

70 The interests of expediency and procedural flexibility inform the need for judicial specialization in the realm of bankruptcy and insolvency. Indeed, in many provinces, there are specialist judges who take carriage of restructuring proceedings and all related issues. Their expertise and "file knowledge" allow them to find the right balance of procedural formality while meeting the need for timely resolution of disputes within the overall restructuring process (McElcheran, at ¶5.85).

71 In sum, reliance on a decision maker with expertise in the relevant field is a core feature of both arbitration law and insolvency law, and for good reason. Specialized expertise can assist in capitalizing on other attributes that are also common to both bodies of law, such as expediency and procedural flexibility.

(d) Conclusion on the Interplay Between Arbitration Law and Insolvency Law

72 In many cases, the shared interests in expediency, procedural flexibility, and specialized expertise will converge through arbitration. In such a scenario, the parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. In other words, the court should grant a stay of legal proceedings in favour of arbitration, and any dispute as to the scope of the arbitration agreement or the arbitrator's jurisdiction should be left to the arbitrator to resolve. As is evident from the foregoing, valid arbitration agreements are generally to be respected. This presumption in favour of arbitral jurisdiction is supported by this Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit.

73 However, in certain insolvency matters, it may be necessary to preclude arbitration in favour of a centralized judicial process. This may occur when arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. In such a scenario, a court may assert control over the proceedings, both to ensure the timely resolution of the parties' dispute

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and to protect the public interest in the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors. This authority arises from the statutory jurisdiction conferred on superior courts under ss. 243(1) and 183(1) of the *BIA*.

74 This exercise is necessarily a highly factual one. It requires the court to carefully review the particular statutory regimes and arbitration agreements in play, having regard to the principles of party autonomy and freedom of contract as well as the policy imperatives underpinning bankruptcy and insolvency law.

75 To guide this exercise, I will briefly summarize the two-part stay framework that is implicit in provincial arbitration legislation like the *Arbitration Act*.

C. Two-Part Framework for Stays of Proceedings in Favour of Arbitration

76 There are two general components to the stay provisions in provincial arbitration legislation across the country. As the framework is similar across jurisdictions, it will be useful to provide a general overview before turning to the interpretation of s. 15 of the *Arbitration Act* itself. The two components are as follows:

(a) the technical prerequisites for a mandatory stay of court proceedings; and

(b) the statutory exceptions to a mandatory stay of court proceedings.

77 Though interrelated, these two components ought to remain analytically distinct. This distinction is necessary because the burden of proof shifts between the first component and the second.

78 Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof (McEwan and Herbst, at § 3:43; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, at paras. 29-30 (CanLII)).

79 If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused (McEwan and Herbst, at § 3:43; Casey, at ch. 3.4). Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal.

80 I will briefly elaborate on each component and its respective standard of proof.

(1) Technical Prerequisites

81 The first component is concerned with whether the applicant for a stay has established that the arbitration agreement at issue engages the mandatory stay provision in the applicable provincial arbitration statute.

82 Considerations at this stage may differ depending on the jurisdiction and the nature of the arbitration (i.e., whether it relates to domestic or international arbitration). Broadly speaking, however, this threshold inquiry requires the court to determine whether the party seeking to rely on the arbitration agreement has established the technical prerequisites for a stay in favour of arbitration.

83 There are typically four technical prerequisites relevant at this stage:

(a) an arbitration agreement exists;

(b) court proceedings have been commenced by a "party" to the arbitration agreement;

(c) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and

(d) the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings.

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If all the technical prerequisites are met, the mandatory stay provision is engaged and the court should move on to the second component of the analysis.

84 It is important to note that the standard of proof applicable at the first stage is lower than the usual civil standard. To satisfy the first component, the applicant must only establish an "arguable case" that the technical prerequisites are met (McEwan and Herbst, at § 3:47; *Sum Trade Corp. v. Agricom International Inc.*2018 BCCA 379(B.C. C.A.) , 18 B.C.L.R. (6th) 322, at paras. 26 and 32, citing *Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd.* 1992 66 B.C.L.R. (2d) 113 (C.A.), at paras. 39-40).

85 I acknowledge that, in *Dell* , this Court characterized the applicable standard of proof as that of proof on a "*prima facie*" basis (para. 82). However, as the Court of Appeal for British Columbia has noted, there is no substantive difference between the arguable case test in *Gulf Canada Resources* and the *prima facie* test in *Dell* :

> The significance of both standards is that there is room for a judge to dismiss a stay application when there is no nexus between the claims and the matters reserved for arbitration, while referring to the arbitrator any legitimate question of the scope of the arbitration jurisdiction. This avoids duplication and respects the competence-competence principle.
>
> (*Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, 446 D.L.R. (4th) 626, at para. 30)

86 Notwithstanding this less onerous standard of proof, court proceedings are not automatically stayed in favour of arbitration where the technical prerequisites are met. Rather, the court must move on to the second component and assess whether any of the statutory exceptions apply (*Dell* , at para. 87; *Clayworth*, at paras. 31-32).

(2) Statutory Exceptions

87 Certain exceptions, such as whether the arbitration clause is "void, inoperative or incapable of being performed", arise from the Model Law and the New York Convention and appear in several provincial arbitration statutes, including the *Arbitration Act*. I will discuss these particular exceptions in the context of this appeal in further detail below. Other statutory exceptions may also be relevant, depending on the jurisdiction (see, e.g., *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(2)).

88 At this second stage, the key question is whether, even though the technical requirements for a stay are met, the party seeking to avoid arbitration has shown on a balance of probabilities that one or more of the statutory exceptions apply. If not, the court *must* grant a stay. The mandatory nature of stay provisions across jurisdictions in Canada reflects the presumptive validity of arbitration clauses and the principle of party autonomy.

89 It follows that a court should dismiss a stay application on the basis of a statutory exception only in a "clear" case (McEwan and Herbst, at § 3:55; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at p. 155). A clear case is, for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator. Such an approach accords due respect to arbitral jurisdiction, in light of the competence-competence principle, as well as to the parties' intention to refer their disputes to arbitration (McEwan and Herbst, at § 3:55; *Dalimpex Ltd. v. Janicki*, (2000), 137 O.A.C. 390 (S.C.J.), at paras. 3-5, aff'd (2003), 228 D.L.R. (4th) 179 (C.A.)).

90 As I have indicated, the application of the above two-part framework in a particular case must begin with a proper interpretation of the governing stay provision. This brings me to the focal point of this appeal: s. 15 of the *Arbitration Act*.

D. Section 15 of the Arbitration Act

91 The modern approach to statutory interpretation requires us to read the words of s. 15 in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the *Arbitration Act* and the intention of the legislature.

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(1) Text of Section 15

92 The text of s. 15(1) and (2) of the *Arbitration Act* mirrors the two-part analytical framework just described. The sections read as follows:

> **15** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings [the *technical prerequisites*].
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed [the *statutory exceptions*].

(2) Proper Interpretation of Section 15

93 The parties disagree on four issues of statutory interpretation regarding s. 15 of the *Arbitration Act*. Two relate to the technical prerequisites set out in s. 15(1):

> (a) whether undertaking to file a defence constitutes a "step in the proceedings"; and
>
> (b) whether a court-appointed receiver may be a "party" to a debtor's arbitration agreement.

94 The other two relate to the statutory exceptions provided for in s. 15(2):

> (c) whether a receiver's purported disclaimer of an arbitration agreement renders it "void, inoperative or incapable of being performed"; and
>
> (d) whether the *Arbitration Act* permits a court to find an arbitration agreement "inoperative" or "incapable of being performed" due to a receivership.

95 All four interpretive issues must be resolved before s. 15 is applied to the case at bar.

(a) Section 15(1) — Undertaking to File a Defence Is Not a "Step in the Proceedings"

96 First, the Receiver resurrects its submission before the chambers judge that undertaking to file a defence may constitute a "step in the proceedings" within the meaning of s. 15(1). This proposed interpretation was explicitly rejected by the chambers judge and not pursued before the Court of Appeal.

97 Determining whether a step in the proceedings has been taken requires an objective approach. The court must ask itself whether, on the facts, the party should be held impliedly to have affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration (McEwan and Herbst, at § 3:27). A step in the proceedings means "something in the nature of an application to the Court, and not mere talk between solicitors ... nor the writing of letters" (*Larc Developments*, at para. 15, citing *Ives & Barker v. Willans*, [1894] 2 Ch. 478 (C.A.), at p. 484).

98 I acknowledge that the Receiver now argues in this Court, for the first time, that requesting the other party's consent to an *extension of time* to file a defence constitutes a step in the proceedings. Assuming, without deciding, that this submission is properly before our Court, I reject it. In my view, requesting an extension of time cannot be considered a "step". In the context of s. 15(1), the very purpose of such a request is to decide whether or not to take a step, and there is no election to proceed with the action (McEwan and Herbst, at § 3:31). Indeed, the result of an extension "might well be quite to the contrary, and have the effect of removing [the action] entirely from the Court" (*Central Investments & Development Corp. v. Miller*, (1982), 133 D.L.R. (3d) 440 (P.E.I.S.C.), at p. 442).

99 In sum, I see no merit in the interpretation of the words "step in the proceedings" proposed by the Receiver.

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(b) Section 15(1) — A Court-Appointed Receiver May Be a "Party" to an Arbitration Agreement

100 The second interpretive issue concerns the term "party" in s. 15(1) of the *Arbitration Act*. Can a court-appointed receiver be a party to the debtor's pre-existing arbitration agreement?

101 The Receiver says no. It agrees with the Court of Appeal that a court-appointed receiver cannot be a party because it is a legal entity separate from the debtor with a fiduciary duty to the appointing court.

102 Peace River disagrees. It says that a court-appointed receiver, like other non-signatories, may be a party to the debtor's pre-receivership arbitration agreement through the operation of ordinary contract law.

103 I agree with Peace River. I say this for three reasons.

(i) Ordinary Contractual Principles Indicate That a Receiver May Be a "Party" to an Arbitration Agreement

104 First, the Receiver's narrow interpretation of the term "party" conflicts with basic principles of contract law. It says that a receiver may advance claims only *through* the debtor in exercising its power to institute proceedings for the benefit of all stakeholders in an insolvent corporation. It further says that s. 15(1) of the *Arbitration Act* must be interpreted in light of the fact that in 1986 the reference to a person claiming "through" a party to an arbitration agreement was removed from the stay provision in the province's domestic arbitration legislation. The provision — now s. 15(1) of the *Arbitration Act* — thus differs from s. 2(1) of the province's *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 ("*ICAA*"), which defines "party" as including "a person claiming through or under a party" to an arbitration agreement. The Receiver asks this Court to give effect to the "narrower wording" in the *Arbitration Act* and the "important textual distinction" between the *Arbitration Act* and the *ICAA* (R.F., at paras. 89-90).

105 I disagree. The interpretation of the term "party" under arbitration legislation falls to be "determined in accordance with the ordinary principles for construction of a contract" (McEwan and Herbst, at § 2:28; Casey, at ch. 3.5.1). It is well established that an entity connected with a signatory to a contract containing an arbitration agreement may become bound as a "party" by operation of law. Such associated entities may include "subsidiaries, assignees, trustees and *others claiming through or under the named party to the arbitration agreement*" (McEwan and Herbst, at § 2:37 (emphasis added)). These entities, although non-signatories, "may have all of the rights and obligations under the arbitration agreement by operation of law" (Casey, at ch. 3.5.1).

106 Two examples are instructive here. The first is assignment. It is a "fundamental" and "universal commercial legal principle" that an assignor may not assign contractual rights in such a way as to "convey the benefits and nullify the burdens". Stated differently, a party seeking to enforce assigned rights under an agreement "can only do so subject to the terms and conditions therein", including the condition that disputes are to be resolved by arbitration (*ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH*, (1996), 135 D.L.R. (4th) 130 (Ont. C.J. (Gen. Div.)); see also Casey, at ch. 3.5.1; *Petro-Canada v. 366084 Ontario Ltd.* 1995 25 B.L.R. (2d) 19 (Ont. C.J. (Gen. Div.)), at para. 55).

107 The second example is trusteeship in bankruptcy. When a trustee in bankruptcy adopts a contract containing an arbitration clause and a dispute later arises, "the arbitration agreement is enforceable by or against the trustee in the same manner as any other commercial contract adopted by the trustee" (Casey, at ch. 3.8.2).

108 In both of these scenarios, a non-signatory "steps into the shoes of the original contracting party" and thereby becomes "bound by the terms of the contract to which he or she has succeeded as a trustee in bankruptcy ... or assignee" (A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at §3.10).

109 I see no principled reason why the foregoing should not apply, *mutatis mutandis*, to a court-appointed receiver claiming through a debtor under a contract containing an arbitration agreement. I agree with the Receiver that it "advances claims *through* [Petrowest and] the Petrowest [Affiliates]" (R.F., at para. 59 (emphasis added)). Indeed, a court-appointed receiver, by initiating legal proceedings on behalf of a debtor, "steps into the shoes" of the debtor as the original contracting party, much like an assignee or a trustee in bankruptcy does. While a court-appointed receiver may have the power to sue on the debtor's behalf,

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"the receiver acquires no cause of action in its own name" and therefore "must ... sue in the debtor's name to recover accounts receivable" (Bennett, at p. 257). In short, a court-appointed receiver has no independent cause of action to assert. It may only rely on the *debtor's* rights to recover, for example, accounts receivable owed by a third party. It would violate basic principles of contract law to permit a receiver to enforce a contract on the debtor's behalf while avoiding the debtor's burdens, including the obligation to arbitrate contractual disputes.

110 Nor am I persuaded that a receiver's duty as an officer of the court precludes it from being considered a party to an arbitration agreement within the meaning of s. 15(1) of the *Arbitration Act*. To the contrary, a court-appointed receiver owes a fiduciary duty to "*all interested parties* involving the debtor's assets, property, and undertaking" (Bennett, at p. 38 (emphasis added)). For this reason, the receiver may not "arbitrarily" break contracts entered into by the debtor with third parties prior to the receivership. Rather, the receiver must exercise "proper discretion in doing so", including by seeking "leave of the court" to terminate such contracts (Bennett, at p. 434). This supports my view that a receiver's court-appointed role cannot insulate it from being considered a party under s. 15(1) where the contractual principles outlined above apply.

(ii) Interpretive Principles Confirm That a Receiver May Be a "Party" to an Arbitration Agreement

111 Second, I reject the Receiver's argument that, by not referring in s. 15(1) of the *Arbitration Act* to a person claiming through or under a party to an arbitration agreement, the legislature intended to preclude non-signatories like receivers from being considered parties under that section. This interpretation would be inconsistent with two applicable principles of statutory interpretation.

112 The first principle is that where legislation does not fully address a matter relating to its subject, courts may look to the common law to interpret the statutory language (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at §17.02). In such a scenario, the common law is presumed to apply, absent persuasive evidence that the legislature intended to change or displace it by enacting the statute at issue (Sullivan, at §17.02).

113 The *Arbitration Act* does not define the term "party". I acknowledge that the reference to a person claiming through a party to an arbitration agreement was removed from the stay provision in domestic arbitration legislation. But if this Court accepted the Receiver's proposed interpretation, no non-signatory could ever be a party to an arbitration agreement under the *Arbitration Act*. This is because *all* non-signatories, whether they are agents, trustees in bankruptcy, receivers, or assignees, may claim *only* through or under a signatory, upon stepping into its contractual shoes. Such an interpretation would plainly undermine these foundational contractual doctrines. I see nothing in the legislative record or the text of the *Arbitration Act* to indicate that the legislature intended to change or displace the common law in such a radical manner.

114 The second principle is that statutes such as the *Arbitration Act* and the *ICAA* must be interpreted harmoniously. As Gonthier J. held in *Therrien (Re)* 2001 SCC 35, [2001] 2 S.C.R. 3, "[i]nterpretations favouring harmony between the various statutes enacted by the same government should indeed prevail. This presumption is even stronger when the statutes relate to the same subject matter" (para. 121; see also Sullivan, at §13.04).

115 This presumption further undermines the Receiver's proposed interpretation of the term "party". I do not accept that the removal of the reference to a person claiming through a party to an arbitration agreement from the stay provision in domestic arbitration legislation reflects a legislative intent to exclude all entities claiming through or under a party. The *ICAA* was passed concurrently with the *Arbitration Act* by the same legislature to deal with the same subject matter. The *ICAA* thus provides useful interpretive guidance in ascertaining the scope of the term "party" in the *Arbitration Act*. The term should be interpreted harmoniously under both statutes. In other words, a "party" under s. 15(1) of the *Arbitration Act* includes "a person claiming through or under a party", in accordance with the definition in s. 2(1) of the *ICAA*. As I explained above, this may include a court-appointed receiver claiming through or under a debtor.

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(iii) Interpreting the Term "Party" as Including a Court-Appointed Receiver Claiming Through or Under a Debtor Is Consistent With a Central Purpose of the Arbitration Act

116 Finally, accepting the Receiver's interpretation would be inconsistent with a central purpose of the *Arbitration Act*: ensuring that parties abide by valid arbitration agreements.

117 Indeed, the interpretation urged on us by the Receiver could effectively prevent arbitration of *any* dispute as soon as one of the contracting parties entered receivership. This would subvert the core arbitral principles of party autonomy, limited court intervention, and competence-competence. Most notably, commercial parties seeking to mitigate risk through arbitration agreements would be deprived of the dispute resolution mechanism they bargained for when they arguably need it the most: when their counterparty cannot meet its obligations due to insolvency. I decline to make such a wide-ranging finding.

118 Accordingly, I conclude that a court-appointed receiver may be a party within the meaning of s. 15(1) of the *Arbitration Act* by claiming through or under a party to a valid arbitration agreement. In short, a receiver, like other non-signatories, may become bound by an arbitration agreement in accordance with ordinary principles of contract law.

(c) Section 15(2) — Disclaimer Cannot Render an Arbitration Agreement "Void, Inoperative or Incapable of Being Performed"

119 The third interpretive issue flows from the second. If a court-appointed receiver can be a party to a debtor's pre-existing arbitration agreement, can it nevertheless avoid the obligation to arbitrate by initiating court proceedings under the main contract? In other words, can a receiver unilaterally disclaim an arbitration agreement, thereby rendering it "void, inoperative or incapable of being performed" within the meaning of s. 15(2) of the *Arbitration Act*?

120 The Court of Appeal appeared to answer this question in the affirmative. It concluded that, even if a court-appointed receiver could be a party to a debtor's arbitration agreement, it would have the power to disclaim that agreement by commencing court proceedings and thereby render an otherwise valid arbitration agreement void, inoperative, or incapable of being performed within the meaning of s. 15(2). The Receiver endorses the Court of Appeal's reasoning.

121 In my respectful view, the Court of Appeal erred in its interpretation of s. 15(2), for two reasons.

122 First, the Court of Appeal's analysis rested on a palpable and overriding error. The Receiver conceded before the Court of Appeal, as it does in this Court, that it "has not expressly disclaimed" the Arbitration Agreements (R.F., at para. 102; A.F., Appendix B, at paras. 3 and 13). During the oral hearing before this Court, counsel for the Receiver reiterated this concession. Thus, the Receiver has not disclaimed the Arbitration Agreements by commencing court proceedings. Therefore, the Court of Appeal's interpretation of s. 15(2) cannot stand.

123 Second, and even setting the Court of Appeal's factual error aside, I agree with Peace River that a receiver's unilateral disclaimer cannot render an arbitration agreement void, inoperative, or incapable of being performed. In *Seidel* , LeBel and Deschamps JJ. (dissenting, but not on this point) held that the terms "void", "inoperative", and "incapable of being performed" in s. 15(2) should be interpreted "narrowly" to prevent parties from avoiding arbitration in favour of what they view as a "preferable procedure" (paras. 117-18). I agree with the Chartered Institute of Arbitrators (Canada) Inc. that allowing a receiver to avoid arbitration by unilaterally disclaiming a debtor's pre-existing arbitration agreement conflicts with the text and intent of s. 15 and "diminishes the presumptive enforceability and overall predictability of arbitration agreements, which was the purpose for Canada ratifying the New York Convention and for British Columbia adopting the Model Law" (I.F., at para. 9).

124 As s. 15(2) makes plain, the sole basis upon which a party may sue to enforce a contract and yet avoid the obligation to arbitrate is that the arbitration agreement has been found by a court to be void, inoperative, or incapable of being performed. Preferably, court-appointed receivers should seek such a judicial determination by bringing a motion for directions before the supervising court (see, e.g., *Canada (Attorney General) v. Reliance Insurance Co.*, (2007), 87 O.R. (3d) 42 (S.C.J.), at paras. 7, 9 and 21). I note that the Receiver did not bring such a motion before the Alberta Court of Queen's Bench, the supervising

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court with carriage of this matter. Instead, it filed a civil claim in the Supreme Court of British Columbia. Contrary to the Court of Appeal's reasoning, I do not accept that the bare act of filing suit in a court unfamiliar with the insolvency proceedings is a sufficient basis on which to find an arbitration agreement unenforceable under s. 15(2). Given the clear expression of legislative will in favour of arbitral jurisdiction embodied in the *Arbitration Act*, the enforceability of an otherwise valid arbitration agreement should not be subject to the whims of any single party, even a court-appointed receiver.

125 Rather, where a court-appointed receiver attempts to initiate court proceedings without prior judicial approval in a dispute covered by a valid arbitration agreement, the court must decide whether to exercise its jurisdiction arising from the *BIA* to decline to enforce the arbitration agreement under s. 15 of the *Arbitration Act*. This requires a proper reading of the words "void, inoperative or incapable of being performed" in accordance with the modern approach to statutory interpretation and in light of the relevant insolvency policy interests. The Court of Appeal did not set out its reasoning in this regard. Accordingly, I turn now to this interpretive exercise.

(d) Section 15(2) — A Court May Find an Arbitration Agreement "Inoperative" Due to a Receivership

126 The final interpretive issue lies at the heart of this appeal. It boils down to the following question: Where the technical prerequisites in s. 15(1) of the *Arbitration Act* are met, does s. 15(2) give a court the power to refuse a stay under s. 15(2) by finding that an arbitration agreement has become "inoperative" or "incapable of being performed" because of court-ordered receivership proceedings?

127 According to Peace River, the answer is no. It accepts that s. 15(2) requires a court to assess whether an arbitration agreement is "void, inoperative or incapable of being performed". However, it argues that these terms must be narrowly interpreted and that courts do not have the power to "simply render" otherwise valid arbitration agreements inoperative or incapable of being performed, whether by virtue of their statutory jurisdiction over receiverships under s. 243 of the *BIA* or by virtue of the inherent jurisdiction to oversee bankruptcy and insolvency proceedings preserved in s. 183 of the *BIA*. Peace River says that even if such a power existed under the *BIA*, it would conflict with s. 15 of the *Arbitration Act*, thus creating a paramountcy conflict between federal legislation and provincial legislation, which the Receiver fails to address.

128 The Receiver takes a more nuanced view. It agrees with Peace River that there was no need for the chambers judge to rely on inherent jurisdiction. Instead, it argues that s. 15(2) of the *Arbitration Act* grants a court the authority, in certain circumstances, to find an otherwise valid arbitration clause inoperative or incapable of being performed in the context of bankruptcy or insolvency proceedings. It says that this power is "also founded" in a court's statutory jurisdiction pursuant to ss. 183(1) and 243 of the *BIA* (R.F., at para. 118). Since s. 15 expressly authorizes a court to decline a stay in favour of arbitration on the basis that an arbitration agreement is inoperative or incapable of being performed, there is no conflict between federal law and provincial law to be resolved through the doctrine of federal paramountcy. This submission was endorsed by several interveners in this appeal, including the Chartered Institute of Arbitrators and the Insolvency Institute of Canada.

129 I agree with the Receiver and the above-noted interveners. A court may find an arbitration agreement inoperative where arbitration would compromise the orderly and efficient resolution of a receivership. Accordingly, there is no conflict between the provincial *Arbitration Act* and the federal *BIA* giving rise to paramountcy concerns.

130 As I will explain, this interpretation is supported by (a) the text, scheme, and purposes of the *Arbitration Act*; (b) the judicial and academic treatment of the term "inoperative"; and (c) the broad statutory jurisdiction conferred on superior courts in bankruptcy and insolvency matters, such as court-ordered receiverships under s. 243 of the *BIA*. I will then conclude by outlining several non-exhaustive factors to guide courts in determining whether an arbitration agreement is inoperative due to parallel bankruptcy or insolvency proceedings.

(i) The Text, Scheme, and Purposes of the Arbitration Act Permit Courts to Find Arbitration Agreements "Inoperative" in the Insolvency Context

131 When the modern approach to statutory interpretation is applied, it is clear that courts have the power to decline a stay in favour of arbitration under s. 15(2) of the *Arbitration Act* even where all the technical prerequisites in s. 15(1) are met.

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132 Both Peace River and the Receiver agree that, plainly read, s. 15(2) requires a court to assess whether an arbitration agreement is "void, inoperative or incapable of being performed" before granting a stay in favour of arbitration. This language is drawn from the Model Law, art. 8(1) of which states that a court "shall" refer the parties to arbitration unless it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed". Similar language is also found in art. II(3) of the New York Convention. This language is commonly understood as requiring the court to pronounce upon the validity and enforceability of the arbitration agreement before referring the dispute to the arbitrator (McEwan and Herbst, at § 3:55, citing *Heyman v. Darwins, Ld.*, [1942] A.C. 356 (H.L.); *Kaverit Steel and Crane Ltd. v. Kone Corp.*, (1992), 87 D.L.R. (4th) 129 (Alta. C.A.)).

133 That said, courts must be careful not to overstep their role on a stay application under s. 15. They must bear in mind the competence-competence principle, the intention of the parties to refer their disputes to arbitration, and the legislative purposes underlying the *Arbitration Act*. As I have noted, the text and scheme of s. 15 make it *mandatory* for a court to defer to arbitral jurisdiction where the technical prerequisites in s. 15(1) are met, subject only to the narrow statutory exceptions in s. 15(2). This deferential approach accords with the purposes of the *Arbitration Act*, which were identified by the enacting legislature as follows: (a) providing a "simpler, faster, less expensive and less formal process" for resolving disputes, thereby minimizing costly and time-consuming court procedures; and (b) limiting judicial review in respect of disputes that parties have agreed to resolve by arbitration (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 7, 4th Sess., 33rd Parl., April 21, 1986, at p. 7865 (Hon. Brian Smith, Attorney General)).

134 In the typical case, both legislative objectives will be served by holding the parties to their agreement to arbitrate. Indeed, a narrow interpretation of the words "void, inoperative or incapable of being performed" promotes the enforcement of arbitration agreements, which generally leads to streamlined dispute resolution with minimal judicial intervention (see *Seidel*, at para. 117; S. Kröll, "The 'Incapable of Being Performed' Exception in Article II(3) of the New York Convention", in E. Gaillard, D. Di Pietro and N. Leleu-Knobil, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008), 323, at p. 324).

135 But when do these narrow statutory exceptions apply? The terms "void", "inoperative", and "incapable of being performed" are not defined in the *Arbitration Act*, nor in the Model Law or the New York Convention from which they originate. It is therefore necessary to briefly define each term.

1. "Void"

136 The meaning of the term "void" is relatively settled. An arbitration agreement will be considered void only in the rare circumstances where it is "intrinsically defective" (and therefore void *ab initio*) according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation (C. B. Lamm and J. K. Sharpe, "Inoperative Arbitration Agreements Under the New York Convention", in E. Gaillard, D. Di Pietro and N. Leleu-Knobil, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008), 297, at p. 300; McEwan and Herbst, at § 3:56; Casey, at ch. 3.7.1). The Supreme Court of British Columbia has confirmed that the term "void" in s. 15(2) of the *Arbitration Act* provides a court with a narrow discretion to decline a stay where there are "sufficient materials before the court on which to base a summary determination that the arbitration agreement itself is void" on one or more of the recognized grounds (*James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315, at para. 99). There is no dispute that the Arbitration Agreements in the present case are not void within the meaning of s. 15(2).

2. "Inoperative"

137 Less settled — and more significant to the case at bar — is the proper interpretation of the terms "inoperative" and "incapable of being performed", particularly in the context of a bankruptcy or insolvency. I turn first to the meaning of "inoperative".

138 The term "inoperative" has no universal common law definition (*Prince George (City) v. McElhanney Engineering Services Ltd.* 1995 9 B.C.L.R. (3d) 368 (C.A.), at para. 33, citing M. J. Mustill and S. C. Boyd, *The Law and Practice of*

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Commercial Arbitration in England (2nd ed. 1989), at pp. 464-65). In arbitration law, however, the term has been used to describe arbitration agreements which, although not void *ab initio*, "have ceased for some reason to have future effect" or "have become inapplicable to the parties and their dispute" (McEwan and Herbst, at § 3:57; Lamm and Sharpe, at p. 301; see also Casey, at ch. 3.7.2).

139 Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties. The cases interpreting s. 15(2) of the *Arbitration Act* make it clear that matters such as inconvenience, multiple parties, intertwining of issues with non-arbitrable disputes, possible increased cost, and potential delay generally will not, standing alone, be grounds to find an arbitration agreement inoperative (*Prince George* , at para. 37; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291, at para. 34). Indeed, like all the statutory exceptions, the exception for an inoperative arbitration agreement is to be narrowly interpreted, with the party seeking to avoid arbitration bearing the heavy onus of showing that it applies. This serves "the interests of freedom of contract, international comity and expected efficiency and cost-savings" from enforcing otherwise valid arbitration agreements (McEwan and Herbst, at § 3:57; *MacKinnon* , at para. 36).

140 The application of this exception where the defendant in litigation that has been commenced is subject to bankruptcy or insolvency protection is straightforward. For instance, the making of a winding-up order or a receivership order may be grounds for a court to find an arbitration agreement inoperative (Casey, at ch. 7.18.2; McEwan and Herbst, at § 3:57). Indeed, in either scenario, all proceedings *against* the debtor are stayed under the applicable bankruptcy or insolvency legislation. Accordingly, an agreement to arbitrate ceases, in most circumstances, to have effect for the future and may not be relied upon. It is inoperative, and the matter is left to be resolved in the relevant bankruptcy or insolvency proceedings.

141 This is not to say that a court *must* decline a stay in favour of arbitration based on inoperability in these circumstances. As Casey notes, it "may well be that the bankruptcy judge will refer the matter to arbitration as the most expeditious way to prove the creditor's claim" (ch. 7.18.2). As I will explain further below, the court must assess, in light of all the circumstances, whether to refer the matter to arbitration or to maintain centralized judicial oversight.

142 It must be noted, however, that the term "inoperative" may not always cover scenarios where a court-appointed creditor representative, like a receiver, *initiates* court proceedings on behalf of a debtor. This is because insolvency law generally stays legal claims *brought against* a debtor under court protection, while permitting claims *brought on its behalf* to proceed, in the interest of maximizing creditor recovery and salvaging the debtor's business as a going concern. Again, in these circumstances, the court must assess whether to permit the receiver to proceed with the debtor's claim in court rather than through the arbitral process bargained for by the parties.

143 A helpful example of inoperability in the insolvency context is provided by *Reliance*. In that case, a liquidator appointed under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), initiated court proceedings to collect monies allegedly owed to the debtor by third parties. The third parties invoked their arbitration agreements with the debtor and asked the court to refer the dispute to arbitration. Pepall J. (as she then was) concluded that, in these circumstances, the arbitration agreements ceased to have future effect and were inoperative within the meaning of the applicable arbitration legislation. To hold otherwise would have compromised the "expeditious and inexpensive" resolution of the insolvency proceedings, contrary to the *WURA* (para. 34). Pepall J. observed that referral to arbitration would result in undue delay given the "three separate adjudications" that would be required under the arbitration agreements, and also pointed to the "attendant danger of inconsistent rulings" (para. 34).

3. "Incapable of Being Performed"

144 An arbitration agreement is considered "incapable of being performed" where "the arbitral process cannot effectively be set in motion" because of a physical or legal impediment beyond the parties' control (McEwan and Herbst, at § 3:58; Casey, at ch. 3.7.3; *Prince George* , at para. 35; Lamm and Sharpe, at p. 300; Kröll, at p. 326; van den Berg, at p. 159; D. Schramm, E. Geisinger and P. Pinsolle, "Article II", in H. Kronke et al., eds., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010), 37, at p. 108).

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145 Physical impediments rendering an arbitration agreement incapable of being performed may include the following: (a) inconsistencies, inherent contradictions, or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; (b) the non-availability of the arbitrator specified in the agreement; (c) the dissolution or non-existence of the chosen arbitration institution; or (d) political or other circumstances at the seat of arbitration rendering arbitration impossible (McEwan and Herbst, at § 3:58; Casey, at ch. 3.7.3; van den Berg, at p. 159; Kröll, at pp. 330-42). In all these circumstances, the arbitration agreement is incapable of being performed because it is impossible for the parties to obtain the specific arbitral procedures for which they bargained. Importantly, financial impecuniosity alone does not render an arbitration agreement incapable of being performed (D. St. John Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (24th ed. 2015), at p. 379; Casey, at ch. 3.5.1; D. Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (2nd ed. 2010), at p. 355). Legal impediments may also lead to an incapacity to perform an arbitration agreement. For example, an arbitration agreement may be incapable of being performed because the subject matter of the dispute is covered by an express legislative override of the parties' right to arbitrate (see *Seidel*, at para. 40).

(ii) The BIA Provides Jurisdiction to Find an Arbitration Agreement "Inoperative"

146 The broad and flexible powers granted to superior courts under the *BIA*, particularly in the receivership context, provide further support for the foregoing interpretation of s. 15(2) of the *Arbitration Act*. The *Arbitration Act* and the *BIA* are not incompatible, such that no paramountcy concerns arise.

147 The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives (*Century Services*, at para. 15; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43). Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters (Houlden, Morawetz and Sarra, at § 8:2; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333, at para. 8 (CanLII)).

148 Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, "take any ... action that the court considers advisable", if the court considers it "just or convenient to do so". This very expansive wording has been interpreted as giving judges the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise" in relation to court-ordered receiverships (*DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538, at para. 20; see also Houlden, Morawetz and Sarra, at § 12:18; *Dianor*, at paras. 57-58). Section 243(1)(c) thus permits a court to do not only what "justice dictates" but also what "practicality demands" (*Dianor*, at para. 57; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*, (1994), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)), at p. 185).

149 In my view, practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Said differently, ss. 243(1)(c) and 183(1) provide a statutory basis on which a court may, in certain circumstances, find an arbitration agreement inoperative within the meaning of s. 15(2) of the *Arbitration Act*.

150 Peace River resists this interpretation, relying on s. 72(1) of the *BIA* as interpreted by this Court in *GMAC Commercial Credit Corp.-Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. In short, it argues that s. 243(1)(c) of the *BIA* cannot empower a court to find an arbitration agreement unenforceable, as this would "abrogate" a contracting party's substantive right to a stay in favour of arbitration under s. 15 of the *Arbitration Act*, contrary to s. 72(1) of the *BIA*.

151 I disagree. Section 72(1) merely confirms the constitutional doctrine of federal paramountcy, affirming that the *BIA* prevails where there is a "genuine inconsistency" between provincial laws relating to property and civil rights and the *BIA* (*Moloney*, at para. 40). It is well established that harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at paras. 64 and 66). Peace River's proposed interpretation of s. 72(1) of the *BIA* overlooks the fact

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that a party's "right" to have its dispute referred to arbitration under s. 15 of the *Arbitration Act* arises only where the court finds that the arbitration agreement at issue is not void, inoperative, or incapable of being performed. I have already explained that the statutory exception for inoperability may apply in certain insolvency scenarios. In other words, there is no "genuine inconsistency" between the *Arbitration Act* and the *BIA*. I therefore agree with both Peace River and the Receiver that the paramountcy doctrine is not engaged.

152 Accordingly, I find that there is statutory jurisdiction arising from ss. 183(1) and 243(1)(c) of the *BIA* for a court to hold that an arbitration agreement is inoperative in the receivership context. It is therefore unnecessary in this case to resort to inherent jurisdiction, which is to be considered only after statutory jurisdiction is determined to be unavailable (*Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at para. 24; 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).

153 In sum, the foregoing interpretation of s. 15(2) of the *Arbitration Act* recognizes that the legislative and judicial preference for the enforcement of arbitration agreements is not set in stone. Rather, in limited circumstances, the *BIA* provides courts with jurisdiction to find an arbitration agreement inoperative in the face of parallel insolvency proceedings.

154 I will now consider how to ascertain whether an otherwise valid arbitration agreement is inoperative in the context of insolvency proceedings. To date, this question has not been directly addressed by our Court. I will therefore briefly outline a set of factors arising from the authorities reviewed above that may be relevant in this exercise.

(iii) Factors for Assessing Whether an Arbitration Agreement Is "Inoperative" Under Section 15(2) of the Arbitration Act Due to Insolvency Proceedings

155 As I have explained, a court may find an arbitration agreement "inoperative" within the meaning of s. 15(2) of the *Arbitration Act* where enforcing it would compromise the orderly and efficient resolution of insolvency proceedings, including a court-ordered receivership under s. 243 of the *BIA*. The following non-exhaustive list of factors may be relevant in determining whether a particular arbitration agreement is inoperative in this context:

(a) *The effect of arbitration on the integrity of the insolvency proceedings*. Party autonomy and freedom of contract must be balanced with the need for an orderly and equitable distribution of the debtor's assets to creditors. An arbitration agreement may therefore be inoperative if it would lead to an arbitral process that would compromise the objective of the insolvency proceedings, namely the orderly and expeditious administration of the debtor's property. The court should have regard to the role and expertise of the court-appointed creditor representative, if any, in managing the insolvency proceedings.

(b) *The relative prejudice to the parties from the referral of the dispute to arbitration*. The court should override the parties' agreement to arbitrate their dispute only where the benefit of doing so outweighs the prejudice to them.

(c) *The urgency of resolving the dispute*. The court should generally prefer the more expeditious procedure. If the effect of a stay in favour of arbitration would be to postpone the resolution of the dispute and hinder the insolvency proceedings, this militates in favour of a finding of inoperability.

(d) *The applicability of a stay of proceedings under bankruptcy or insolvency law*. Bankruptcy or insolvency legislation may impose a stay that precludes any proceedings, including arbitral proceedings, *against* the debtor. If such a stay applies, the debtor cannot rely on an arbitration agreement to avoid the bankruptcy or insolvency; the agreement becomes inoperative.

(e) *Any other factor the court considers material in the circumstances*.

156 Each of the foregoing factors may carry more or less weight depending on the circumstances of the case. But it bears repeating that the party seeking to avoid arbitration bears a heavy onus to establish a clear case of inoperability or incapacity to perform the impugned arbitration agreement. To discharge this onus, it must prove on a balance of probabilities that one

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or more of the statutory exceptions set out in s. 15(2) of the *Arbitration Act* apply. Otherwise, the court must grant a stay in favour of arbitration.

(e) Conclusion on Section 15

157 In sum, a proper interpretation of s. 15 of the *Arbitration Act* leads to the following conclusions:

- The chambers judge was correct that undertaking to file a defence without invoking the rules of court is not a "step in the proceedings" within the meaning of s. 15(1);

- The chambers judge was correct that a court-appointed receiver may be a "party" to a debtor's pre-existing arbitration agreement within the meaning of s. 15(1);

- The Court of Appeal erred in holding that a court-appointed receiver may disclaim an arbitration agreement and thereby render it "void, inoperative or incapable of being performed" within the meaning of s. 15(2); and

- The chambers judge was correct that she had the authority to find an arbitration agreement inoperative in light of bankruptcy and insolvency proceedings. This power arises from the broad statutory jurisdiction accorded to superior courts in bankruptcy and insolvency matters by ss. 183 and 243 of the *BIA*. A court may find an arbitration agreement inoperative where the arbitral proceedings bargained for by the parties would compromise the orderly and efficient resolution of a receivership.

158 In light of these interpretive conclusions, I now apply the two-part stay analysis under s. 15 of the *Arbitration Act* to the facts of the case at bar.

E. Application of Section 15 of the Arbitration Act

(1) Technical Prerequisites: Section 15 Is Engaged

159 At the first stage of the stay analysis, the party seeking to rely on the arbitration agreement must establish an arguable case that all the technical prerequisites contemplated in s. 15(1) are met.

160 There is no dispute that two of the technical prerequisites are met in this case: the Arbitration Agreements exist, and the impugned civil proceedings are in respect of a contractual dispute covered by them.

161 I conclude that Peace River has also established an arguable case that the remaining technical prerequisites are met: (a) the Receiver is a "party" to the Arbitration Agreements, contrary to the Court of Appeal's conclusion; and (b) Peace River did not take a "step in the proceedings".

(a) The Receiver Is a "Party" to the Arbitration Agreements

162 It is at least arguable that the Receiver is a party to the Arbitration Agreements. I say this for the following reasons.

163 First, the Receiver would have no cause of action to assert without Petrowest or the Petrowest Affiliates. The Court of Appeal recognized that "nominally, the claims remain those of Petrowest and its affiliates" (para. 43). In other words, the Receiver stepped into their shoes by initiating a civil claim on their behalf. Similarly to an assignee or a trustee in bankruptcy, the Receiver arguably became bound by operation of law by claiming through or under Petrowest and the Petrowest Affiliates. As I explained above, a receiver should not be permitted to seek the benefits of a contract in the debtor's name while avoiding the burdens.

164 Second, contrary to the submissions of both Peace River and the Receiver, the distinction between a trustee in bankruptcy and a receiver is immaterial here. Under para. 3(j) of the Receivership Order, the Receiver is authorized to bring a civil claim on behalf of Petrowest and the Petrowest Affiliates by relying on the Main Agreements. Doing so is arguably sufficient to bind the

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Receiver, a non-signatory, as a party by operation of law to the Arbitration Agreements. I see no reason to discuss the distinction between trustees and receivers further.

165 Third, contrary to the Receiver's submission, it did not need to "adopt" or "perform" the contracts to become a party. A receiver's obligation to either adopt or disclaim arises only in respect of executory contracts. Here, the parties agree that there are no remaining obligations for the Receiver to perform. Further inquiry into adoption or performance is not only unnecessary but would also clearly conflict with the arguable case threshold and the competence-competence principle, which together prevent a court on an application under s. 15 of the *Arbitration Act* from conducting anything more than a *superficial* review of the record.

166 Fourth, contrary to the Court of Appeal's conclusion, disclaimer and separability do not affect the Receiver's status as a party to the Arbitration Agreements. As noted, the Receiver concedes that it never disclaimed the Main Agreements or the Arbitration Agreements.

167 Even setting this concession aside, I am of the view that the Court of Appeal misapplied the doctrine of separability. Separability does not apply absent a challenge to the validity of the main contract or of the arbitration agreement itself (*Uber* , at para. 224, per Côté J., dissenting, but not on this point). No issue is taken in this case with the validity of the Main Agreements or the Arbitration Agreements. Indeed, before the Court of Appeal, the Receiver argued that separability was "irrelevant" in this case (C.A. reasons, at para. 48). It now concedes that this Court does not need to consider separability to resolve this appeal. I accept this concession.

168 I would add that the Court of Appeal's approach to separability would undermine the central purpose of the *Arbitration Act*. In essence, the Court of Appeal held that receivers are permitted to revoke arbitration agreements unilaterally, without any judicial inquiry into their validity or enforceability. But separability is intended to safeguard arbitration agreements, not imperil them (see, e.g., T. Meshel, "*Petrowest v. Peace River Hydro*: The Revocability and Separability of Commercial Arbitration Agreements" (2022), 65 *Can. Bus. L.J.* 329). As I have explained, it is for a court — not a receiver — to determine whether an arbitration agreement is valid and enforceable according to the narrow statutory exceptions set out in s. 15(2).

169 Finally, I emphasize the low arguable case threshold applicable at the first stage of the s. 15 analysis. I recognize that receivership is a flexible remedy which may require interfering with the contractual rights of third parties in certain circumstances. However, accepting the Receiver's position at this stage of the s. 15 analysis would permit all court-appointed receivers to avoid pre-existing arbitration agreements with impunity. I do not believe this would be appropriate in view of the clear legislative and judicial preference in favour of party autonomy and arbitral jurisdiction.

(b) Peace River Did Not Take a "Step in the Proceedings"

170 The Receiver has not identified a reviewable error in the chambers judge's finding that Peace River did not take a step in the proceedings. That finding was not challenged before the Court of Appeal. As such, it is not properly before this Court. Even if it were, I see no basis to question the chambers judge's reasoning. She correctly held that undertaking to file a defence without invoking the rules of court is not a step in the proceedings. Nor is requesting an extension of time, as I explained above. Peace River did not take a step in the proceedings within the meaning of s. 15(1) of the *Arbitration Act*.

171 Accordingly, s. 15 of the *Arbitration Act* is engaged. I must therefore grant a stay in favour of arbitration *unless* I find the Arbitration Agreements to be "void, inoperative or incapable of being performed" under s. 15(2).

(2) Statutory Exceptions: The Arbitration Agreements Are "Inoperative" Under Section 15(2)

172 At the second stage of the s. 15 framework, the burden shifts to the party seeking to avoid arbitration to establish on a balance of probabilities that the arbitration agreement at issue is void, inoperative, or incapable of being performed within the meaning of s. 15(2), as explained above.

173 I conclude that the Receiver has established that the Arbitration Agreements are inoperative. Stated differently, the arbitral processes contemplated in the Arbitration Agreements would compromise the orderly and efficient resolution of the

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receivership, contrary to the objectives of the *BIA*. Further, while recognizing the importance of party autonomy and freedom of contract, referral to arbitration in the unique circumstances of this case would jeopardize the Receiver's ability to maximize recovery for the creditors and to allow Petrowest and the Petrowest Affiliates to move forward with certainty. This conclusion is based on the following factors.

(a) Effect of Arbitration on the Integrity of the Insolvency Proceedings

174 The inexpediency of the multiple overlapping arbitral proceedings contemplated in the Arbitration Agreements, as compared to a single judicial process, is the determinative factor in this case. In these circumstances, I conclude that enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership proceedings.

175 The Receiver's affidavit evidence outlines the chaotic arbitral processes that would result if this Court were to grant a stay under s. 15 of the *Arbitration Act*. First, the Receiver would need to participate in and fund at least four different arbitrations involving "seven different sets of counterparties" (A.R., vol. XI, at p. 2895). The funding for these proceedings would necessarily come from the estates of Petrowest and the Petrowest Affiliates, to the detriment of their creditors. Second, at least some of the respondents' claims involve entities not subject to any of the Arbitration Agreements. As the chambers judge properly recognized, these claims may have to be determined by a court, in parallel with the arbitral proceedings described above. Finally, in the scenario just described, I agree with the Receiver that "[f]acts and argument would be repeated in different forums, before different decision makers, creating piecemeal decisions and a serious risk of conflicting outcomes" (R.F., at para. 6).

176 The inefficient and protracted nature of the contemplated arbitral processes would plainly compromise the integrity of the receivership proceedings. I acknowledge the chambers judge's finding that arbitration would not "derail" the insolvency proceedings (para. 51). However, this must be read alongside her finding that "the significant cost and delay inherent in the multiple [arbitral] proceedings that would occur in this case as compared to judicial determination is unfair to the creditors and contrary to the objects of the *BIA*" (para. 60). I agree.

177 In light of the foregoing, I see no basis on which to interfere with the following factual findings made by the chambers judge:

- the parties agreed that declining the requested stay "would promote the efficient and inexpensive resolution of their dispute", and no one suggested that the issues were "not appropriate for judicial determination" (para. 56);
- there was "no evidence" of any "realistic likelihood" that the parties would agree to streamline the arbitral proceedings through consolidation, notwithstanding their ability to do so (para. 57); and
- a single judicial process would "be faster and less expensive than four arbitrations and a possible court case" (para. 56).

178 Accordingly, expediency and efficiency concerns militate strongly in favour of a finding that the enforcement of the Arbitration Agreements would compromise the objects of the *BIA* and that the Agreements are therefore inoperative under s. 15(2) of the *Arbitration Act*.

(b) Relative Prejudice to the Parties From the Referral of the Dispute to Arbitration

179 I agree with the chambers judge that Peace River has failed to show any prejudice it would suffer if the Arbitration Agreements were not enforced (para. 58). To the contrary, as already indicated, it conceded that a single judicial proceeding would be the most efficient and cost-effective route. This supports my view that enforcing the Arbitration Agreements would compromise the receivership proceedings.

(c) Urgency of Resolving the Dispute

180 As noted, the parties agree that proceeding through the courts is the more expeditious option. I see no basis for interfering with the chambers judge's finding that "[i]t will not be possible to distribute the proceeds" of the property of Petrowest and the

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Petrowest Affiliates to their creditors "until these disputes are resolved" (para. 60). This urgency further militates in favour of finding the Arbitration Agreements inoperative.

(d) Applicability of a Stay of Proceedings Under Bankruptcy or Insolvency Law

181 In light of the foregoing, it is unnecessary to consider the effect of the stay of proceedings under the Receivership Order on the enforceability of the Arbitration Agreements.

182 Finally, I have had the benefit of reading my colleague's reasons. His view that the analysis should start with the terms of the Receivership Order is a sensible one. Further, it cannot be said that his interpretation of the terms of the Receivership Order is without merit. However, in the particular circumstances of this case, I would decline to resolve the appeal on this basis. I say this for two reasons.

183 First, the argument that the combined effect of paras. 3(c), 3(f) and 3(j) authorizes the Receiver to proceed in court despite the Arbitration Agreements was not squarely before the Court. While the parties made some submissions on the interpretation of the terms of the Receivership Order, for instance about the scope of the Receiver's power to cease to perform the debtors' contracts under para. 3(c), none suggested that it was the combined effect of paras. 3(c), 3(f) and 3(j) that enabled the Receiver to act so as to render the Arbitration Agreements inoperative. As a result, the Court did not have the benefit of assistance from the parties, nor the interveners, on this specific interpretive question. We also lack the benefit of analysis on this point from the courts below. This is significant because, in my respectful view, more than one interpretation of the Order remains plausible. It is not clear, for example, that the terms either expressly or impliedly authorize the Receiver to take the benefits of the agreements while avoiding their procedural burdens, such as the obligations arising from their arbitration clauses. Nor is it clear that the Receiver's powers to initiate "proceedings" and exercise "remedies" render the Arbitration Agreements *inoperative* in this case. It is plausible to interpret the language of the Receivership Order as consistent with "proceeding", and seeking "remedies", through arbitration rather than in court.

184 Second, resolving the question of the proper interpretation of the terms of the Receivership Order would have no impact on the disposition of the appeal. My colleague and I agree that the separability doctrine, as relied upon by the Court of Appeal, has no application here. We also share the view that the Arbitration Agreements are inoperative. Ultimately, whether they are inoperative because the Receivership Order authorizes the Receiver to act in a certain way or because a stay in favour of arbitration would compromise the orderly and efficient resolution of the receivership, the result is the same.

185 Given that the interpretation of the terms of the Receivership Order was not fully argued by the parties and that the appeal can be resolved without addressing this issue, it is prudent to leave it to another day.

(3) Conclusion on Section 15

186 I agree with the courts below that Peace River's application for a stay of proceedings under s. 15 of the *Arbitration Act* must be dismissed.

187 The prerequisites for a mandatory stay in s. 15(1) are met. However, enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the purposes of the *BIA*.

188 Accordingly, the Arbitration Agreements are inoperative within the meaning of s. 15(2).

VII. Disposition

189 For the foregoing reasons, I would dismiss the appeal with costs throughout. In the result, the civil claim of Petrowest and the Petrowest Affiliates may proceed in the Supreme Court of British Columbia.

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Jamal J. **(Karakatsanis, Brown, Martin JJ. concurring):**

190 I have had the benefit of reading the reasons of my colleague Justice Côté. I agree with my colleague that Peace River's application for a stay of proceedings under s. 15 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, should be dismissed, and thus the appeal should be dismissed, because the Arbitration Agreements are inoperative under s. 15(2) of the *Arbitration Act*.

191 My point of departure from my colleague concerns the primary basis for finding the Arbitration Agreements to be inoperative. In my view, by suing in court to collect the accounts receivable allegedly owing, as authorized under the Receivership Order, the Receiver disclaimed the Arbitration Agreements. The Arbitration Agreements were thereby rendered inoperative. The analysis should start with the terms of the Receivership Order itself.

192 Several provisions of the Receivership Order authorized the Receiver to sue in court to collect the accounts receivable allegedly owing and to disclaim the Arbitration Agreements, thus effectively rendering them inoperative:

- The Receivership Order authorized the Receiver to sue to collect the accounts receivable that Peace River allegedly owed Petrowest. Paragraph 3(f) of the Order authorized the Receiver "to receive and collect all monies and accounts now owed or hereafter owing to the Debtors [i.e., Petrowest] and to exercise all remedies of the Debtors in collecting such monies". Paragraph 3(j) of the Order similarly authorized the Receiver "to initiate, prosecute and continue the prosecution of any and all proceedings" with respect to the "Property", broadly defined in para. 2 of the Order as including "all of the Debtors' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate[d], including all proceeds thereof".

- The Receivership Order authorized the Receiver to disclaim the Arbitration Agreements. Paragraph 3(c) of the Order authorized the Receiver to "cease to perform any contracts of the Debtors". An arbitration agreement is a contractual right of a party to have a claim referred to arbitration to the exclusion of the courts (see *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 160; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 137-38), and thus came within the scope of para. 3(c) of the Order, even if all the other contractual obligations had been performed.

193 In my view, the combined effect of paras. 3(c), 3(f), and 3(j) of the Receivership Order is to authorize the Receiver to disclaim the Arbitration Agreements and to sue in court for amounts owing to the Debtors. These provisions authorize the Receiver to sue, either in court or before an arbitrator, at the Receiver's election, based on what will best promote the orderly and efficient resolution of the receivership under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

194 This interpretation of the Receivership Order does not rely on the arbitration doctrine of separability. The separability doctrine is recognized, for example, in s. 17(2) of the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17, and provides that, for the purposes of ruling on arbitral jurisdiction, an arbitration agreement "shall ... be treated as an independent agreement that may survive even if the main agreement is found to be invalid" (see also *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 96, per Abella and Rowe JJ.). As Professor Tamar Meshel notes in her helpful article on the decision of the British Columbia Court of Appeal under appeal, the separability doctrine provides that "an arbitration clause does not necessarily become invalid merely because the underlying agreement is found to be invalid, and *vice versa*" ("*Petrowest v. Peace River Hydro*: The Revocability and Separability of Commercial Arbitration Agreements" (2022), 65 *Can. Bus. L.J.* 329, at p. 345 (footnote omitted)). Without the separability doctrine, "a contracting party could avoid arbitration simply by alleging that the underlying agreement was void or invalid" (Meshel, at p. 345 (footnote omitted)). I agree with Professor Meshel's view that, because "neither party challenged the validity of the agreements in which the arbitration clauses were found, but rather only the arbitration clauses themselves", the result is that "the separability doctrine, which simply operates to separate the validity analysis of an arbitration clause from that of the underlying agreement, [is] not relevant to [this] case" (Meshel, at p. 346 (footnote omitted)). I am not relying on the separability doctrine. I am simply interpreting the Receivership Order at issue in this case.

195 I also disagree with my colleague's view that reliance on the terms of the Receivership Order is precluded by Petrowest and the Receiver's position before the Court of Appeal and this Court that the Receiver "has not expressly disclaimed" the

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Arbitration Agreements (para. 122, citing R.F., at para. 102, and A.F., Appendix B, at paras. 3 and 13). In my view, the *legal effect* of the Receiver suing in court and not before an arbitrator to collect the accounts receivable was undoubtedly to disclaim reliance on the Arbitration Agreements — conduct which, I repeat, was authorized by the Receivership Order itself. Indeed, although before this Court counsel for the Receiver erroneously relied on the doctrine of separability, her position was that "by its conduct the Receiver has disclaimed [the] Arbitration Agreements" (transcript, at p. 110).

196 I also disagree with my colleague's claim that this Court should not interpret the Receivership Order because this issue "was not squarely before the Court" and was "not fully argued by the parties" (Côté J.'s reasons, at paras. 183 and 185). The interpretation of the Receivership Order was amply debated before the Court, both in written submissions and during the oral hearing. The Receiver argued in its factum, for example, that "[a] court-appointed receiver authorized by court order to disclaim any contracts of the debtor may cease to perform arbitration agreements" (R.F., at para. 101, citing para. 3(c) of the Receivership Order). The Receiver submitted that "the Receiver was appointed with the court-ordered power to cease to perform any of the Petrowest Respondents' contracts" (R.F., at para. 104, citing para. 3(c) of the Receivership Order). The proper interpretation of the Receivership Order also occupied a significant part of the oral hearing (see transcript, at pp. 9-12, 15-17, 41-42, 81-87, 97 and 105). This Court can and should interpret such a template court order. As I have already noted, courts must start with the terms of the relevant receivership order. Declining to address this issue leaves the insolvency and arbitration bars in a regrettable state of uncertainty.

197 To be clear, I am not suggesting that a receiver can unilaterally "revoke" an otherwise valid arbitration agreement. I agree with my colleague that "[o]nly a court can make a finding that an arbitration agreement is inoperative or incapable of being performed" (para. 6). However, the courts' exclusive power to declare an arbitration agreement inoperative is distinct from the question of whether a receivership order authorizes a receiver to act in a certain way in a court-appointed receivership. When a receiver's action is challenged, as it has been here, it is a court that will ultimately determine whether the receiver has acted under the authority of the receivership order, and thus whether the arbitration agreement is inoperative or incapable of being performed.

198 To the extent that the Receivership Order did not authorize the Receiver to sue in court, I otherwise agree with my colleague's reasons for concluding that ss. 183 and 243 of the *Bankruptcy and Insolvency Act* provided a statutory basis for the chambers judge to declare the Arbitration Agreements inoperative and to dismiss the stay application. As my colleague explains, in this case, requiring arbitration of the collection action would compromise the orderly and efficient resolution of the receivership.

199 I would dismiss the appeal with costs throughout.

Appeal dismissed.

Pourvoi rejeté.

Appendix — Arbitration Agreements

Partnership Agreement

32. SETTLEMENT OF PARTNERSHIP DISPUTES

. . . . .

32.6 If the Management Committee does not elect to proceed with mediation, or if the Management Committee is unable to agree with the mediator's decision, the Dispute shall be finally and exclusively settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("*ICC*"). The arbitration proceeding shall take place in Vancouver, British Columbia. The arbitrator's decisions shall be final and shall not be subject to appeal. The arbitrator's decisions shall be binding upon the Partners and the Partnership, and compliance therewith shall be obligatory for the Partners and the Partnership. The Partners agree that the arbitrator's award may be enforced in any court of competent jurisdiction....

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Guarantee

12. This Guarantee shall be governed by the laws of the Province of British Columbia and the federal laws of Canada applicable therein. Any dispute arising out of or in connection with this Guarantee shall be finally and exclusively settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("*ICC*"). The seat, or legal place, of arbitration shall be Vancouver, British Columbia. The arbitrator's decisions shall be final and shall not be subject to appeal. The arbitrator's decisions shall be binding upon the Partners and Guarantors, and compliance therewith shall be obligatory. The Partners and Guarantors agree that the arbitrator's award may be enforced in any court of competent jurisdiction....

Purchase Order

CLAUSE 19 — SETTLEMENT OF DISPUTES

... In the event that the parties are unable to resolve a Dispute within 7 days, either party shall be entitled to require that the Dispute is submitted to binding arbitration to be finally resolved. If a Dispute is submitted to arbitration, such arbitration shall be conducted pursuant to the arbitration provisions in Schedule D (*Supplementary Conditions*).

Minor Works/Services Subcontract

16. DISPUTE RESOLUTION

. . . . .

16.2 Dispute Resolution — Subcontract

. . . . .

(e) *Arbitration*: If either (1) the Parties do not agree that such Dispute should be referred to mediation within 10 days following the Target Dispute Resolution Date, or (2) the Dispute is not completely resolved by agreement between the Parties within 14 days of the appointment of a mediator or within 5 days following the conclusion of the mediation, then such Dispute shall be submitted to arbitration and such arbitration shall be conducted pursuant to Section 10 (Dispute Resolution) of Schedule F (Main Contract Related Provisions).

Footnotes

1 The Arbitration Agreements are reproduced in an appendix to these reasons.

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TAB 2

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 CSC 60, 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.7 Tax claims in bankruptcy proceedings

Tax

III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]

III.12 Collection and remittance

III.12.b GST/HST 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,

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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

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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

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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.

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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.

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Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

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s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

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Generally — referred to

s. 23(3) — referred to

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Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

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

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

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s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered
Fairness for the Self-Employed Act, S.C. 2009, c. 33
Generally — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 227(4) — referred to

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s. 44(f) — considered
Personal Property Security Act, S.A. 1988, c. P-4.05
Generally — referred to
Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30
Generally — referred to
Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67(2) — considered

s. 67(3) — considered
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Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

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Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

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s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

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

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

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

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

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

s. 2(1)"enactment" — considered

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

Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that

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provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

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

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

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

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

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

3. Analysis

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

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

3.1 Purpose and Scope of Insolvency Law

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

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

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

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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

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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.

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3.2 GST Deemed Trust Under the CCAA

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

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

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

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

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

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because,

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being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

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

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

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

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency.

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Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

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

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

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

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

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

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source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

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

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

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

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

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

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

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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?

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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.

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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).

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Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

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

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

3.4 Express Trust

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

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

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

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

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

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

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4. Conclusion

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

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

***Fish J. (concurring)*:**

I

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

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

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

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

II

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

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

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

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> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

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

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

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

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

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

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

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

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

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

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

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

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

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

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

III

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

***Abella J. (dissenting)*:**

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

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

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

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

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

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

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

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

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

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

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

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

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

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

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

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

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

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

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

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

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

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of

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the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant)*. But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

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

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

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

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

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

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

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

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

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

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

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

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

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

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

...

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

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

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

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

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

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2)

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of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

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

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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

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

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

...

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

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

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

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

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

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

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

...

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

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

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

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

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

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

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

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

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

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

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

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

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

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

...

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

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

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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

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

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

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

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

...

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

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

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

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

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

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

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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

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

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

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

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

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

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

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

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

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

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TAB 3

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11,
306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.ii Time for appeal

Natural resources
II Mines and minerals
II.5 Remedies
II.5.f Vesting orders

Personal property security
X Statutory liens
X.6 Miscellaneous

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Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order

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approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

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APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

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4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter. [1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor. [2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

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12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value. [3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;
>
> (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

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(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

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26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction

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in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters'" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act 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, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an 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: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property. [5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

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> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

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The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

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49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) [6].

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; 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* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report"). [7]

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55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable. [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order 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.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad

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wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become

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more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

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78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

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85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

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(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests. [9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

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103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

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112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

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(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction. [10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

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129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

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138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

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144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

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***P. Lauwers J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *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 ("*Insolvency Reform Act* 2005"); *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 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

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10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

End of Document

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TAB 4

2010 ABQB 507
Alberta Court of Queen's Bench

BA Energy Inc., Re

2010 CarswellAlta 1598, 2010 ABQB 507, [2010] A.W.L.D. 4793, 192 A.C.W.S. (3d) 27, 70 C.B.R. (5th) 24

In the Matter of Section 193 of the Alberta Business Corporations Act, R.S.A. 2000, c. B-9, as amended; and in the matter of the Judicature Act, R.S.A. 2000, c. J-2, as amended,

And in the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc.; And in the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; and in the Matter of BA Energy Inc.

B.E. Romaine J.

Heard: June 1, 2010
Judgment: August 5, 2010 *
Docket: Calgary 0801-16292

Counsel: Chris D. Simard, Kelsey J. Drozdowski for Dresser-Rand Canada, Ltd.
David LeGeyt for Ernst & Young Inc.
Howard A. Gorman, Kyle D. Kashuba for BA Energy Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.3 Practice and procedure
IX.3.c Miscellaneous
Headnote
Bankruptcy and insolvency --- Proving claim — Practice and procedure — Amendment of claim
Debtor entered into agreement of sale with creditor for purchase of equipment — Total purchase price was US$8,577,942.39 — Debtor paid US$7,021,918 pursuant to purchase agreement before successfully applying for protection under Companies' Creditors Arrangement Act — Some equipment was still in creditor's possession at that time — Creditor filed proof of claim with monitor claiming US$1,655,477.95 secured by undelivered equipment — Monitor advised creditor it was free to sell undelivered equipment in satisfaction of its claim — Equipment was custom made and difficult to sell — Creditor filed late amended proof of claim for unsecured claim of US$1,474,161.63 and secured claim of US$177,382 — Monitor disallowed amended claim on basis that it was late — Creditor brought application for order requiring monitor to accept late amended proof of claim — Application dismissed — Amended claim was really new claim so it was properly treated as late — It would not have been fair or equitable to accept late amended proof of claim — Late amended claim was not result of inadvertence — Creditor delayed in valuing undelivered equipment — Creditor changed nature of its claim at time when all creditors would have been aware that distribution to unsecured creditors was expected to be substantial — Allowing late amended claim would have been prejudicial to debtor and other creditors — Debtor structured plan of arrangement on basis that creditor would not be affected — There were no conditions that would have alleviated relevant prejudice — Debtor was required to pay reasonable conduct money for employee of creditor who was cross-examined on his affidavit.
Table of Authorities
Cases considered by *B.E. Romaine J.*:

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Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — followed

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73, 1994 CarswellBC 620 (B.C. S.C.) — distinguished

Look Communications Inc., Re (2005), [2006] G.S.T.C. 122, 2005 CarswellOnt 8591, 21 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — referred to

APPLICATION by creditor for order requiring monitor to accept late amended proof of claim.

***B.E. Romaine J.*:**

Introduction

1 Dresser-Rand Canada, Inc. ("Dresser-Rand") applies for acceptance of its late amended proof of claim so that it may participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. ("BA Energy") under the *Companies' Creditors Arrangement Act*.

2 The issue is whether Dresser-Rand, having initially filed a claim which it characterized as fully secured on the basis of holding assets that it described as having a value equal to its claim, is entitled to file a late amended claim that now alleges that a large portion of the claim is unsecured.

Facts

3 In 2006, BA Energy had entered into an agreement of sale with Dresser-Rand for the purchase of a wet-gas compressor and ancillary equipment for use at the proposed Heartland Upgrader, a heavy oil upgrader that BA Energy was in the process of constructing at a site near Fort Saskatchewan, Alberta. The total purchase price for this compressor was USD $8,577,942.39.

4 On December 30, 2008, BA Energy was granted an initial order under the *Companies' Creditors Arrangement Act*,R.S.C. 1985, c. C-36 as amended (the "CCAA").

5 At the time of the filing under the CCAA, BA Energy had paid USD $7,021,918 pursuant to the purchase agreement, leaving a balance owing of USD $1,651.543.63. The compressor was still in the possession of Dresser-Rand at its premises in Edmonton, with the exception of some of the ancillary equipment which had been delivered to the proposed site of the Heartland Upgrader.

6 On March 9, 2009, counsel to Dresser-Rand enquired of counsel to BA Energy and counsel to the Monitor whether the balance of the purchase price would be paid, "failing which Dresser-Rand will be free to exercise its right of sale pursuant to the *Sale of Goods Act*." On May 15, 2009, Dresser-Rand sent a Proof of Claim to the Monitor, signed by Dresser-Rand's General Manager in Canada, indicating that it had a secured claim for USD $1,655,477.95 and that "in respect of the said debt, we hold assets of the CCAA Debtor valued at $1,655,477.95 US as security". Under the Claims Procedure Order, claims were to be filed by June 15, 2009.

7 On August 26, 2009, BA Energy repudiated the purchase agreement and advised Dresser-Rand that it had a duty to mitigate its losses with respect to the terminated agreement.

8 In an email dated August 31, 2009, counsel to Dresser-Rand asked counsel to BA Energy to confirm that Dresser-Rand was free to deal with the compressor equipment in its possession and enquired whether BA Energy would return the parts in its possession. On the same day, counsel to BA Energy responded that Dresser-Rand could deal with the equipment subject to

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any requirement to act reasonably in performing its duty to mitigate and said that he would ask his client about the equipment in its possession.

9 On September 18, 2009, the Monitor advised counsel to Dresser-Rand that, in light of the repudiation, Dresser-Rand's previous claim may have been stayed and that Dresser-Rand may have the right to file "Subsequent Claim" as set out in the Claims Procedure Order. The Monitor also told Dresser-Rand that BA Energy believed that the ancillary equipment in its possession was worth about $1 million. Counsel to Dresser-Rand responded that he did not believe his client would be interested in the equipment at that price.

10 On September 22, 2009, Dresser-Rand submitted a Subsequent Claim for USD $1,651,543.63 (taking into account a further invoice paid by BA Energy). Again, Dresser-Rand in its claim form characterized the claim as secured and, again, the claim form states that Dresser-Rand held assets of the CCAA Debtor valued at USD $1,651.543.63.

11 On December 16, 2009, the Monitor issued a Notice of Revision or Disallowance of the claim. This notice indicates that the Proof of Claim as submitted in the amount of USD $1,651,543.53 was revised and accepted at nil. The Monitor noted as follows:

> **Retained Assets**
>
> [Dresser-Rand] retained possession of certain assets as a result of the termination of the Purchase Order. In the Termination Letter the Applicant directed [Dresser-Rand] to mitigate its losses in respect of the termination of the Purchase Order. The Applicant noted in its review of [Dresser-Rand]'s Claim that the retained assets have a value in excess of the amount of [Dresser-Rand]'s Claim. Accordingly, the Applicant has revised [Dresser-Rand]'s claim to $0.00.

12 On December 18, 2009, counsel to Dresser-Rand asked to meet with counsel to BA Energy and the Monitor to discuss the reasoning behind the Notice of Revision, commenting that "(p)reviously you did not dispute our priority to the extent of what we could realize from the equipment we have in our possession." The email also notes that the compressor is custom-made equipment and that its sale may take some time.

13 On December 20, 2009, counsel to Dresser-Rand delivered a Notice of Dispute to the Monitor, with a covering letter that noted as follows:

> With respect to the enclosed Notice of Dispute, in reviewing the documentation you forwarded to Dresser-Rand Canada, Inc. in this regard, this simply may be a situation where there is misunderstanding of terminology between us. Looking at your statement about the "retained assets", you do not appear to be disputing Dresser-Rand Canada, Inc.'s right to retain the assets in question (being compressor equipment) and deal with it as it wishes. To this stage, we have always valued the retained assets as being worth as much or more than the debt that is owed by BA Energy Inc. to Dresser-Rand Canada, Inc. We do not believe that you should have put $0.00 beside the secured aspect of this claim in the Notice of Revision or Disallowance dated December 16, 2009.

14 The Notice of Dispute lists $1,651.543.63 under the designation "Reviewed Claim or Subsequent Claim as Disputed" and characterizes this amount as "Secured". It makes no claim on an unsecured basis. The Notice stipulates that "(t)his claim is fully secured. The Notice of Revision or Disallowance did not reflect this fact."

15 A without-prejudice conference call was held on January 6, 2010 among counsel to BA Energy, the Monitor and counsel to Dresser-Rand.

16 In an email dated January 11, 2010, the Monitor asked Dresser-Rand's counsel whether he had been able to determine the appropriate person for the Monitor to speak to with respect to the equipment in the possession of BA Energy. Counsel to Dresser-Rand responded that he had not and that he was "awaiting the letter [counsel to BA Energy] indicated last week you would be sending on the other point that deals more generally with the claim, etc."

17 On January 14, 2010, the Monitor sent counsel to Dresser Rand an email that attached a letter that he was asked to review, commenting: ... "let me know if it meets your needs before I finalize it."

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18 The letter, marked "draft", reads as follows:

> As Court Appointed Monitor of BA Energy Inc. I am sending this letter to you as a follow-up to our teleconference of January 5, 2010 and to provide more clarity with respect to the Notice of Revision and Notice of Dispute between BA Energy Inc. ("BA Energy") and Dresser Rand Canada, Inc. ("DRC").
>
> As agreed on our teleconference, BA Energy does not dispute DRC's rights to retain the assets in question and deal with them as it wishes. This right means DRC shall have no claim against BA Energy given that the value of the assets are at least as much or more than the claim amount. Furthermore, I must note that DRC will accept all potential risks and rewards of its actions in dealing with the assets. For further clarity, should DRC sell the assets for an amount greater than the amount of the claim filed against BA Energy, then this excess amount benefits DRC. Should DRC sell the assets for an amount less than DRC's claim against BA Energy, DRC will not be able to claim the difference against BA Energy.
>
> *I trust this clarifies any misunderstanding between the parties.*
>
> (emphasis added)

19 Counsel to Dresser-Rand responded saying that the letter would be reviewed internally and by his client and that he would get back to the Monitor. Numerous emails ensued between counsel to Dresser-Rand and the Monitor. On January 25, 2010, counsel to Dresser-Rand advised the Monitor that "I am told that I should hear from someone in the US part of the organization tomorrow. Unfortunately, many people have become involved within my client and has made it more complex for me to get instructions."

20 In an email dated January 27, 2010, counsel to Dresser Rand advised the Monitor that:

> ...my people as of yesterday were still assessing their position, including what can be done with the part of the compressor they have and those parts which BA has in its position. Unfortunately, these machines are very custom made for a particular customer and are not readily saleable or useable for anyone else. They [sic] inquiries out to see what they can do and hope to get back to me this week.

21 On February 19, 2010 counsel to Dresser-Rand left a voice mail for the Monitor. The recording was not preserved. Counsel to Dresser-Rand in an email to his client said that in the voice mail, he enquired if BA Energy was interested in making an offer to Dresser-Rand for the compressor "with the concept being that if an acceptable cash offer was made to [Dresser-Rand] for that equipment, [Dresser Rand] would forego any further claim against [BA Energy] for the balance owing." The Monitor in an email to BA Energy said that in the voice mail, counsel to Dresser-Rand was enquiring whether BA Energy would like to acquire the compressor for an unnamed price and that "if [BA Energy] acquired this equipment then Dresser-Rand would withdraw their claim".

22 On February 23, 2010, BA Energy advised the Monitor that it did not wish to purchase the compressor. On the same day, the Monitor filed its Ninth Report with the Court and served it on the parties on the service list. The report states that BA Energy anticipated filing a plan of arrangement which would result in a recovery that would be better than a liquidation, and that it was expected that the plan would be brought to the Court for approval in mid to late March, 2010. During this time period, the Monitor and BA Energy were finalizing the sale of a key asset necessary to fund the plan and were in the course of structuring the plan.

23 On March 15, 2010, BA Energy filed and served its Notice of Motion for approval to circulate a plan of arrangement and hold a meeting of creditors. Dresser-Rand was not listed either as an affected or unaffected creditor nor was it mentioned on the list of disputed claims.

24 Apparently, counsel to Dresser-Rand had not yet been added to the service list at this time and did not receive a copy of the Ninth Report until it was posted on the Monitor's web-site on March 16, 2010. Counsel to Dresser-Rand received a copy of the plan motion materials on March 17, 2010 and requested to be put on the service list on that date. The Monitor also informed

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counsel to Dresser-Rand on March 17, 2010 that BA Energy was not interested in purchasing the compressor from Dresser-Rand and that it took the position that the Dresser-Rand claim had been satisfied.

25 On March 18, 2010, the Court approved the circulation of the plan of arrangement to creditors.

26 On March 26, 2010, Dresser-Rand submitted a late amended proof of claim in which it stated it had an unsecured claim of USD $1,474,161.63 and a secured claim of USD $177,382.

27 On April 5, 2010, the Monitor issued a Notice of Revision or Disallowance relating to Dresser-Rand's amended proof of claim, with a revised claim amount of zero. The Monitor set out the following as reasons for disallowance:

> Dresser-Rand's Late Amended proof of claim dated March 26, 2010, claiming an unsecured claim in the amount of $1,474,161.63 USD and a secured claim in the amount of $177,382.00 USD (the "Late Amended Claim") is barred and extinguished pursuant to the claims procedure order dated April 29, 2009 (the "Claims Procedure Order"). The Late Amended Claim is in essence the same as the Initial Claim (as defined below) submitted by Dresser-Rand, which claim has been resolved as described below.
>
> Dresser-Rand was aware of and participated in the claims process established under the Claims Procedure Order. Dresser-Rand's initial proof of claim was received by the Monitor on or about May 15, 2009, as amended to a Subsequent Claim (as defined in the Claims Procedure Order) on September 22, 2009 (the "Initial Claim") following BA Energy's repudiation of the purchase order. The Initial Claim by Dresser-Rand was for $0.00 unsecured and Dresser-Rand acknowledged it held equipment or collateral of a value equal to its claim.
>
> On December 16, 2009, the Monitor issued a notice of revision or disallowance thereby disallowing the total claim amount listed by Dresser-Rand in its Initial Claim (the "NOR"). The reason for the disallowance in the NOR was that Dresser-Rand acknowledged that it retained possession of the collateral equipment that it held in full satisfaction of the Initial Claim amounts (the "POC Satisfaction"), therefore, Dresser-Rand had no claim against BA Energy. Dresser-Rand did respond by issuing a notice of dispute on December 21, 2009 (the "NOD"); however, the NOD served to only address a "misunderstanding of terminology" on the part of Dresser-Rand regarding the classification of the claim amounts and not a dispute as to or the rejection of the POC Satisfaction. After further discussions between the parties, the Monitor sent draft correspondence to Dresser-Rand's solicitors dated January 13, 2010 affirming the POC Satisfaction, that Dresser-Rand was retaining the equipment in full satisfaction of its claim and that it had the risk and benefit of any potential recovery. Throughout the process leading up to the Late Amended Claim, Dresser-Rand valued the collateral equipment as being worth as much or more than the debt owed by the Applicant.
>
> BA Energy and the Monitor relied upon the proofs of claim as filed in the claims process, including the Initial Claim, in calculating the dividend in the BA Energy Plan of Arrangement filed March 10, 2010 (the "Plan"). The inclusion of the Late Amended Claim would have significantly affected BA Energy's/the Monitor's calculations and provisions contained in the Plan, and the subsequent BA Energy creditor review, consideration and implementation of the Plan.
>
> The Dresser-Rand filing of the Late Amended Claim occurred only after distribution of the Plan proposing a 55% dividend. Allowance of the Amended Proof of Claim would: (i) circumvent the *Companies' Creditor Arrangement Act* (Canada) process, the Claims Procedure Order and provide Dresser-Rand an unjustified and improper advantage, and (ii) prejudice BA Energy and/or BA Energy's creditors generally in the pro rata or total distribution under the Plan.

28 Dresser-Rand filed a Notice of Dispute on April 8, 2010, submitting that there was no resolution of its claim as asserted by the Monitor, that it was "prudent and reasonable" for it to amend its claim on March 26, 2010 and that not accepting the claim would be prejudicial to Dresser-Rand and not prejudicial to BA Energy or its creditors. Dresser-Rand filed a Notice of Motion with respect to its claim on April 12, 2010 and served the service list.

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29 The meeting of creditors was held on April 15, 2010. Only one creditor appeared in person: the rest voted by proxy. No-one voted against the plan. Counsel to Dresser-Rand read a prepared statement indicating that it had filed an amended proof of claim that may impact the other creditors if ultimately validated.

Analysis

30 Dresser-Rand submits that the amended proof of claim it filed on March 26, 2010 is not a "late claim", but merely an amendment to the September, 2009 proof of claim which was filed in a timely manner in compliance with the Claims Procedure Order. I cannot agree with this submission. The amended proof of claim purports to assert an unsecured claim for the first time, a claim that would qualify as an affected claim under the plan as opposed to the fully-secured claim previously asserted. It changes the nature of the original claim to such a degree that it must be considered a new claim and not a mere amendment.

31 Dresser-Rand initially filed its claim on the basis that it was in possession of assets of such a value as to satisfy its claim and that it was secured by its possession of such assets. It maintained that position for approximately eight months, leading the debtor and the Monitor to believe, not unreasonably, that Dresser-Rand would not be an affected creditor in a plan of arrangement. BA Energy structured its plan on that assumption. Dresser-Rand changed its approach and amended its claim to file in large part as an affected unsecured creditor at a time when it would have been clear to creditors that the distribution to unsecured creditors under a plan would be substantial, albeit prior to a formal vote by unsecured creditors on the plan.

32 While this application involves a determination of whether Dresser-Rand's late amended claim should be accepted, it is neither a clear case of a creditor "lying in the weeds" nor is it clearly the kind of late claim reviewed by Wittmann, J. A. (as he then was) in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.), the leading authority on the assessment of late claims. However, the principles set out in *Blue Range* are relevant to the application.

33 Wittmann, J. A. set out the following as appropriate criteria for a court to apply to the assessment of late claims:

> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

34 In identifying these criteria and applying them to specific late claims, Wittmann, J. A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act*. and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

A. Inadvertence and Good Faith

35 Wittmann, J.A. noted that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

36 BA Energy submits that Dresser-Rand's conduct in this case cannot be described as careless, negligent or accidental, but arose from a deliberate intent to reframe its claim as an unsecured claim when it became apparent that there would be a distribution to unsecured creditors of approximately $0.55 per dollar of claim.

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37 It is clear that Dresser-Rand was aware of BA Energy's process under the CCAA from shortly after the initial order and had retained counsel active on its behalf as early as March, 2009. It filed its initial proof of claim in a timely manner in May, 2009. It was aware from August, 2009 that BA Energy had repudiated the agreement but it was also clear that from March, 2009, Dresser-Rand took the position that it was free to exercise a right of sale of the equipment in its possession. I agree that it cannot be said that Dresser-Rand's amended proof of claim arose from inadvertence.

38 BA Energy alleges that Dresser-Rand has acted in bad faith in putting forth its recharacterized and amended claim only when it became apparent that it may do better as an unsecured creditor, given the level of distribution to unsecured creditors anticipated by the successful monetization of assets.

39 While there is insufficient evidence to reach the conclusion that Dresser-Rand acted in bad faith, it is true that it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. At the least, Dresser-Rand delayed approximately eight months before taking any substantial or meaningful steps to value the assets in its possession in order to come to a valuation of its security. While Scott Kaffka, an employee of a U.S. affiliate of Dresser-Rand, suggests in his affidavits that Dresser-Rand was investigating the possibility of remarketing the equipment before January, 2010, it is also clear from the affidavits and cross-examination on them that relatively little was done in that regard until Mr. Kaffka became involved and contacted an equipment dealer to obtain an estimate of value for the compressor on January 28, 2010, some eleven months after counsel for Dresser-Rand first stated that it took the position that it was entitled to sell the equipment. It is noteworthy that on January 27, 2010, counsel to Dresser-Rand advised the Monitor that Dresser-Rand was still assessing its position, and that the opinion as to of value that Dresser-Rand relies upon was not formally prepared until March 19, 2010.

40 The consequences of the delay in adequately investigating the value of the assets it held as security for its claim, which accounts for most of the delay in filing the amended claim, must be borne by Dresser-Rand. The question of the resale value of the compressor was a question within the reasonable control of Dresser-Rand to determine.

41 The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

42 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

43 Dresser-Rand was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and did so on September 22, 2010, confirming its initial claim with only a slight variation in amount claimed. As late as December 21, 2009, Dresser-Rand characterized its claim as a fully-secured claim its Notice of Dispute and concedes that it believed at least to this point in time that the compressor was worth at least as much as its claim. Dresser-Rand submits that there was delay by the Monitor in responding to the amended claim, but a three-month delay in the circumstances of a large restructuring with many claims is not unusual. Dresser-Rand also submits that the Monitor should have reacted more quickly to its February 19, 2010 suggestion that it was open to accepting an unspecified cash offer from BA Energy to settle its claim. While the Monitor did not respond for roughly a month, it is clear that the Monitor was involved in preparing and filing a key report on the restructuring with the Court and also involved in a major monetization of BA Energy's assets that would subsequently fund the plan.

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B. Prejudice Caused by the Delay

44 BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from Dresser-Rand. Given what had been communicated among the parties with respect to Dresser-Rand's claim at this point of time, this was not unreasonable.

45 It is difficult to determine what the effect Dresser-Rand's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted on the plan by proxy, and some of those proxies were authorized before Dresser-Rand served other creditors with a Notice of Motion with respect to its revised claim on April 12, 2010. Dresser-Rand states in its brief that 16 out of 30 proxies were submitted after April 7, 2010. Therefore, roughly half of the creditors in number had already voted on the plan several days prior to receiving notice of Dresser-Rand's late claim.

46 With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claims accepted by the Court in *Blue Range*.

47 As noted in *Blue Range* at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

48 During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's late claim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.

49 Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: *Blue Range* at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: *Blue Range* at para. 36.

50 The parties prejudiced by this late amended claim are BA Energy and its parent Value Creation, BA Energy's largest secured creditor. Value Creation refrained from requiring BA Energy to pay all of the proceeds of the assets it had monetized on Value Creation's secured claim and allowed BA Energy to use a portion of those proceeds to distribute to other creditors under the plan. While there is no doubt that Value Creation benefits from BA Energy's restructuring under the CCAA as a continuing entity with surviving assets, the postponement of a portion of Value Creation's secured claim was arrived at in consideration of the status of creditor claims as they had been filed, without Dresser-Rand's late amended claim.

51 It is not surprising that BA Energy did not attempt to alter its plan after having received notice of Dresser-Rand's amended proof of claim. Given the negotiations that necessarily proceed a vote on the plan, the status of proxy voting and the limited time to the creditors' meeting, BA Energy did not have a realistic opportunity to amend its plan to include Dresser-Rand without the risk of losing support from other creditors and jeopardizing the plan.

52 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.) at para. 74, Huddart, J. held, in a case where there would have been no effect on other creditors if a late claim was accepted as it would be paid from post-arrangement revenue, that it was fair to refuse to grant leave to the late creditor to commence an action against the debtor company for a number of reasons, noting that "(a) CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself ... As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything."

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53 While the facts of this case are distinguishable from the facts before the Court in *Lindsay*, Dresser-Rand filed a very late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. Dresser-Rand's recovery would be improved considerably by its very late recharacterization of claim if Dresser-Rand's new submissions with respect to the resale value of the compressor is accepted.

54 Dresser-Rand submits that, from its perspective, the Monitor's draft letter of January 14, 2010 was a "proposed resolution" of the claim, and that thus BA Energy and the Monitor should have been aware from early 2010 that the Dresser-Rand claim was unresolved and that Dresser-Rand would be claiming a deficiency in value as an unsecured claim. While the letter is marked "draft" and the Monitor requested a response before it was finalized, it refers to an agreement reached in the teleconference and the clarification of a misunderstanding arising from the Notice of Revision. While the Monitor was advised that this letter was being reviewed by Dresser-Rand, and Dresser-Rand invited a proposal for settlement on February 19, 2010, it was not until March 26, 2010, ten months after the expiry of the initial claims bar date that Dresser-Rand made its revised position clear to the debtor and the Monitor.

55 Mr. Kaffka states in his affidavits that Dresser-Rand received a verbal estimate of value from an equipment dealer on January 28, 2010. It may well be that Dresser-Rand did not wish to disclose the low resale value it was now alleging for the compressor at a point in time when it was hoping that BA Energy would make an offer to purchase the compressor, but this was a strategic decision by Dresser-Rand, and, again, the risk of further delay in clearly communicating its revised estimate of value because of this strategic decision must be borne by Dresser-Rand.

56 Dresser-Rand also submits that it would have filed its amended claim sooner had the Monitor advised it sooner that BA Energy was not interested in purchasing the compressor. It is true that Dresser-Rand may have been able to file its amended claim at the end of February, 2010 instead of at the end of March, 2010 had the Monitor responded earlier to Dresser-Rand's suggestion that BA Energy may wish to make an offer on the equipment, but it should be noted that Dresser-Rand's "proposal" was merely an invitation to BA Energy to make a settlement offer, and not a proposal specifying an acceptable price for the compressor that may have alerted the Monitor to its importance. The Monitor in the Thirteenth Report to the Court dated April 30, 2010 explained that it did not place a high priority on its response to the voice-mail enquiry as it thought that it was one of several enquiries that Dresser-Rand was making to potential purchasers to of the compressor.

57 Dresser-Rand submits that BA Energy knew as early as January 14, 2010 (the date of the Monitor's draft letter) that Dresser-Rand may have been in the position of recovering less than it was owed if it sold the equipment. While this was anticipated as a possibility in the January 14, 2010 letter, the responsibility for valuing the equipment Dresser-Rand claimed as its security cannot be transferred to the debtor or the Monitor. Dresser-Rand is in the business of manufacturing and marketing the equipment, and had as late as September 22, 2009 made the formal representation in its revised proof of claim that the equipment was worth the amount of its claim. It appears that in January 2010, an officer of BA Energy enquired of the Monitor whether BA Energy could recover any surplus proceeds from Dresser-Rand's sale of the compressor, further indicating that there is no evidence that either the debtor or the Monitor anticipated Dresser-Rand's late change of position on value.

C. Other Considerations

58 Dresser-Rand submits that equity favours its application, as it is a wronged party with a legitimate claim that has been compromised by the CCAA proceedings. While if Dresser-Rand's current position with respect to value is accepted, it may suffer a deficiency in its claim of roughly $1.6 million still owing on the purchase price of roughly $8 million for the compressor, Dresser-Rand has possession of the compressor and current estimates of a deficiency are still speculative. There is no overwhelming equitable consideration that would counter-balance relevant prejudice to BA Energy of the late claim.

59 Dresser-Rand submits that the situation is similar to that described in *Look Communications Inc., Re* (2005), 21 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]). However, this is not a situation where BA Energy was aware at all times of the applicant's claim and did not object, nor is it a case where, had court approval of the claim been sought prior to plan approval,

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it would be clear that such approval would be granted as a matter of course. No assumptions can be made about the outcome if this amended claim had been brought in a timely way and disputed.

D. Conclusion on a Late Claim

60 It would not be fair or equitable to accept this late amended claim. Given the facts of this case, there are no conditions that would alleviate relevant prejudice.

61 If I am wrong in my assessment of whether the late revised claim should be accepted, I would agree with BA Energy that the claim should not in any event be accepted as set out in the Amended Proof of Claim, but should be remitted to the Monitor to allow a proper consideration of value. BA Energy and the Monitor have not been given an opportunity to test the allegations made as to the resale value of the compressor as would occur in the normal course of a claim, given the timing of the late claim in relation to the plan and its sanctioning. While the parties may not have discussed this in advance of the application, it is clear that this was not a normal claims dispute, but was restricted to the issue of whether the claim should be accepted.

E. Conduct Money

62 In support of this application, Dresser-Rand filed and relied upon affidavits sworn by Mr. Kaffka, who resides in New York. Mr. Kaffka was cross-examined on these affidavits. Dresser-Rand submits that BA Energy should be required to pay conduct money for Mr. Kaffka's attendance at cross-examination.

63 BA Energy objects to paying conduct money for Mr. Kaffka's cross-examination because he is not an employee of Dresser-Rand Canada Inc., because he had no involvement with the issues prior to January, 2010 and because Dresser-Rand has employees in Alberta who could have provided an affidavit, including Bill Colpitts, its recently-retired General Manager who was involved with the matter and signed the first Proof of Claim.

64 Dresser-Rand submits that Mr. Kaffka was an appropriate affiant because he was primarily responsible for Dresser-Rand's mitigation efforts after January, 2010 and because he was the individual who determined the market value of the compressor.

65 While Mr. Kafka's evidence of pre-2010 efforts by Dresser-Rand to mitigate and to assess value was of necessity hearsay, he was involved in 2010 mitigation efforts. He was not so clearly an inappropriate witness that Dresser-Rand is disentitled to reasonable conduct money. I direct that BA Energy be required to pay reasonable conduct money for Mr. Kaffka's attendance.

F. Costs

66 This is not an appropriate case to depart from the usual practice with respect to costs in commercial insolvency applications, and therefore both Dresser-Rand and BA Energy will bear their own costs.

Application dismissed.

Footnotes

* A corrigendum issued by the court on August 13, 2010 has been incorporated herein.

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TAB 5

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11.General power of court

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

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Judicial Consideration (6)

Currency

Federal English Statutes reflect amendments current to October 23, 2024
Federal English Regulations Current to Gazette EXTRA Vol. 158:3 (December 6, 2024)

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TAB 6

2014 BCSC 1732
British Columbia Supreme Court

Bul River Mineral Corp., Re

2014 CarswellBC 2702, 2014 BCSC 1732, [2014] B.C.W.L.D. 6764, [2014] B.C.W.L.D. 6765, [2014] B.C.W.L.D. 6771, [2014] B.C.W.L.D. 6779, 16 C.B.R. (6th) 173, 245 A.C.W.S. (3d) 333

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, S.B.C. 2002, c. 57 and the Business Corporations Act, R.S.A. 2000, c. B-9

In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation, Petitioners

Fitzpatrick J.

Heard: September 3, 5, 2014
Judgment: September 15, 2014
Docket: Vancouver S113459

Counsel: Colin D. Brousson for Petitioners
William C. Kaplan, Q.C., Peter Bychawski for CuVeras, LLC
J. Roger Webber, Q.C. for Eldon Clarence Stafford
Robert M. Curtis, Q.C. for Gordon Preston and Carol Preston
Tevia R.M. Jeffries for Monitor, Deloitte Restructuring Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Torts
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.1 Provable debts
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Commercial law
I Agency
I.3 Creation of agency
I.3.a General principles
Contracts
XIII Novation
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside

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financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — Applicable law was amended to require debt claims to be paid in full, before any equity claims were to be paid out — P claimed that their claim was transferred into debt claim — However, claim was for recovery of own capital instead of return on capital, as was true in case relied upon by P — Other preferred shareholders were in same situation, despite not having judgment — It would be against policy objective to treat these shareholders differently — Treatment of claim as equity claim was not collateral attack on judgment given elsewhere — For S claim, intentions of parties were unclear as principal of owners was dead, and S was incapacitated — Documents between parties had to be examined — S advanced loan to principal personally, and not to his companies — There was no assignment of loan agreement — As no novation occurred, S could not characterize claim as debt claim — No agency relationship was created between parties.

Commercial law --- Agency — Creation of agency — General principles

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — No agency relationship was created between parties.

Contracts --- Novation — Proof of novation

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — For S claim, intentions of parties were unclear as principal of owners was dead, and S was incapacitated — Documents between parties had to be examined — S advanced loan to principal personally, and not to his companies — There was no assignment of loan agreement — As no novation occurred, S could not characterize claim as debt claim — No agency relationship was created between parties.

Bankruptcy and insolvency --- Proving claim — Provable debts — Claims of director, officer or shareholder of bankrupt corporation

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — Applicable law was amended to require debt claims to be paid in full, before any equity claims were to be paid out — P claimed that their claim was transferred into debt claim — However, claim was for recovery of own capital instead of return on capital, as was true in case relied upon by P — Other preferred shareholders were in same situation, despite not having judgment — It would be against policy objective to treat these shareholders differently — Treatment of claim as equity claim was not collateral attack on judgment given elsewhere.

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Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 12, 259 A.R. 30, 76 Alta. L.R. (3d) 338, [2000] 4 W.W.R. 738, 2000 ABQB 4, 15 C.B.R. (4th) 169 (Alta. Q.B.) — considered

Bul River Mineral Corp, Re (2014), 2014 CarswellBC 1010, 2014 BCSC 645, 12 C.B.R. (6th) 57 (B.C. S.C.) — referred to

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Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1992), 5 Alta. L.R. (3d) 193, [1992] 3 S.C.R. 558, 16 C.B.R. (3d) 154, 7 B.L.R. (2d) 113, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 131 A.R. 321, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 25 W.A.C. 321, 1992 CarswellAlta 790, 97 D.L.R. (4th) 385, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 16 C.B.R. (3d) 14, 1992 CarswellAlta 298 (S.C.C.) — followed

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Excelsior Electric Dairy Machinery Ltd., Re (1922), 1922 CarswellOnt 42, 2 C.B.R. 599, 52 O.L.R. 225, [1923] 3 D.L.R. 1176 (Ont. S.C.) — referred to

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Negus v. Oakley's General Contracting (1996), 40 C.B.R. (3d) 270, 152 N.S.R. (2d) 172, 442 A.P.R. 172, 1996 CarswellNS 229 (N.S. S.C.) — referred to

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0487826 B.C. Ltd., Re (2012), 97 C.B.R. (5th) 105, 2012 CarswellBC 3079, 2012 BCSC 1501 (B.C. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable" — considered

s. 2 "creditor" — considered

s. 54(2)(d) — considered

s. 60(1.7) [en. 1992, c. 27, s. 24(1)] — considered

s. 95 — referred to

s. 101 — referred to

s. 121(1) — considered

s. 135 — considered

Business Corporations Act, S.B.C. 2002, c. 57

s. 193(2) — considered

s. 193(4) — considered

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

Generally — referred to

s. 2(1) "claim" — considered

s. 2(1) "equity claim" — considered

s. 2(1) "equity claim" (a)-(c) — referred to

s. 2(1) "equity interest" (a) — considered

s. 6 — referred to

s. 6(8) — considered

s. 11 — considered

s. 22.1 [en. 2007, c. 36, s. 71] — considered

s. 36.1 [en. 2007, c. 36, s. 78] — referred to

Words and phrases considered:

equity claim

The effect of the amendments was considered by Pepall J. (as she then was) in Nelson Financial Group Ltd., Re, 2010 ONSC 6229 (Ont. S.C.J. [Commercial List]). In that case, the court had no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the CCAA.

HEARING to determine nature of claims brought by creditors, against petitioner owners of mining companies.

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> In that event, the Claim Particulars in the Creditor List would be deemed to be the creditor or shareholder's proven claim for voting and distribution purposes under any restructuring plan subsequently filed by the petitioners;
>
> c) in the event a creditor or shareholder objected to the Claim Particulars in the Creditor List, or wished to advance another claim, the creditor or shareholder had to, on or before October 17, 2011 (the "Claims Bar Date"), deliver to the petitioners, with a copy to the Monitor, a notice of such objection in the form of a Notice of Dispute, together with a Proof of Claim and supporting documentation;
>
> d) in the event a Notice of Dispute was not submitted on or before the Claims Bar Date, the creditor or shareholder was deemed to have accepted the amount owing and all other Claim Particulars set out in the Creditor List, and was forever barred from advancing any other claim against the petitioners or participating in any plan subsequently filed by the petitioners;
>
> e) where a Notice of Dispute and/or Proof of Claim was filed by a creditor or shareholder, the petitioners were deemed to have accepted it unless they delivered to the creditor or shareholder a Notice of Disallowance on or before October 31, 2011 (later extended to November 15, 2011); and
>
> f) in the event of the petitioners delivering a Notice of Disallowance, a creditor or shareholder had 21 days to seek a determination from the court of the validity and value of and particulars of the claim by filing and serving the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

28 The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

29 Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the *CCAA* to facilitate a restructuring rather than a liquidation of assets: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services] at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a *CCAA* proceeding has a "broad and flexible authority" or statutory jurisdiction to makes such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

30 The discretionary authority of the court is confirmed by s. 11 of the *CCAA* which provides that the court may make any order that it considers "appropriate in the circumstances". As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the *CCAA*:

> [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.

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31 Claims process orders are an important step in most restructuring proceedings. In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.), Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

32 The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *0487826 B.C. Ltd., Re*, 2012 BCSC 1501 (B.C. S.C.) [hereinafter Steels Products] are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60at paras. 24 and 47.

33 Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

34 This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

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35 The Prestons and Mr. Stafford do not suggest that the court lacks the jurisdiction to reconsider the issues that arise in relation to their claims. The Prestons do, however, contend that it is not appropriate that any reconsideration take place at this time.

(ii) Review of the Claims

36 The stated purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors (see also s. 6 of the *CCAA*). In accordance with that fundamental objective or purpose, it is axiomatic that it is necessary to determine what are the true claims of the creditors as might be compromised or arranged.

37 A "creditor" is not defined in the *CCAA*, unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") where it is defined as meaning "a person having a claim provable as a claim" under that *Act* (s. 2). Both the *CCAA* and the *BIA* define "claim" by reference to liabilities "provable" under the *BIA*. Specifically, s. 2(1) of the *CCAA* defines "claim" as meaning:

> 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*.

Section 2 of the *BIA* defines a "claim provable in bankruptcy" as "any claim or liability provable in proceedings under this Act by a creditor".

38 Section 121(1) of the *BIA* addresses which claims are "provable claims":

> 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.

39 In substance, this same statutory definition is applied in the *CCAA* and represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24. In addition, as noted by CuVeras, this definition is essentially used in the Claims Process Order by its definition of "Claim".

40 Various authorities establish that a "provable debt" must be due either at law, or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process: *Excelsior Electric Dairy Machinery Ltd., Re* (1922), 2 C.B.R. 599, [1923] 3 D.L.R. 1176 (Ont. S.C.); *Farm Credit Corp. v. Holowach (Trustee of)* (1988), 68 C.B.R. (N.S.) 255, 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal to S.C.C. refused, (1989), 73 C.B.R. (N.S.) xxvii (note), 60 D.L.R. (4th) vii (note) (S.C.C.); *Central Capital Corp., Re* (1995), 29 C.B.R. (3d) 33, [1995] O.J. No. 19 (Ont. Gen. Div. [Commercial List]) ("*Central Capital*"), aff'd (1996), 27 O.R. (3d) 494, 38 C.B.R. (3d) 1 (Ont. C.A.) ("*Central Capital* (ONCA)"); *Negus v. Oakley's General Contracting* (1996), 40 C.B.R. (3d) 270, 152 N.S.R. (2d) 172 (N.S. S.C.).

41 In a *CCAA* proceeding, a claims process order is the means by which the "claims" of the creditors are determined. By reason of that process, the debtor is able to determine the nature and extent of its debts and liabilities so as to enable it to formulate a plan of arrangement. There are no rules as to when a claims process may be implemented although it is usually early in the process in anticipation of a plan and distributions to creditors. In that respect, a debtor company will be seeking some certainty regarding the determination of claims for that purpose.

42 In *Timminco*, the Court, prior to citing relevant authorities at para. 52, outlined many of the factors that might be considered by the court in relation to deciding whether to allow claims to be advanced after the claims bar date:

> [51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay[?] (c) if relevant prejudice is found, can it be alleviated by attaching appropriate

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TAB 7

2020 BCSC 749, 2020 CarswellBC 1233, 319 A.C.W.S. (3d) 17, 80 C.B.R. (6th) 133

2020 BCSC 749
British Columbia Supreme Court

Soccer Express Trading Corp. (Re)

2020 CarswellBC 1233, 2020 BCSC 749, 319 A.C.W.S. (3d) 17, 80 C.B.R. (6th) 133

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

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, S.B.C. 2002, c. 57, AS AMENDED

AND IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SOCCER EXPRESS TRADING CORP. AND KAHUNAVERSE SPORTS GROUP INC. (Petitioners)

Fitzpatrick J.

Heard: May 8, 2020
Judgment: May 12, 2020
Docket: Vancouver S204288

Counsel: C.J. Ramsay, K.G. Mak, N. Carlson (A/S), for Petitioners, Soccer Express Trading Corp. and Kahunaverse Sports Group Inc.
V. Tickle, L. Williams, for Monitor, PricewaterhouseCoopers Inc.
K. Robertson, D. Jackson, for Greyrock Capital Incorporated
R. Clark, Q.C., E. Bisceglia, B. Frino, C. Fell, for Adidas Canada Limited

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.iii Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
In March 2020, petitioners, who were in business of selling multi-brand sporting equipment, filed notices of intention (NOIs) to make proposal pursuant to Bankruptcy and Insolvency Act — Months before NOI filings, petitioners entered into share purchase agreement with G Inc., to address continuing liquidity issues — NOI filings were intended to allow petitioners to secure interim financing during restructuring, with petitioners intending to present proposal to their creditors, which would allow sale to G Inc. to close and continuation of business operations — Spread of COVID-19 pandemic across Canada affected petitioners, and effects of pandemic, including store closures and staff layoffs, created more uncertainty within petitioners' restructuring proceedings — Despite challenges, NOI proceedings continued with some progress and success but major issue arose, with A Ltd., who was their largest vendor — Petitioners were unable to process or fulfil customer orders for A Ltd. products during NOI proceedings, and A Ltd. made it clear that it had no intention of continuing its supply relationship with petitioners — On March 30, 2020, orders were granted in BIA proceedings, which extended stay period to May 25, 2020,

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approving administrative charge and authorizing interim financing facility with G Inc., and on April 30, 2020, petitioners were granted order continuing BIA proceedings under s. 11.6(a) of Companies' Creditors Arrangement Act (CCAA) — Petitioners brought request for declaration of critical supplier with respect to A Ltd., and that A Ltd. be granted charge for supply of its goods — Request granted — It was found as fact that A Ltd. was "supplier" to petitioners and that supply of its goods and services were critical to petitioners' continued operations at this time, as numbers clearly supported that A Ltd. was largest supplier of product for petitioners' business — Declaring A Ltd. to be critical supplier was consistent with statutory objectives of CCAA and well supported by circumstances here — A Ltd.'s demand for payment toward pre-NOI filings debt was rejected, stay of proceedings would be extended to end of July 2020, and, at that time, matter of supply arrangements with petitioners' suppliers, including A Ltd., would be subject of evidence and also, comment and report by Monitor Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.4.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Miscellaneous

In March 2020, petitioners, who were in business of selling multi-brand sporting equipment, filed notices of intention (NOIs) to make proposal pursuant to Bankruptcy and Insolvency Act — Months before NOI filings, petitioners entered into share purchase agreement with G Inc., to address continuing liquidity issues — NOI filings were intended to allow petitioners to secure interim financing during restructuring, with petitioners intending to present proposal to their creditors, which would allow sale to G Inc. to close and continuation of business operations — Spread of COVID-19 pandemic across Canada affected petitioners, and effects of pandemic, including store closures and staff layoffs, created more uncertainty within petitioners' restructuring proceedings — Despite challenges, NOI proceedings continued with some progress and success but major issue arose, with A Ltd., who was their largest vendor — Petitioners were unable to process or fulfil customer orders for A Ltd. products during NOI proceedings, and A Ltd. made it clear that it had no intention of continuing its supply relationship with petitioners — On March 30, 2020, orders were granted in BIA proceedings, which extended stay period to May 25, 2020, approving administrative charge and authorizing interim financing facility with G Inc., and on April 30, 2020, petitioners were granted order continuing BIA proceedings under s. 11.6(a) of Companies' Creditors Arrangement Act (CCAA) — Petitioners brought request for declaration of critical supplier with respect to A Ltd., and that A Ltd. be granted charge for supply of its goods — Request granted — It was accepted that value of all of assets could be compromised in event of liquidation, particularly given uncertain and recessionary times into which Canadian economy has fallen with COVID-19 pandemic — However, it was considered extremely unlikely that, even with significant fall in recoveries, there was any material risk of non-payment to A Ltd. in these circumstances — This was particularly so given that A Ltd. would receive ongoing payments for supply, if such payments were not made in ordinary course, it would be expected that A Ltd. would seek immediate relief in respect of critical supplier declaration and critical supplier charge — Increase to interim lending facility, as proposed, was also granted.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — referred to

Clothing for Modern Times Ltd., Re (2011), 2011 ONSC 7522, 2011 CarswellOnt 14402, 88 C.B.R. (5th) 329 (Ont. S.C.J. [Commercial List]) — referred to

Northstar Aerospace Inc., Re (2012), 2012 ONSC 4546, 2012 CarswellOnt 9721 (Ont. S.C.J. [Commercial List]) — referred to

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

7098961 Canada inc., Re (2016), 2016 QCCS 2115, 2016 CarswellQue 4126, 36 C.B.R. (6th) 274 (C.S. Que.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

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Generally — referred to

s. 65.1 [en. 1992, c. 27, s. 30] — considered

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

Generally — referred to

s. 11 — considered

s. 11.001 [en. 2019, c. 29, s. 136] — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

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

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(4) [en. 2005, c. 47, s. 128] — referred to

s. 11.6(a) [en. 1997, c. 12, s. 124] — considered

REQUEST by petitioners for declaration of critical supplier with respect to one of their major suppliers, A Ltd., and that A Ltd. be granted charge for supply of its goods.

***Fitzpatrick J.* (orally):**

Introduction

1 This is a comeback hearing arising from my earlier granting of an initial order on April 30, 2020 pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") in favour of the petitioners, Soccer Express Trading Corp. ("SX") and Kahunaverse Sports Group Inc. ("KSG"), (collectively, the "Petitioners").

2 The significant issue to be addressed is the Petitioners' request for a declaration of critical supplier with respect to one of their major suppliers, adidas Canada Limited ("adidas"), and that adidas be granted a charge for the supply of its goods (the "Critical Supplier Charge").

Procedural History

3 On March 11, 2020, the Petitioners filed notices of intention (NOIs) to make a proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). PricewaterhouseCoopers Inc. ("PwC") was appointed as the proposal trustee.

4 The NOI filings arose against the backdrop of the Petitioners facing increasing financial challenges, reaching back to early 2019.

5 In late 2019, before the NOI filings, the Petitioners entered into a share purchase agreement (the "SPA") with Greyrock Capital Incorporated ("Greyrock") to address continuing liquidity issues. The SPA has not yet closed; it remains subject to a number of conditions.

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6 The NOI filings were intended to allow the Petitioners to secure interim financing during a restructuring, with the Petitioners intending to present a proposal to their creditors which would allow the sale to Greyrock to close and the continuation of business operations. Since mid-March 2020, generally speaking, the Petitioners have secured the cooperation of their vendors and suppliers of product toward that end.

7 The spread of the COVID-19 pandemic across Canada has, not surprisingly, affected the Petitioners, as with most other businesses. Needless to say, the effects of the pandemic, including store closures and staff layoffs, created more uncertainty within the Petitioners' restructuring proceedings.

8 Despite these challenges, the NOI proceedings continued with some progress and success. A major issue arose, however, with adidas. As I will discuss in more detail below, adidas' position with respect to the Petitioners was seen as threatening the potential success of the restructuring proceedings.

9 On March 30, 2020, Justice Myers granted orders in the *BIA* proceedings extending the stay period to May 25, 2020, approving an administrative charge and authorizing an interim financing facility with Greyrock of $1.4 million (the "*BIA* Orders").

10 On April 16, 2020, Aegis Advisory Incorporated ("Aegis") was appointed as Chief Restructuring Officer (CRO) of the Petitioners. Aegis' president, Jeff Johnson, a licensed insolvency trustee, is acting as CRO.

11 On April 28, 2020, the Petitioners commenced these proceedings, seeking relief under the *CCAA*. In large part, the Petitioners considered that the *CCAA* afforded them broader relief than that obtainable under the *BIA*, principally in respect of adidas. That broader relief included the possibility of obtaining a declaration that adidas was a critical supplier and that adidas be ordered to continue to supply product to the Petitioners.

12 On April 30, 2020, I granted an order continuing the *BIA* proceedings under the *CCAA*, in accordance with the *CCAA*, s. 11.6(a) (the "Initial Order"). I was satisfied that the statutory requirements had been met (including that no *BIA* proposals had been filed) and that the continuation of the *BIA* proceedings under the *CCAA* was consistent with the purposes of the *CCAA*: *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 (Ont. S.C.J. [Commercial List]) at para. 9.

13 In the Initial Order, I continued the relief granted by Myers J. in the *BIA* Orders, including granting an Administration Charge of $200,000 (increased from $150,000) and approving the Interim Lender's Charge in favour of Greyrock.

14 I also extended the stay for only a short period to May 8, 2020, in accordance with the *CCAA*, s. 11.02(1). In addition, over the objection of adidas, I was satisfied that the Petitioners were entitled to temporary and interim relief from April 30, 2020 until the comeback hearing with respect to adidas, as necessary for their continued operations: *CCAA*, s. 11.001. That relief included a declaration of critical supplier with respect to adidas and an order that adidas continue to supply the Petitioners during that period, but on a cash-on-delivery (COD) basis.

15 Evidence on the application for the Initial Order included Mr. Johnson's Affidavits #1 and #2, both sworn on April 28, 2020. In addition, I had the benefit of PwC's Proposed Monitor's Pre-Filing Report dated April 28, 2020, which included PwC's Proposal Trustee's First Report dated March 27, 2020 which was prepared in support of the hearing before Myers J.

16 The May 8, 2020 hearing was the comeback hearing. The Petitioners seek an Amended and Restated Initial Order (ARIO) that:

a) Amends and restates the Initial Order;

b) Extends the stay of proceedings to July 31, 2020;

c) Declares that adidas is a critical supplier to the Petitioners and orders that adidas continue to supply goods and services to the Petitioners on the terms and conditions that are consistent with the existing arrangements, including but not limited

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to the 2020 Trade Investment Package — adidas Brand (the "adidas Trade Agreement"), as may be amended by the terms and conditions set out in the ARIO;

d) Orders adidas to:

i. Maintain KSG/SX as vendors on the MiTeam system to allow MiTeam orders to be processed;

ii. Provide access to KSG/SX and their representatives to the B2B system;

iii. Permit the Petitioners, their representatives and their customers uninterrupted access to the MiTeam and B2B system;

iv. Honour all negotiated net price items in accordance with the supply relationship;

v. Honour all customer activation discounts in accordance with the supply relationship; and

vi. Process all purchase orders in a timely manner without delay consistent with the supply relationship.

e) Grants adidas a charge on the Petitioners' property in an amount equal to the value of the goods and services supplied by adidas and received by the Petitioners; and

f) Approves the terms of an amended commitment letter between the Petitioners and Greyrock for a credit facility in the maximum amount of $2.8 million and increases the Interim Lender's Charge to that amount.

17 In addition, the Petitioners seek approval to implement a claims process.

18 With the exception of adidas, no person objects to the granting of the relief sought. Adidas remains significantly opposed, although that opposition is limited to the relief sought under the *CCAA* critical supplier provisions, whether as proposed by the Petitioners or otherwise.

19 All of the relief sought is supported by Greyrock and the Monitor.

Background of the Petitioners

20 KSG is in the business of selling multi-brand sporting equipment, apparel and accessories to individuals, institutions and sports teams. It has a wide range of product offerings. KSG is headquartered in Surrey, BC. It has five retail locations across Canada and has an e-commerce platform. It employed approximately 90 employees across Canada prior to recent layoffs due to a decision to close its retail stores as part of the efforts to address the COVID-19 pandemic.

21 SX is a fully owned subsidiary of KSG. SX specializes in the business of selling multi-brand soccer related sports apparel and equipment to customers across Canada. It has a focus on servicing soccer clubs. SX is headquartered in Coquitlam, BC. It has a retail store in Coquitlam, called the "Superstore", and an e-commerce platform. It employed approximately 60 employees prior to recent layoffs due to the closure of the Superstore.

22 Aside from intercompany balances, the Petitioners' combined assets include:

a) Accounts receivable consisting primarily of trade receivables to be collected from sports teams, clubs and institutional customers for the sale of sports apparel, accessories and equipment;

b) Inventory consisting of sporting goods such as apparel, shoes, accessories and equipment for sale from multiple brands. The inventory also includes team uniforms which have not yet been customized;

c) Property consisting of equipment, furniture and leasehold improvements; and

d) Intangibles consisting of goodwill.

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23 The Petitioners' combined liabilities include approximately $10.4 million owing to secured creditors. This includes approximately $8.6 million of secured debt which has now been acquired by Greyrock. The pre-filing amount owed by the Petitioners to unsecured creditors is approximately $15.5 million, including approximately $8 million owed to vendors/suppliers.

24 Greyrock is also the holder of the Interim Lender's Charge approved in the *BIA* proceedings and continued in the Initial Order. As of May 2, 2020, approximately $750,000 had been drawn under that facility.

25 One of the conditions under the SPA is that Greyrock would enter into satisfactory arrangements with the Petitioners' vendors and suppliers. This condition related not only to addressing current balances owing by the Petitioners (through proposals and now a plan of arrangement), but also ensuring future supply of goods and services.

26 With respect to the latter aspect of that condition, the Petitioners and Greyrock have been in contact with all key vendors and have been making arrangements for the continued supply of product. To date, the arrangements concluded have varied, and include COD purchases, providing retainers on account, in process arrangements for credit card purchases and letters of credit. In addition, the Petitioners have had ongoing discussions with vendors regarding their intention to settle pre-NOI obligations through the filing of formal proposals (and now a plan of arrangement in the *CCAA* proceedings).

27 The Petitioners' evidence is that, with the exception of adidas, vendors and suppliers have generally been supportive of continuing to do business with the Petitioners, even in the present circumstances. The Petitioners are of the view that their vendors and suppliers will be supportive of a proposal or plan to compromise the pre-filing debts as they will receive more through that process than in the event of a bankruptcy.

The adidas Relationship

28 In support of this application, I have had the benefit of reading the direct evidence of various representatives of the Petitioners and adidas. I have read John Prisco's Affidavit #1 sworn on May 7, 2020. He is the Vice President of KSG. I have also read Brad Leitch's Affidavit #1 sworn on May 7, 2020. He is the President of SX. Finally, I have read Chris Miall's Affidavits #1 and #2 sworn May 7 and 8, 2020 respectively. Mr. Miall is a Sales Director — Team and Soccer Specialty for adidas.

29 What is apparent from this evidence, particularly from Mr. Prisco and Mr. Leitch, is that the relationship between the Petitioners and adidas is significant and long standing. The business relationship between the Petitioners and adidas stretches back not in years, but in decades. I accept Mr. Leitch's evidence that the relationship with SX can be described as "intertwined" and Mr. Prisco's description of their supply relationship with adidas as "symbiotic".

30 Adidas is the largest vendor to the Petitioners by a large margin. Adidas supplies products to the Petitioners pursuant to the adidas Trade Agreement. The term of the adidas Trade Agreement expires on November 30, 2020.

31 An important aspect of the relationship between the Petitioners and adidas is what is referred to as "Team Sales". The Petitioners, in relation to the sale of product directly to institutional clients and clubs, enter into contracts with customers which include providing access to adidas product. These contracts will usually cover a multi-year period. For KSG, 2019 sales to customers under exclusive buy-sell agreements were approximately $8 million to about 150 different customers. Of these sales, approximately $2.7 million related to agreements that provided customers with access to adidas product. For SX, total sales to adidas institutional and contract clubs for the 2019 fiscal year were $3.8 million, being approximately 40% of SX's total club sales of $8.4 million.

32 In addition, an important aspect of the Team Sales programs is the ability of the Petitioners to source product from adidas by way of purchase orders, using access by the Petitioners and their customers to online services offered by adidas, known as the "MiTeam" and "business to business" or "B2B" platforms. Access by the Petitioners and their customers to these platforms is not addressed in the adidas Trade Agreement; however, it was and continues to be an important service provided by adidas and is an important aspect of the operation of the relationship in terms of the Petitioners and their customers accessing adidas product.

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33 I acknowledge that issues between the Petitioners and adidas in their business relationship have arisen over the years, most recently arising from the Petitioners' financial challenges that began in 2019.

34 Mr. Miall describes that there were material defaults throughout the fall of 2019. Arising from those defaults, adidas began carefully monitoring the Petitioners' order of product to ensure payment was made. At times, the Petitioners' access to the online platforms were temporarily suspended by adidas until matters were regularized.

35 In late February 2020, given ongoing concerns, adidas requested that the Petitioners execute a General Security Agreement (GSA) in its favour. Adidas complains that instead, the NOI filings took place, and suggests that the Petitioners were acting inappropriately in holding off providing the GSA while ordering more product from adidas. At the time of the NOI filings, the Petitioners' combined debt owing to adidas was approximately $1.89 million.

36 I see no merit in adidas' arguments in this respect. As Mr. Johnson and the Monitor confirm, the balances outstanding to adidas, while discussions concerning a GSA were underway, were in fact reduced over the period of the discussions by over $430,000; they were not increased to the detriment of adidas. In addition, the Critical Supplier Charge now sought by the Petitioners is materially better than any such GSA, even assuming that such security would have withstood an attack that granting it on the eve of the NOIs was a preference that should be set aside.

37 The NOI filings certainly did not improve the relationship with adidas, despite immediate communications from the Petitioners to adidas to confirm that they wished to carry on business as normal, including with adidas.

38 In response to the NOI filings, adidas immediately deactivated the Petitioners' access to the MiTeam and B2B platforms. In addition, adidas continued to supply the Petitioners but it unilaterally decided not to process orders that provided for delivery after what adidas calculated would be a vote on a proposal (despite that no formal proposal had yet been filed). This action was arguably in violation of s. 65.1 of the *BIA*; however, the Petitioners sought to negotiate an amicable solution with adidas.

39 Subsequent to the NOI filings, the Petitioners made substantial efforts to discuss and negotiate a path forward with adidas. At that time, the Petitioners confirmed that all post-filings orders would be paid on a COD basis. The Petitioners and Greyrock had discussions with adidas in the hopes of coming to a long term supply arrangement beyond these *CCAA* proceedings, or alternatively, to at least confirm ongoing supply and payment terms to the end of the term of the adidas Trade Agreement on November 30, 2020.

40 Even so, the Petitioners and Greyrock were singularly unsuccessful in their efforts to secure adidas' cooperation; adidas made it crystal clear that it has no intention of continuing its supply relationship with the Petitioners, unless it is ordered to do so by the Court.

41 After the NOI proceedings were commenced and even now during the *CCAA* proceedings, adidas has advanced a number of allegations against the Petitioners, met to some extent by allegations by the Petitioners against adidas.

42 Adidas alleged that there were some post-NOI filings orders that were filled but remained unpaid. I understand that this was an oversight; when brought to the Petitioners' attention, those amounts were immediately paid.

43 Adidas also now alleges that the Petitioners are in breach of the adidas Trade Agreement by producing "knockoff" brands. However, adidas has been aware of that activity for some time and only very recently voiced objections, raising suspicions as to the veracity of such allegations.

44 The Petitioners allege that adidas has directly contacted some of their customers and attempted to harm their relationship with those customers for its own benefit. Adidas denies these allegations. In my view, it is not necessary to determine that issue on this application.

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45 At present, the Petitioners have accepted adidas' position, as they must. They now have no choice but to source product from other vendors in terms of their ongoing operations. However, that process will take time and will not happen overnight, particularly given the depth of the current relationship with adidas and the historical supply of adidas products to their customers.

46 Given the state of their increasingly fractious relationship with adidas, the Petitioners were unable to process or fulfil customer orders for adidas product in the normal course of their business during the NOI proceedings. That circumstance in turn led to the commencement of these *CCAA* proceedings and the granting of the Initial Order on April 30, 2020.

47 On May 1, 2020, following the reinstatement of the Petitioners' access to the MiTeam and B2B platforms pursuant to the Initial Order, the Petitioners began working through open orders and advised adidas that they would be communicating with adidas on processing orders. The Petitioners proposed to adidas that they would advance a retainer to adidas of $250,000 to be held against unpaid invoices. That proposal was presented to address the impracticality of paying COD on numerous invoices, some very small.

48 The Petitioners' proposed that, once open purchase orders are confirmed or new purchase orders submitted, adidas would ship and invoice in the usual manner. The Petitioners would then batch the invoices received by adidas at the end of each week and submit payment each Monday. The Petitioners did not believe that at any point in time the outstanding invoices would exceed $250,000.

49 Adidas did not accept that this arrangement was sufficient to remove payment risk to it, given the amount of open purchase orders (then some $1.8 million). Adidas advised that it required $1 million in cash security, a demand that the Petitioners could not meet.

50 In the normal course of their supply relationship, the Petitioners work with adidas to finalize purchase orders for shipment based on reports made by adidas. Purchase orders are made up to six months in advance of shipment, and are open and subject to change during that period. The Petitioners communicate with customers and adidas throughout this period to finalize the open purchase orders based on current demand for and availability of product.

51 KSG expects to sell approximately $2 million in adidas product between July 1 and December 31, 2020. This period is consistent with past years, as customers must make orders for product for the coming sports season that begins every September. These sales are effected by customers placing orders. To ensure the timely delivery of adidas product to the customers, the Petitioners must place these orders in the spring and early summer with adidas, otherwise orders will be backlogged, and delivery will not occur in time for the September sports season. If adidas does not immediately place these orders, KSG may lose any or all of the expected sales from orders throughout this period.

52 For 2020, KSG forecasts team sales of $4 million; $2 million represents team sales on contract; $2 million represent other team sales and rebates. If adidas cuts off supply of adidas products to KSG, customers relying on rebates would lose $192,000.

53 In the normal course of business, SX generates adidas purchase orders up to six months in advance of shipment to ensure that its customers will have access to the adidas product when required.

54 SX currently has $1.5 million in open purchase orders with adidas which have been generated by SX to ensure that customers have product available for the fall sports season. From now until the fall, these orders remain open and subject to change. SX communicates with customers and adidas to finalize what products will actually be shipped based on the current demand for and availability of product. As this process is ongoing amongst the customers, adidas and SX, "batches" of adidas product are shipped to customers directly or to third party design companies over the period of time leading up to the fall sports seasons. At the point in time the orders are shipped, adidas issues an invoice for that particular batch of adidas goods and that invoice is paid by SX in the normal course.

55 Accordingly, the process of having "open purchase orders" with adidas is underway and is of fundamental importance to the Petitioners' ongoing business operations. That process involves an ongoing discussion between the Petitioners, their customers

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and adidas concerning the product to be shipped. Once the product is determined, the order is finalized. Once shipment occurs, adidas invoices the Petitioners for payment. Payment terms are as set out in the adidas Trade Agreement, typically net 30, 60 or 90 days.

Critical Supplier Issue

56 The critical supplier provision in s. 11.4 of the *CCAA* provides:

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

57 Accordingly, the decision tree under s. 11.4 requires a number of steps:

a) The court must determine if a person is a "supplier" and if the goods and services supplied by that person are "critical" to the debtor's continued operations. In that event, the court has the discretion to declare that person to be a "critical supplier" (s. 11.4(1));

b) If a person is declared to be a "critical supplier", the court has the discretion to order the continued supply of goods and services on certain terms (s. 11.4(2)); and

c) If the court declares that a critical supplier must continue to supply specified goods or services, it is mandatory that the court also order security or a charge in favour of the supplier, although the court has the discretion to determine the priority of any security or charge (s. 11.4(3) and (4)).

(1) Is adidas a "supplier" and are its goods and services "critical" to the Petitioners' continued operations?

58 Despite the difficult and acrimonious relationship that has arisen between the Petitioners and adidas, in deciding this issue, I have had the benefit of the independent evidence and analysis of both Mr. Johnson as CRO and PwC in its capacity as both Proposal Trustee and Monitor.

59 Adidas opposes any declaration that it is a "critical supplier". It takes the position that its products are not integral to the Petitioners' business and that the Petitioners are not dependent on the continued supply of those products to remain in operation. This position by adidas is, however, untethered to any evidence and in fact, is contradicted by the evidence.

60 The numbers, as confirmed by Mr. Johnson and the Monitor, clearly support that adidas is the largest supplier of product for the Petitioners' business:

a) In 2019, 52% ($3.5 million) and 21.5% ($3.2 million) of the top ten vendor purchases by SX and KSG, respectively, came from adidas. On a combined basis this represents 30.9% ($6.7 million) of the top ten vendor purchases;

b) In 2019, KSG sold $5.3 million of adidas product, accounting for 21.18% of sales for that year;

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c) SX sells more adidas product than any other brand. SX's total sales in past years are: $6,451,068 (2019); $7,264,109 (2018); $6,273,282 (2017);

d) In 2013, SX opened the Superstore and 70% of the Superstore's inventory has always consisted of adidas product; and

e) As of March 12, 2020, the Petitioners have open purchase orders with adidas for approximately $2.2 million, for deliveries into July 2020.

61 Mr. Johnson describes the continued supply of adidas product to the Petitioners to the end of the term of the adidas Trade Agreement as "critical" to their business operations and ability to preserve customer goodwill and meet their obligations to customers. He expresses the view that, if this relationship is not reinstated to normal or somewhat normal terms, the completion of the SPA with Greyrock will be jeopardized. In that event, he considers it unlikely that the Petitioners can find another purchaser and, without a sale, no plan can be presented that would see operations continue.

62 Similarly, the Monitor confirms that adidas is the Petitioners' largest supplier. The Monitor also describes that the Petitioners have integrated adidas into their sales and purchasing processes. Finally, the Monitor confirms its view that a discontinuation of the supply of adidas product to the Petitioners jeopardizes the viability of the businesses and increases the risk that the SPA conditions can not be met toward a conclusion of the sale to Greyrock. Accordingly, the Monitor opines that without such a declaration, the restructuring is in jeopardy.

63 In the above circumstances, I conclude and find as a fact that adidas is a "supplier" to the Petitioners and that the supply of its goods and services are critical to the Petitioners' continued operations at this time.

(2) Should the Court declare adidas to be a "critical supplier" and order continued supply?

64 Section 11.4 of the *CCAA* is intended to allow the Court to intervene and order continued supply where actions that might otherwise be taken by a supplier might jeopardize the restructuring efforts that are underway. Such relief is not unlike other *CCAA* provisions that allow relief which adversely affects other stakeholders in aid of these objectives and measures. The stay of proceedings and the priming of existing security are other examples.

65 In *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) at para. 43, Justice Pepall (as she then was) described an order under the provision as "facilitative and practical in nature".

66 As always, a balancing of interests is required in determining what is appropriate and fair in the circumstances. In that respect, the comments of the Court in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) bear repeating:

> [70] . . . 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.

67 I readily conclude that this Court should exercise its discretion to declare adidas as a "critical supplier" under s. 11.4(1) of the *CCAA* given the following circumstances:

a) The relationship between the Petitioners and adidas is significant, a point conceded by adidas' counsel in argument;

b) Adidas supplies unique branded goods to the Petitioners, as their customers wish to purchase and arising from the active promotion of adidas products by the Petitioners to their customers over the course of their long relationship;

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c) The relationship at this point is beyond repair and continues to be acrimonious. Adidas has indicated that it is not prepared to continue to supply without a court ordering it to do so;

d) The Petitioners do not have the capability to pivot away from the supply of adidas products in the near term to other or similar products;

e) Any disruption in the continued supply of adidas products at this time would have serious and negative repercussions to the Petitioners' business operations into the near term and would likely cause irreparable harm to their businesses;

f) If any disruption to the adidas supply occurs, with expected negative consequences, there is serious jeopardy to Greyrock's support of these proceedings; and

g) Without Greyrock's support of these proceedings, there is significant risk that the restructuring proceedings will fail entirely, with disastrous consequences to most stakeholders in the event of a liquidation of assets. Those stakeholders include the significant supplier group, which includes adidas.

68 In my view, declaring adidas to be a critical supplier is consistent with the statutory objectives of the *CCAA* and well supported by the circumstances here. It is so ordered. Adidas is ordered to continue to supply its products and provide services to the Petitioners under the arrangements in place prior to the NOI filings, until further court order. Those services will include providing access to the MiTeam and B2B platforms, as before.

(3) What terms should be imposed with respect to adidas' continued supply of goods and services?

69 Section 11.4(2) of the *CCAA* provides the Court with considerable flexibility to impose terms and conditions that are "consistent" with the supply relationship or that the Court considers appropriate. This allows the Court to exercise its discretion to impose the same or similar terms as were in place before the filing, or to impose such other terms as might be appropriate in the circumstances.

70 Any terms that might be imposed may be informed by the existing contractual terms between the parties, although the existence of a contract is not necessarily a prerequisite under s. 11.4. In addition, any existing terms and conditions may be modified by the Court as appropriate. Other appropriate terms may be imposed.

71 I have already outlined above the relief sought by the Petitioners in the ARIO with respect to adidas. Essentially, they seek an order moving away from a COD relationship or retainer arrangement and into something akin to the pre-NOI filings relationship, by which supply would occur, and payment would follow within specified time limits as set out in the adidas Trade Agreement.

72 Adidas takes the position that, if it is declared to be a critical supplier, any further orders or fulfillment of existing orders should be subject to the following conditions:

a) The Petitioners are required to take delivery in accordance with the date that the orders are ready for shipment for all orders to date moving forward, without rights of cancellation (ie. they are "final" now to avoid "cherry picking" orders);

b) The Petitioners remedy existing non-monetary defaults, including selling non-branded and knock-off products, alleged by adidas to be in breach of the adidas Trade Agreement;

c) The Petitioners pay monies into a solicitor's trust account in an amount to be paid to adidas 60 days in advance of shipment, such monies to be on a "rolling basis";

d) The Petitioners pay a "reasonable" contribution to the repayment of the pre-NOI filings debt (suggested by adidas' counsel at 30% of the amount outstanding or approximately $600,000);

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e) There be a clear expiration or review date of the compelled supply of July 31, 2020, or in any event, no later than the end of the term on November 30, 2020; and

f) The Petitioners pay adidas' legal fees in respect of the *CCAA* proceedings.

73 Adidas advances its argument, particularly as to the retainer arrangement, on the basis that the cash flows attached to the Monitor's report include budgeting for payment of ongoing supply, including from adidas, on a COD basis. This is said to be accommodated by the proposed increase in the Interim Lending Facility to $2.8 million, to be funded by Greyrock. Accordingly, adidas takes the position that it is not necessary to allow any outstanding payables to accrue and thereby expose adidas to payment risk. Adidas contends that the Petitioners' evidence only supports that it would be "convenient", not crucial, for the Petitioners to be supplied on credit, rather than continue in a COD supply arrangement.

74 Again, I return to the independent evidence before me provided by Mr. Johnson and the Monitor.

75 Mr. Johnson states in his Affidavit #3:

41. Based on the position being taken [by adidas], I am concerned that any go forward arrangement that relies on C.O.D. or retainer arrangements is not likely to be successful, will result in an unnecessary and cumbersome level of administration and will be contrary to the normal course of business. The current process between adidas and the Companies will allow for normal processing of orders, which avoids delays and an opportunity to verify that what is shipped, received and invoiced is consistent.

. . .

51. The Updated Cashflows do not reflect normal credit terms with adidas, however, a return to normal credit terms with adidas would provide flexibility in relation to uncertainties inherent in the cashflow projection, would decrease reliance on interim financing and reduce related costs, would streamline the administration process and reduce demands on the Companies finance group.

76 Similarly, the Monitor states in its First Report that, while the cash flows assume COD payments to adidas:

4.20 . . . it is preferable for the Companies to pay based on pre-filing terms as it is not practical from an administrative perspective for the Companies to pay adidas on a COD basis . . .

77 I accept the reasoning of both Mr. Johnson and the Monitor in this respect. I do not agree with adidas that ordering it back to normal supply terms is simply a matter of preference, and a cheaper preference at that, for the Petitioners and Greyrock, rather than having Greyrock finance a COD supply arrangement.

78 As mentioned, the state of the relationship between adidas and the Petitioners is extremely toxic at this time. I consider that any arrangement — such as a COD or rolling retainer arrangement — would introduce further levels of complexity and risk of conflict between them. If that should occur, as mentioned by Mr. Johnson, there is risk of delays and breakdowns in the ordering of product and shipments, all potentially very detrimental to the Petitioners' restructuring efforts. In addition, the added time, distraction and cost of managing and overseeing such a fractious relationship would detract from those restructuring efforts.

79 I reject adidas' other proposed terms as unreasonable in the circumstances.

80 As for the "cherry picking", this is inconsistent with what has occurred in the supply arrangement in the past. There is no reason to compel the Petitioners to accept delivery of products that they or their customers have not ordered and do not want, as confirmed to adidas through the existing arrangements. In my view, the "open purchase order" process should continue as before, which simply restores the *status quo* as between these parties.

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81 I have already rejected adidas' argument regarding the Petitioners selling knock-offs. This was only very recently advanced by adidas with respect to the Petitioners and was not raised in any fashion prior to the NOI filings. I make no determination of course with respect to that issue as it might be raised in these proceedings or otherwise. I would parenthetically add that adidas' present position on this issue is interestingly inconsistent with its other position that the Petitioners really have no need for adidas products because of their other options for supply.

82 I also reject adidas' demand for payment toward the pre-NOI filings debt. I acknowledge that it is within the discretion of the Court to order such a payment: see *Canwest Global Communications (Re)* at para. 41; *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) at paras. 23-24, 66-71; and *Northstar Aerospace Inc., Re*, 2012 ONSC 4546 (Ont. S.C.J. [Commercial List]) at paras. 11-15.

83 However, while factual circumstances supporting such payments toward pre-filing debt will differ, they often involve one or more of the following factors: the debtors having sufficient cash flow for such payment; the support of the debtor; the support of the Monitor; the likely payment of some amount to the unsecured creditor in any event under a plan; need on the part of the supplier; authorization to make such payments only as required and with ongoing approval and oversight by the Monitor; and, that such payment will secure the ongoing cooperation of the supplier for the continued supply of goods or services.

84 Here, none of these circumstances (or any other relevant circumstances) exist that would support the exercise of this Court's discretion to allow payment of such a large pre-filing sum to adidas. In particular, payment of such a large sum to adidas — well beyond what appears to be likely proposed in any plan of arrangement at the end of the day — would be seriously detrimental to other financial stakeholders and the success of the restructuring itself. Adidas would be clearly preferred in respect of other unsecured creditors, without any justification whatsoever.

85 In my view, it is not necessary to set any review date for this arrangement. As I will discuss below, I am acceding to the Petitioners' request to extend the stay of proceedings to July 31, 2020. I expect at that time that the matter of the supply arrangements with the Petitioners' suppliers, including adidas, will be the subject of evidence and also, comment and report by the Monitor. The continuation of the supply arrangements as I am ordering now with respect to adidas can be adjusted at that time, as necessary, based on that evidence.

86 I accept that the terms sought by the Petitioners in the ARIO with respect to adidas are not strictly set out; however, I do not agree that they are vague, as adidas argues. Those terms, as set out in the Initial Order, have been sufficiently stated and understood by the parties to date without issue: see *7098961 Canada inc., Re*, 2016 QCCS 2115 (C.S. Que.) at para. 187. Those terms simply restore the Petitioners and adidas to the arrangements or *status quo* in place just prior to the NOI filings. Any further delineation of the terms and conditions of the supply arrangement would only serve to hamstring the dynamic supply arrangements that were intended to and were in place under the former arrangements.

87 In addition, it remains the case that the Monitor will continue to oversee the ongoing operations of the Petitioners until the next hearing date at the end of July 2020. As part of that exercise, I expect that the Monitor will continue to determine if suppliers (including adidas) are being paid in the ordinary course, as the Petitioners propose and as provided for in the cash flow projections. I would also expect that, if issues arise, the Monitor can be involved to attempt to sort out the matters between the Petitioners and adidas. Failing a resolution of the matter through that process, it is of course open to the parties to return to this Court.

88 Finally, I also reject adidas' request for payment of its legal fees. In large part, I have found adidas' position to be unreasonable and I have rejected its position generally. There is no basis to reward that outcome by granting payment of adidas' legal fees.

89 There is, however, one point advanced by adidas with which I do agree. Payment terms under the adidas Trade Agreement include net payment periods of 30, 60 or 90 days. As adidas argues, this essentially amounts to adidas financing the Petitioners' operations to some degree where they might otherwise have been financed by Greyrock at some cost to the stakeholders generally. Net payment terms are a usual term and they were a feature of the relationship with the Petitioners, by which adidas did

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essentially agree to advance credit. Having said that, there is added financial uncertainty now given the restructuring proceedings and the current economic state of Canada, principally arising from the COVID-19 pandemic.

90 I consider that an appropriate balance between the Petitioners, adidas and the other stakeholders is to shorten those payment terms for adidas. I order that any payment terms under the adidas Trade Agreement shall be in accordance with that Agreement, but no more than 45 days net. This will reduce payment risk to adidas, as it has sought to do.

91 In summary, the relief sought by the Petitioners with respect to the terms and conditions of supply by adidas are granted, save and except to shorten the payment period as above.

(4) What security or charge should the Court provide for adidas and with what priority?

92 Having declared adidas to be a critical supplier and required to continue to supply the Petitioners on the above terms, the Court is required to order that security or a charge be imposed on the Petitioners' assets to secure the value of the goods and services to be supplied. As stated above, it is intended that adidas will be paid throughout the restructuring as supply occurs; however, there remains some risk that the restructuring will not be successful, leaving adidas exposed.

93 The Petitioners, supported by Greyrock, are proposing that the Critical Supplier Charge rank ahead of the Interim Lender's Charge and of course, the pre-filing security which includes the secured debt now held by Greyrock.

94 Both Mr. Johnson and the Monitor share the view that the assets of the Petitioners will be more than sufficient to satisfy any amounts owing under the Critical Supplier Charge should the restructuring prove unsuccessful. Specifically, they point to:

a) The Critical Supplier Charge would only be subject to the Administration Charge to a maximum of $200,000;

b) The net book value of the Petitioners' current assets as of April 30, 2020 exceeds $11 million, as represented by:

i. Inventory of $10 million (at average net cost);

ii. Accounts receivable of $1.8 million; and

c) The net book value of the Petitioners' fixed assets (property and equipment) as of December 2019 was $1.9 million.

95 I accept that the value of all of these assets could be compromised in the event of a liquidation, particularly given the uncertain and recessionary times into which the Canadian economy has fallen with the COVID-19 pandemic. However, I consider it extremely unlikely that, even with a significant fall in recoveries, there is any material risk of non-payment to adidas in these circumstances. Again, this is particularly so given that adidas will receive ongoing payments for supply; if such payments are not made in the ordinary course, I would expect that adidas will seek immediate relief in respect of the Critical Supplier declaration and Critical Supplier Charge.

96 The Critical Supplier Charge as sought is granted.

Approval of Amended Commitment Letter

97 The Initial Order authorized the Petitioners to continue to borrow under a credit facility from Greyrock and continued the Interim Lender's Charge under the BIA Orders, to the maximum amount of $1.4 million plus interest, fees and costs. Approximately $750,000 has already been drawn. The Petitioners seek to increase that amount to $2.8 million.

98 As previously stated, the Petitioners' cash flow projections to July 31, 2020 assume that the purchase of product is based on COD terms with most suppliers, which increases the pressure on cash flow and results in a much higher level of borrowings than anticipated. The Petitioners concede that, with the critical supplier declaration in favour of adidas and the requirement imposed on adidas to fund on the above terms, it is very possible that the full extent of this further borrowing will not be required.

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99 Pursuant to s. 11.2(4) of the *CCAA*, any increase in borrowing involves a consideration of the following factors, among other things:

> a) the period during which the company is expected to be subject to proceedings under [the *CCAA*];
>
> b) how the company's business and financial affairs are to be managed during the proceedings;
>
> c) whether the company's management has the confidence of its major creditors;
>
> d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> e) the nature and value of the company's property;
>
> f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> g) the monitor's report referred to in paragraph 23(1)(b), if any.

100 The Petitioners' cash flow sets out the requirements to help fund working capital as sports teams source uniforms and equipment to ready themselves for the spring/summer season. In addition, the Petitioners will require funding for on-going operations as they work towards finalizing the transaction with Greyrock and concluding these proceedings.

101 The Monitor will continue to oversee the Petitioners' business and financial affairs during these *CCAA* proceedings; that will include drawdowns on the Interim Lending Facility so as to ensure that it is being used only as needed. While perhaps the full amount will not be required, increasing the limit affords the Petitioners the flexibility of accessing those funds as circumstances arise, again with oversight by the Monitor.

102 No creditor of the Petitioners will be materially prejudiced as a result of the increase in the Interim Lender's Charge, including adidas since the Critical Supplier Charge ranks ahead of the Interim Lender's Charge and the further borrowings will be available, if needed, to fund payments to adidas with respect to ongoing supply.

103 The Monitor supports the increase to the Interim Lending Facility and the Interim Lender's Charge.

104 I conclude that the s. 11.2(4) factors support an increase to the Interim Lending Facility as proposed.

Claims Process Order

105 In conjunction with the Monitor, the Petitioners have developed and are seeking approval of a Claims Process Order to call for the submission of claims against the Petitioners.

106 Pursuant to s. 11 of the *CCAA*, the Court may make any order that it considers appropriate in the circumstances. Courts have in past relied on this broad statutory authority under the *CCAA* to grant claims process orders.

107 The proposed Claims Process Order allows for the usual steps and procedures in such a claims process, consistent with what has been previously ordered in many other restructurings. In particular, the process sets a claims bar date of June 30, 2020 to file claims or, with respect to a restructuring claim, within 10 days of receiving a notice of disclaimer or resiliation.

108 The Monitor supports the proposed Claims Process Order. The Monitor opines that this process should facilitate the implementation of a plan and the overall restructuring.

109 I conclude that, consistent with the statutory objectives of the *CCAA*, the claims process will bring some certainty to this restructuring proceeding in determining the claims that must be addressed by the Petitioners in any plan of arrangement. The

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proposed Claims Process Order is granted on the terms sought, with amendment of the various timelines set out in the proposed order to extend them by two business days, given the delay in giving these reasons.

Extension of Stay

110 Finally, the Petitioners are seeking to extend the stay period to July 31, 2020.

111 No stakeholder objects to such an extension.

112 The Monitor supports such an extension, confirming that the Petitioners have acted and continue to act in good faith and with due diligence, as required by s. 11.02(2) of the *CCAA*.

113 Clearly the extension of the stay is necessary for a number of reasons to advance the restructuring. The further time will allow the Petitioners to continue operations with a view to developing a longer term strategy that does not include supply from adidas. In addition, once the Claims Process is completed, a clearer picture will emerge toward developing a plan of arrangement for consideration of the creditors and the Court. Finally, as matters move along, the Petitioners and Greyrock can move toward completion of the SPA.

114 These reasons are consistent with the purpose and objectives of the *CCAA* and will enable the Petitioners to proceed with an orderly sale of their assets to maximize recovery to stakeholders, including all unsecured creditors which of course includes adidas.

115 I am satisfied that an extension of the stay to July 31, 2020 is appropriate in the circumstances and it is so ordered.

Request granted.

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TAB 8

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Jurisdiction of Courts

R.S.C. 1985, c. B-3, s. 183

s 183.

Currency

183.

183(1)Courts vested with jurisdiction

The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed 2001, c. 4, s. 33(2).]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench of the Province;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

183(1.1)Superior Court jurisdiction in the Province of Quebec

In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

183(2)Courts of appeal — common law provinces

Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

183(2.1)Court of Appeal of the Province of Quebec

In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with the power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

183(3)Supreme Court of Canada

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The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Amendment History
R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); 1990, c. 17, s. 3; 1993, c. 28, s. 78 (Sched. III, item 6) [Repealed 1999, c. 3, s. 12 (Sched., item 3).]; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 2001, c. 4, s. 33(2), (3); 2002, c. 7, s. 83; 2015, c. 3, s. 9

Judicial Consideration (6)

Currency
Federal English Statutes reflect amendments current to October 23, 2024
Federal English Regulations Current to Gazette EXTRA Vol. 158:3 (December 6, 2024)

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R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver

In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"

Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)

For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

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243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Judicial Consideration (9)

Currency
Federal English Statutes reflect amendments current to October 23, 2024
Federal English Regulations Current to Gazette EXTRA Vol. 158:3 (December 6, 2024)

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TAB 9

2023 QCCA 1295
Cour d'appel du Québec

Syndic de Chronométriq inc.

2023 CarswellQue 14729, 2023 QCCA 1295, EYB 2023-533699

(500-09-029763-216) ATTORNEY GENERAL OF CANADA, APPELLANT, v. RICHTER ADVISORY GROUP INC., in continuance of proceedings for Chronométriq Inc. and Health Myself Innovations Inc., RESPONDENT-PROPOSAL TRUSTEE, and CANADIAN IMPERIAL BANK OF COMMERCE, CANADIAN BANKERS' ASSOCIATION AND INSOLVENCY INSTITUTE OF CANADA, INTERVENERS

(500-09-029765-211) AGENCE DU REVENU DU QUÉBEC, APPELLANT, v. RICHTER ADVISORY GROUP INC., in continuance of proceedings for Chronométriq Inc. and Health Myself Innovations Inc., RESPONDENT-PROPOSAL TRUSTEE, and CANADIAN IMPERIAL BANK OF COMMERCE, CANADIAN BANKERS' ASSOCIATION AND INSOLVENCY INSTITUTE OF CANADA, INTERVENERS

Schrager J.C.A., Moore J.C.A., Weitzman J.C.A.

Heard: 12 september 2023
Judgment: 18 october 2023
Docket: C.A. Qué. Montréal 500-09-029763-216, 500-09-029765-211

Counsel: Mtre Kim Sheppard, Mtre George Body, Mtre Arianne Gauthier, For Attorney General of Canada
Mtre Daniel Cantin, For Agence du revenu du Québec
Mtre Hugo Anthony Babos-Marchand, Mtre Frédérique Drainville, For Richter Advisory Group inc., in continuance of proceedings for Chronométriq Inc. and Health Myself Innovations Inc.
Mtre Harvey G. Chaiton, Mtre Joshua Bouzaglou, For Canadian Imperial Bank of Commerce
Mtre Christian Lachance, Mtre Benjamin Jarvis, For Canadian Bankers' Association
Mtre Alain Riendeau, Mtre Brandon Farber, For Insolvency Institute of Canada

Subject: Insolvency; Corporate and Commercial; Income Tax (Federal); Provincial Tax

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Comstock Canada Ltd., Re (2013), 2013 ONSC 4700, 2013 CarswellOnt 9713, 5 C.B.R. (6th) 249 (Ont. S.C.J.) — referred to

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Statutes considered by *Benoît Moore J.C.A., Mark Schrager J.C.A., Lori Renée Weitzman J.C.A.*:

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art. 224(1.3) — considered

art. 227 — considered

art. 227(4.1) — considered

Loi sur l'administration fiscale, RLRQ, c. A-6.002

art. 20 — considered

Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3

art. 50.6 — considered

art. 50.6(1) — considered

art. 50.6(3) — considered

art. 54(2.1) — considered

art. 60(1.1) — considered

art. 64.1 — considered

art. 64.1(1) — considered

art. 64.2(1) — considered

art. 67 — considered

art. 67(3) — considered

art. 136 — considered

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985), ch. C-36

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art. 3 — considered

art. 6(3) — considered

art. 11 — considered

art. 11 et s. — considered

art. 11.2 — considered

art. 11.2(2) — considered

art. 11.51 — considered

art. 11.52 — considered

art. 37 — considered

Regulations considered by *Benoît Moore J.C.A., Mark Schrager J.C.A., Lori Renée Weitzman J.C.A.*:

Code de procédure civile, RLRQ, c. C-25.01

Règlement de la Cour supérieure du Québec en matière civile, RLRQ, c. C-25.01, r. 0.2.1

art. 51 — considered

***Schrager J.C.A., Moore J.C.A., Weitzman J.C.A.* :**

1 The Attorney General of Canada and the Agence du revenu du Québec appeal against the order rendered on October 27, 2021 by the Honourable Martin Castonguay of the Superior Court, District of Montreal, which approved a *Motion for the Issuance of an Order Authorizing and Approving the Interim Financing, an Administration Charge, a Sale and Investment Solicitation Process, a Directors and Officers Charge, a Key Employee Retention Program, Procedural Consolidation of the Estates, and other Relief*.

2 For the reasons of Justice Schrager, J.A., with which Moore and Weitzman, JJ.A. concur, *THE COURT*:

In the file number 500-09-029763-216

3 *DISMISSES* the appeal;

4 *THE WHOLE* without legal costs;

In the file number 500-09-029765-211

5 *DISMISSES* the appeal;

6 *THE WHOLE* without legal costs.

***Mark Schrager, J.A.* :**

I. INTRODUCTION

7 The Attorney General of Canada and the Agence du revenu du Québec (the "*Appellants*") appeal against the order (the "*Order Under Appeal*") rendered on October 27, 2021 by the Honourable Martin Castonguay of the Superior Court, District of Montreal, which approved a *Motion for the Issuance of an Order Authorizing and Approving the Interim Financing, an Administration Charge, a Sale and Investment Solicitation Process, a Directors and Officers Charge, a Key Employee Retention Program, Procedural Consolidation of the Estates, and other Relief* (the "*Motion*"). [1]

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8 Essentially, the case requires this Court to settle whether, under the *Bankruptcy and Insolvency Act*,[2] the Superior Court has the authority to order super-priority charges - an interim financing charge, an administration charge, and directors' and officers' charges - with priority over a deemed trust in favour of the Crown created by s. 227(4.1) of the *Income Tax Act*[3] (the "*ITA Deemed Trust*") and the equivalent provisions of Quebec law.[4] The case requires a close look at *Canada v. Canada North Group Inc.*,[5] in which the Supreme Court of Canada decided that the Superior Court has such authority under the *Companies' Creditors Arrangement Act* (the "*CCAA*").[6]

9 On October 26, 2021, faced with liquidity problems, Chronométriq Inc. and Health Myself Innovations Inc. (the "*Respondents-Debtors*") filed a notice of intention to make a proposal pursuant to s. 50.4 *BIA*. On the same date, they filed the Motion, seeking an order authorizing interim financing as well as a sale and investment process and the granting of the priority charges (whose treatment is the focus of the case). The ultimate goal expressed in the Motion was to find a purchaser or investors.

10 The Motion discloses a total indebtedness of $9,192,413, of which $3,193,414.20 was owed to three secured creditors:

1.	Canadian Imperial Bank of Commerce (an intervener in this proceeding)	$2,923,724
2.	Investissement Québec	$139,055
3.	Business Development Bank	$130,635

11 The balance was due to unsecured creditors, although the Respondents-Debtors further represented in their proceedings that $3,181,454 in unremitted source deductions was owed to the Agence du revenu du Québec and to the Canada Revenue Agency.

12 The Appellants, having received the notice less than four hours before the hearing of the Motion was scheduled to take place on October 27, 2021, requested an adjournment of the hearing, which the judge denied.[7] James Feldkamp, Chronométriq Inc.'s Chief Executive Officer, testified to the operating costs of Respondents-Debtors regarding salaries, consultants' fees, equipment, and services provided by suppliers such as cloud service providers, client support, and messaging. Without funding, the Respondents-Debtors would not be able to continue to provide health software services, such that their value would be substantially diminished given that the only asset of note beyond a going concern was intellectual property. According to Andrew Adessky, the representative of the proposal trustee, Respondent (the "*Proposal Trustee*"), the requested super-priority charge for the interim financing was calculated based on the cashflows of the Respondents-Debtors. The purpose of the interim financing was to sustain their operations until the end of the projected sale and investment solicitation process proposed in the Motion and scheduled to be completed within a month. He confirmed that, in his experience, the continuation of operations would enhance value.

13 The Order Under Appeal was issued on the same day as the hearing. It authorizes, *inter alia*: (1) interim financing, with a corresponding charge of $1,920,000; (2) an administration charge of $200,000 for the fees of the Proposal Trustee and its counsel as well as those of counsel for the Respondents-Debtors; and (3) a directors' and officers' charge of $250,000.

14 Relying on ss. 50.6, 64.1, 64.2 and 183 *BIA*, the judge ordered that the three charges rank in priority over all other interests, including the *ITA* Deemed Trust. The relevant parts of the Order Under Appeal read:

> [34] **ORDERS AND DECLARES** that each of the Charges shall constitute a charge on the Property and that such Charges shall rank in priority to any and all other hypotecs [*sic*], mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the « Encumbrances »), or trusts (statutory or otherwise) affecting the Property in favour of any person.
>
> (. . .)
>
> [37] **ORDERS AND DECLARES** that notwithstanding:

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(. . .)

> **(d)** the provisions of any federal or provincial statute; (. . .)
>
> the Charges shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors and shall not be void or voidable by any person, including any creditor of the Debtors, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable or reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

15 As is often the case in such circumstances, the Order Under Appeal was drafted and presented to the judge by counsel and does not include lengthy or detailed reasons. The judge gave brief reasons in an oral judgment upon issuing the Order Under Appeal. He was convinced that "sans les mesures demandées, la compagnie [. . .] n'a aucune chance de survie". He concluded that the tax authorities would not be worse off as a result of the order granting super-priority charges, and in the exercise of his discretion said this:

> Alors, là, je regarde, je soupèse puis, et j'ai quand même une certaine discrétion, pis me semble que c'est un cas où je dois exercer ma discrétion pour permettre, au moins donner une chance, que ce soit par qui que ce soit, pour que ce service-là continue entre-temps, et on va voir, c'est pas, on ne parle pas d'une situation qui peut durer éternellement, on parle de six semaines. Alors, pour toutes ces raisons, le tribunal va signer le projet d'ordonnance qui lui a été fourni.

16 On November 8, 2021, the Appellants each filed notices of appeal before the Court, in similar terms, within the legal time limit. On December 20, 2021, Baudouin, J.A. granted leave to intervene to the Canadian Imperial Bank of Commerce ("*CIBC*"), the interim lender.[8] On February 7, 2022, she also granted leave to intervene to the Canadian Bankers' Association[9] and she further granted the Agence du revenu du Québec's application for consolidation of the appeals.[10] Hamilton, J.A. granted leave to intervene to the Insolvency Institute of Canada on February 24, 2022.[11] The Appellants filed a joint brief to serve in both appeals, which were joined for hearing.

17 The Court was informed that on November 25, 2021, Immer, J.S.C. issued an *Extension Approval, Vesting and Assignment Order*,[12] which approved a transaction whereby TELUS Health Solutions Inc. purchased the majority of the Respondents-Debtors' assets free of all encumbrances and hired the majority of the employees working for the Respondents-Debtors.

18 The net proceeds of the transaction, amounting to $2,210,000, were paid and are now held by the Proposal Trustee until further order by the Superior Court. The amount is insufficient to pay both the super-priority charges of approximately $2,370,000 and the unremitted source deductions of approximately $3,181,454 owed to the Appellants.

II. ISSUES

19 The parties formulate the issues differently, but, in essence, the Court is tasked with deciding the following:

- In the context of a proposal under the *BIA*, does the Superior Court have jurisdiction to grant super-priority charges that rank ahead of the *ITA* Deemed Trust (i.e., the deemed trust in favour of the Crown created by s. 227(4.1) of the *ITA* and the corresponding provisions of provincial law)?

- Did the Superior Court violate the principle of *audi alteram partem* in dismissing the Appellants' request for an adjournment?

III. PARTIES' POSITIONS

20 Essentially, the Appellants submit that, under the *BIA*, the judge did not have any power to order super-priority charges that rank ahead of the *ITA* Deemed Trust and the provincial equivalent. Parliament has enacted mechanisms, including the *ITA*

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Deemed Trust, to protect unremitted source deductions, because amounts are sometimes misappropriated, and the tax authority is an "involuntary creditor" with limited information that relies on taxpayer filings.

21 The Appellants argue that s. 227(4.1) *ITA* and comparable provisions in other statutes give "absolute" priority to the tax authority for unremitted amounts - in the case at bar, the unremitted source deductions - by creating a deemed trust over the property of the debtor notwithstanding the *BIA*. The amounts of the *ITA* Deemed Trust are paid in priority to the security interests, which, following the Supreme Court ruling in *Canada North*, include the court-ordered super-priority charges. Section 67(3) *BIA* confirms the absolute priority of the *ITA* Deemed Trusts.

22 Moreover, none of the statutory super-priority charge provisions, the provisions of the *BIA* or the Superior Court's inherent jurisdiction recognized in s. 183 *BIA* authorize it to subordinate *ITA* Deemed Trust claims to any charge on the debtor's property. Sections 50.6(1), 64.1(1) and 64.2(1) *BIA* do not apply because the Crown is not a secured creditor, as that expression was interpreted in *Canada North*. The inherent jurisdiction of the court does not permit the displacement of the clear language of s. 227(4.1) *ITA*.

23 *Canada North*, [13] in which the Supreme Court of Canada decided that *CCAA* courts could grant super-priority charges ranking in priority over the aforesaid *ITA* Deemed Trust, is not applicable to a proposal made under the *BIA*. While s. 11 *CCAA* provides broad discretion to supervising judges consistent with the flexibility and discretion associated with that statute, the *BIA* is a rules-based statute that does not contain a similar provision.

24 On the second question, the Appellants argue that the judge did not provide them with a sufficient opportunity to present their arguments: they were served the Motion less than four hours before the hearing. The judge therefore should have granted the request for an adjournment.

25 The Appellants argue that because the judge lacked jurisdiction to make the Order Under Appeal, it must be set aside. They also maintain that the deemed trust rights operate "notwithstanding any security" - i.e., that of the Respondents-Debtors' existing secured creditors, of which only the CIBC is a party to this appeal, being the interim lender benefitting from the super-priority pursuant to the Order Under Appeal. However, given that the amount outstanding covered by super-priority charges exceeds the net proceeds of realization, it is not necessary to decide whether the Appellants would outrank the CIBC for the balance of the proceeds of realization beyond the amount outstanding under the interim loan.

26 All the other parties argue that the judge had jurisdiction to make the Order Under Appeal and, specifically, to order the granting of a charge with priority over the deemed trusts. They add that the judge did not breach the principle of *audi alteram partem* and that he did not err in exercising his discretion to refuse an adjournment.

IV. DISCUSSION

In the context of the proposal under the BIA, does the Superior Court have jurisdiction to grant super-priority charges that rank ahead of the ITA Deemed Trust, i.e., the deemed trust in favour of the Crown created by s. 227(4.1) of the ITA and the corresponding provisions of provincial law?

27 I agree with the Respondent that the judge had jurisdiction to make the Order Under Appeal and that the charge to secure the interim financing ranks ahead of - or "primes" - any rights of the Appellants under the deemed trusts.

28 To a large extent, the outcome of this case depends on one's reading of the decision of the Supreme Court of Canada in *Canada North.* [14] In that case, the Supreme Court decided that the *ITA* Deemed Trust could be subordinated pursuant to a judge's order for interim financing under the *CCAA*. As seen above, the Appellants maintain that such is not the case regarding orders under the *BIA*. The thrust of the appeal concerns the court-ordered charge to secure interim financing, such that my reasons do not address the administration charge or the directors' and officers' charge *per se*. Before examining in detail the judgment in the matter of *Canada North*, it is useful to set out the statutory provisions creating the *ITA* Deemed Trust: [15]

227 (...) **227** [...]

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Extension of trust
(4.1) Notwithstanding any other provision of this *Act*, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this *Act*, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.
Meaning of security interest
(4.2) For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

Non-versement
(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;
b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

Sens de garantie
(4.2) Pour l'application des paragraphes (4) et (4.1), n'est pas une garantie celle qui est visée par règlement.

29 Section 224(1.3) *ITA*, which defines the expression "secured creditor", an expression that is invoked in s. 227(4.1) *ITA*, is set out in the Appendix to these reasons.

30 In addition, the *BIA* provides that a court may order a security charge that ranks in priority over the claim of any secured creditor of the debtor, such charge applying to interim financing (s. 50.6 *BIA*), to the indemnification of directors (s. 64.1 *BIA*) and to administration costs (s. 64.2 *BIA*). The following are also pertinent for purposes of the analysis: s. 60(1.1) *BIA*, which provides that in order for the court to approve a proposal, certain Crown claims - including those related to unremitted source deductions - must be dealt with in the proposal to the satisfaction of the Crown; and s. 67 *BIA*, which preserves the *ITA* Deemed Trust in the *BIA* as regards the property of the bankrupt. These provisions are also set out in the Appendix.

31 Sections 11.2, 11.51 and 11.52 *CCAA* are the functional equivalent of ss. 50.6, 64.1 and 64.2 *BIA* in providing for the court's discretion to order super-priority charges. Section 6(3) *CCAA* is equivalent to s. 60(1.1) *BIA* and s. 37 *CCAA* resembles s. 67 *BIA* for our purposes. All of these are set out in the Appendix.

32 There are four sets of reasons in *Canada North*: two for the majority (Justice Coté, with Chief Justice Wagner and Justice Kasirer concurring; and Justice Karakatsanis, with Justice Martin concurring), and two for the dissent (Justices Brown and Rowe, with Justice Abella concurring, as well as the separate reasons of Justice Moldaver).

33 Justice Côté observed that without the availability of super-priority charges, interim lending in insolvency would become impossible on a practical level given the high degree of risk involved. Professionals and financiers cannot be expected to put their time or money at risk only to learn after the fact that reimbursement to them is superseded by a deemed trust. [16] She

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reasoned that given the large and liberal interpretation required to give effect to the remedial nature of the *CCAA*, absent a specific impediment to subordinating the deemed trust, a *CCAA* court has jurisdiction to do so.[17] Specifically, Justice Côté found this jurisdiction in s. 11 *CCAA*:

> **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.
>
> **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.

34 She added that the general power found in s. 11 *CCAA* is not restricted by the specific powers in ss. 11.2, 11.4, 11.51 and 11.52 *CCAA*.

35 This is a relevant place to address a central argument put forward by the Appellants, based on s. 11.2(2) *CCAA*, which reads as follows:

> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **(2)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

36 It is identical to s. 50.6(3) *BIA*:

> **50.6(3)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.
>
> **50.6(3)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

37 Justice Côté did not say whether the *ITA* Deemed Trust is or is not "security". She did find that there was authority to order the priming charge, which authority is grounded in s. 11 and following *CCAA*:

> 70. As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create "two distinct approaches - one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96).
> Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of
>
> 70. Comme nous l'avons vu plus haut, le pouvoir du tribunal de surveillance d'ordonner des charges super prioritaires est fondé sur le vaste pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, ainsi que sur les pouvoirs plus spécifiques que lui accordent les art. 11.2, 11.4, 11.51 et 11.52. Ces dispositions autorisent le tribunal à accorder certaines charges prioritaires qui prennent rang devant les créances de « tout créancier garanti ». Bien que j'aie déjà conclu que Sa Majesté ne possède pas d'intérêt à titre de propriétaire du fait de sa fiducie présumée, il est moins sûr que la Couronne soit un « créancier garanti » au sens de la *LACC*. Selon le professeur Wood, la fiducie présumée dont bénéficie Sa Majesté ne lui confère pas la qualité de « créancier garanti » au sens de la *LACC*.
>
> Les articles 37 à 39 de la *LACC* créent plutôt [traduction] « deux approches distinctes : l'une qui s'applique à la fiducie réputée, l'autre qui entre en jeu lorsque la loi reconnaît à la Couronne la qualité de "créancier garanti

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> "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68 70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.
>
> » (p. 96). Par conséquent, le fait de faire passer une charge prioritaire devant la fiducie réputée déborderait le cadre des dispositions portant expressément sur les charges prioritaires. Je n'ai pas à trancher de façon définitive la question de savoir si Sa Majesté répond à la définition de « créancier garanti » au sens de la *LACC* du fait de sa fiducie. Je ferais plutôt reposer le pouvoir du tribunal de surveillance sur l'art. 11, qui « permet aux tribunaux de constituer des charges prioritaires qui ne sont pas expressément prévues par la *LACC* » (p. 98). Avec égards, je ne suis pas d'accord avec la suggestion de mes collègues les juges Brown et Rowe suivant laquelle le professeur Wood ou d'autres auteurs auraient laissé entendre que la portée de l'art. 11 est limitée par les dispositions spécifiques qui le suivent (par. 228). Au contraire, notre Cour a déclaré aux par. 68-70 de l'arrêt *Century Services* que la possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'avait pas pour effet de restreindre le vaste pouvoir conféré par l'art. 11.
>
> (Emphasis added)

38 In her interpretation of s. 227(4.1) *ITA*, Justice Côté found that the *ITA* Deemed Trust does not create a proprietary interest as would a trust at common law or civil law, since the conditions precedent for such creation are not met by the wording of the statute. [18] The *ITA* Deemed Trust might be akin to a floating charge, as the Supreme Court observed in *First Vancouver*. [19] Justice Côté did not conclusively decide that the *ITA* Deemed Trust is not a security interest, but she was clear that it does not create a proprietary interest that would take whatever property is subject to it out of the debtor's patrimony. [20]

39 Justice Côté continued, noting that the court-ordered super-priority charges under the *CCAA* are not "security interests" within the meaning of s. 224(1.3) *ITA*. Thus, the *ITA* Deemed Trust, which operates notwithstanding any "security interest", does not rank ahead of the court-ordered super-priority. It is important to underline that Justice Côté's opinion here is a function of the wording of the definition of "security interest" in s. 224(1.3) *ITA*: [21] "Court-ordered super-priority charges are utterly different from any of the interests listed [in s. 224(1.3) *ITA*]", she wrote.

40 I note here that any strength the Appellants' position might have, relies in large measure on the argument that s. 50.6(3) *BIA* does not give a judge the power to declare that a court-ordered priority ranks ahead of the *ITA* Deemed Trust. In other words, the *ITA* Deemed Trust is not "security" and the government claiming under the *ITA* Deemed Trust is not a "secured creditor" within the meaning of s. 50.6(3) *BIA* and the definition found in s. 2 *BIA*. Thus, its rank cannot be re-ordered, say the Appellants. Justice Côté did not say this in any definite manner. [22]

41 Justice Karakatsanis, in her concurring reasons, found that the government claiming under the *ITA* Deemed Trust is not a secured creditor under the *CCAA*. [23] Any beneficial interest that could be claimed under the *ITA* Deemed Trust is *sui generis*. Such rights are not captured by the wording of s. 11.2 *CCAA*. However, the broad discretion under s. 11 *CCAA* provides sufficient power to make an order creating a super-priority charge ranking ahead of the *ITA* Deemed Trust. She further added: "This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust." [24]

42 The dissenting reasons of Justices Brown and Rowe are underlined by the Appellants since all the dissenting judges taken with Justices Karakatsanis and Martin comprise six judges who clearly stated that the government claiming under the *ITA* Deemed Trust is not a secured creditor within the meaning of the *CCAA*. This is the Appellants' springboard to argue that s. 50.6(3) *BIA* does not apply to empower the judge to subordinate the deemed trusts.

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43 At the hearing, the Appellants attempted to identify a *ratio decidendi* favourable to their position from the *dicta* of a majority in number of the judges, including those who dissented in the result. To such end, the Appellants rely on *Ibanescu v. R.*, [25] in which the Supreme Court said:

> (...)
> In our view, a statement of a legal principle that is accepted by a majority of the Court constitutes the opinion of the Court with respect to that legal principle. This is so even if some of the members of the Court who endorse that legal principle dissent from the majority's disposition of the appeal.
>
> [...]
> Selon nous, l'énoncé d'un principe juridique auquel souscrivent en majorité les juges de la Cour représente l'avis de la Cour sur ce principe juridique. Il en va ainsi malgré le fait que certains juges de la Cour qui adhèrent à ce principe sont dissidents pour ce qui est du dispositif du pourvoi.

44 Consequently, the Appellants argue that Justice Karakatsanis (and Justice Martin) [26] as well as Justices Brown and Rowe (and Justice Abella) [27] hold that s. 227(4.1) *ITA* creates a beneficial interest in favour of the Crown, such that the opinion of Justice Côté (with Justices Wagner and Kasirer) to the effect that the provision does not create a proprietary interest [28] is a minority view. Similarly, the Appellants maintain that Justices Karakatsanis (and Martin), [29] with Justices Brown and Rowe (and Justice Abella) [30] and Justice Moldover hold [31] that the Crown is not a secured creditor under the *CCAA* for its *ITA* Deemed Trust claim.

45 The Respondent, relying on the Supreme Court in *Henry*, [32] argues that *stare decisis* attaches to the result or ultimate conclusion of the judges. Indeed, in *Henry*, the Supreme Court stated:

> 57. (...) All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative.
>
> 57. [...] Les remarques incidentes n'ont pas et ne sont pas censées avoir toutes la même importance. Leur poids diminue lorsqu'elles s'éloignent de la stricte *ratio decidendi* pour s'inscrire dans un cadre d'analyse plus large dont le but est manifestement de fournir des balises et qui devrait être accepté comme faisant autorité.

The exercise suggested by the Appellants - parsing each judge's reasons on specific issues - does not change the fact that five judges (i.e., the majority) all found that s. 11 *CCAA* confers the power on a court to order that the s. 227(4.1) *ITA* Deemed Trust be subject to a priming charge in favour of an interim lender.

46 The proposal provisions in the *BIA* serve, *inter alia*, [33] the same remedial purpose as those in the *CCCA* - i.e., the financial rehabilitation of an insolvent corporate debtor. [34] Indeed, the Supreme Court has indicated that, to the extent possible, the two statutes should be treated in a harmonized fashion. [35] In the instant case, Parliament has done this by incorporating virtually identical provisions providing for interim lending in the *BIA* and the *CCAA*. The Supreme Court also instructs that one should first seek a juridical solution through statutory interpretation before looking to inherent jurisdiction as a source of judicial authority or power. [36]

47 With these basic principles in mind, I believe that the judge in the case at bar had the authority to make the Order Under Appeal and, specifically, to declare that the charge to secure the interim financing would rank in priority to the claims under the *ITA* Deemed Trust.

48 There is certainly nothing in the *BIA* that prohibits this. More specifically, I do not believe that ss. 67(2) and (3) *BIA* are an impediment to this position. In their respective reasons in *Canada North*, Justices Côté and Karakatsanis commented on the impact of ss. 6(3) and 37 *CCAA* on the *ITA* Deemed Trust. [37] These provisions are similar to ss. 67 and 60(1.1) *BIA*. Applying

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their *dicta* to s. 67 *BIA*, the *ITA* Deemed Trust survives the filing of a notice of intention to file a proposal, but the manner of that subsistence is that an eventual proposal of the debtor cannot receive court approval unless it provides for payment of the amount protected by the *ITA* Deemed Trust within six months of court sanction, as set forth in s. 60(1.1) *BIA*, which is similar to s. 6(3) *CCAA*.

49 The judge's power to establish the rank of the charge to secure an interim loan is found in s. 50.6(3) *BIA*. This provision is virtually identical to s. 11.2(2) *CCAA*. The Appellants maintain that since the judges of the Supreme Court in *Canada North* said that the tax authority is not a secured creditor when claiming under the *ITA* Deemed Trust, the judge cannot make an order under s. 50.6(3) *BIA* to establish the rank of the charge vis-à-vis the *ITA* Deemed Trust.

50 It is difficult to discern such a clear holding in *Canada North* or to extrapolate an argument applicable to this case. The Appellants' position would lead to the conclusion that a judge can only create a charge that ranks ahead of secured, but not unsecured creditors. This is an untenable position for the following reasons. If the *ITA* Deemed Trust does not make the Crown a secured creditor under the *BIA*, then it is unsecured or ordinary within the scheme of the *BIA*. No one suggests that the Crown has a preferred claim under s. 136 *BIA*. Indeed, the Crown is, in principle, an unsecured creditor under the *BIA*.[38] It is not even treated as secured for voting purposes for its *ITA* Deemed Trust claim.[39] Any security created to secure interim lending pursuant to s. 50.6(1) *BIA* ranks - by definition and without the need for explicit wording in s. 50.6 *BIA* - ahead of, and is treated in priority to, the rights of unsecured or ordinary creditors. That is, those creditors not benefiting from security are paid after or "subject to the rights of the secured creditors" (s. 136 *BIA*). Thus, the rights (unsecured) of the Crown under a s. 227(4.1) *ITA* Deemed Trust would be subject to the rights of an interim lender secured pursuant to an order made under s. 50.6 *BIA*. Regarding its *ITA* Deemed Trust claims, the Crown does, however, get an advantage in a proposal under the *BIA* in that it is obligatory to provide for payment in full of the Crown claims within six months of court approval (s. 60(1.1) *BIA*).

51 Moreover, it would seem nonsensical in the overall scheme of the *BIA* that a court could order that the interim lending charge take priority over the claim of any hypothecary or mortgage creditor but not over the claim of an unsecured creditor benefiting from a *sui generis* non-proprietary right akin to a floating charge, that is, the *ITA* Deemed Trust. In addition, the judge has all the powers ancillary and necessarily incidental to the power under s. 50.6 *BIA*.[40] This should include subordinating the *ITA* Deemed Trust - or "priming" the charge - because it is incidental to the creation of the interim lending charge that the judge determine its rank *vis-à-vis* other creditors. The creation of a charge without a determination of its rank is useless.

52 It is self-evident, and has been recognized by the Supreme Court, that without the ability to establish a super priority, financiers would not offer interim or debtor-in-possession ("*DIP*") loans.[41] Interim lending charges are an essential ingredient of the restructuring process.[42] The Alberta Court of Appeal noted that 75% of restructurings include interim lending.[43] Thus, the outcome suggested by the Appellants' reading of the *BIA* would make interim financing under s. 50.6 *BIA* unavailable to companies that seek to file a proposal under the *BIA*. As such, companies with total indebtedness of less than $5 million (i.e., the threshold for the *CCAA* to be available pursuant to s. 3 *CCAA*) could not obtain interim financing. This is far from the harmonization to be favoured in applying the two statutes. Moreover, such a state of affairs negates any practical effect or application of s. 50.6 *BIA*. Parliament does not speak for naught.[44] I do not accept that the Appellants' interpretation of the *BIA* is the policy outcome Parliament intended.

53 I therefore find, on the basis of statutory interpretation, that the judge had the power to issue the Order Under Appeal with respect to the interim financing charge.

54 If and to the extent that my exercise of statutory interpretation of the *BIA* is wrong, I believe that the judge's power to order the creation of priming charges is justified by his inherent jurisdiction.

55 As noted, in *Canada North*, the Supreme Court found that the judge had the power to make the priming order, finding so after going through an exercise of statutory construction that led the Court to s. 11 *CCAA*, which has no equivalent in the *BIA*. There is therefore a gap in the *BIA*.

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56 Although the Supreme Court based its decision on the broad discretion found in s. 11 *CCAA*, insolvency practitioners are well aware of the fact that even prior to the 2005 amendment to s. 11 *CCAA*, courts approved DIP financing, granted priority charges and made other orders based on the inherent jurisdiction of the court. [45] This line of jurisprudence was taken up under the *BIA*. [46]

57 The existence of the Superior Court's inherent jurisdiction - including, specifically, in the exercise of its jurisdiction under the *BIA* - is recognized in s. 183 *BIA* as well as by application of art. 49 of the Quebec *Code of Civil Procedure*. [47] Judgments of this Court have acknowledged the existence of this inherent jurisdiction under the *BIA*. [48]

58 In matters of insolvency, courts have held that, as pragmatic problem solvers, they could exercise their inherent jurisdiction to effect a remedy or fill statutory gaps. [49] The jurisprudence has evolved to include substantive law within the purview of the inherent jurisdiction, [50] despite criticism. [51] At the same time, the inherent jurisdiction must be used sparingly and with caution because of its broad and loosely defined nature. [52] Inherent jurisdiction cannot be used in contravention of statutory provisions. [53] It is also limited by the nature of the *BIA*:

> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at 480; *Wasserman Arsenault Ltd. v. Sone* (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th)145 (Ont. C.A.). (. . .)
>
> [21] Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. (. . .) [54]

59 In *Stephen Francis Podgurski (Re)*, Chief Justice Morawetz, of the Ontario Superior Court of Justice, delineated a broad definition of inherent jurisdiction in the context of insolvency. Here, too, in the search for a "just and practical response" - and because he found that the inherent jurisdiction of the court is broad and diverse, unlimited in substantive law and exercisable in any situation [55] - he granted a sweeping motion by the Superintendent of Bankruptcy, which had the effect of extending time limits and tolerating more extensive payment defaults in all cases in the context of COVID-19.

60 I would point out that inherent jurisdiction attaches to the Superior Court, such that the same inherent jurisdiction exists whether the *CCAA* or the *BIA* is applied. Historically, inherent jurisdiction has been exercised more often upon application of the *CCAA*, presumably because its skeletal nature makes for more gaps than is the case for the *BIA*, which offers a detailed rules-based regime. That being said, when a gap is identified upon applying the *BIA*, the inherent jurisdiction allows the gap to be filled when and as appropriate.

61 If the statutory interpretation exercise does not lead to the conclusion that the judge in the instant case had the power to order that the charge to secure the interim financing take precedence over the Appellants' deemed trust rights, then such exercise must be taken as disclosing a gap in the legislation. Indeed, the linchpin of the Appellants' position gleaned from *Canada North* is that the absence of an equivalent to s. 11 *CCAA* in the *BIA* means that the judge had no authority to subordinate the *ITA* Deemed Trust to the charge he created. On the contrary, given that s. 11.2 *CCAA* and s. 50.6 *BIA* are identical, the absence of a s. 11 *CCAA* equivalent in the present context must be taken as a gap to be filled by the exercise of inherent jurisdiction empowering the judge to establish the rank of the interim lending charge ahead of the *ITA* Deemed Trust. Moreover, no provision of the *BIA* explicitly prohibits this.

62 The Agence du revenu du Québec is the Appellant in record 500-09-029765-211. It joined the Attorney General of Canada to file one brief serving both Appellants. It relies on the deemed trust created by s. 20 of the *Tax Administration Act*: [56]

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20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.
Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.
However, the person may, when filing a return with the Minister under any of sections 468, 470 and 477.10 of the Act respecting the Québec sales tax (chapter T-0.1), withdraw from the total amount that the person is deemed by the first paragraph to hold in trust for the State, the amounts that the person is entitled to deduct and that the person has actually deducted in the calculation of the amount to be remitted.

20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.
En cas de non-versement à l'État, selon les modalités et dans le délai prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.
Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu de l'un des articles 468, 470 et 477.10 de la Loi sur la taxe de vente du Québec (chapitre T-0.1), retirer du montant total qu'elle est réputée par le premier alinéa détenir en fiducie pour l'État, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre.

This is provincial legislation of the same nature as s. 227(4.1) *ITA*, as provided for in s. 67(3) *BIA*. Counsel for the Agence du revenu du Québec were heard and conceded that the rights under s. 20 of the *Tax Administration Act* are to be treated in the same manner as those under s. 227(4.1) *ITA*. Indeed, my reasons herein regarding the *ITA* Deemed Trust apply equally to a consideration of the Quebec legislation and the deemed trust provided for therein.

Did the Superior Court violate the principle of audi alteram partem in dismissing the Appellants' request for an adjournment?

63 The power to allow or dismiss a motion to adjourn is discretionary. An appellate court will not intervene unless the decision is wrong in law, the discretion was not exercised judicially, or a party's right was violated. [57]

64 With respect to insolvency matters more specifically, the Supreme Court recently stated that a motions judge enjoys a large discretion, to which an appellate court owes a great degree of deference. A court of appeal will only intervene where the judge has erred in principle or exercised their discretion unreasonably. [58]

65 No intervention is warranted in the instant case. Insolvency proceedings are often issued with short notice [59] in urgent situations. [60] Specifically, interim finance orders have been granted on short or no notice. [61] Although it was on short notice, the Appellants were nevertheless heard by the judge.

66 While I do not approve of giving short notice of significant proceedings, in the instant case, it is unclear whether the situation was so urgent that the judge could not have granted a short adjournment of one or two days without prejudice to the Respondents-Debtors. Nevertheless, deference is due to the judge's exercise of his discretion to refuse the adjournment, and it has not been demonstrated that the refusal was an unreasonable exercise of that discretion. Moreover, the Appellants appear not to have suffered prejudice as a result of that refusal and the granting of the interim financing, because their argument regarding the priming charge is one of law subject to the correctness standard of review. Accordingly, if the judge was wrong in law, this Court could intervene, and the Appellants, having thus succeeded on that ground of appeal, would be paid from the funds set

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aside, to the detriment of the CIBC, which provided the interim financing. In a sense, the Appellants were possibly better off by reason of the judge's refusal to grant the adjournment, since the Order Under Appeal resulted in the injection of new funds from which the Appellants could potentially have been paid had the Court decided that the interim lender's charge does not rank ahead of the *ITA* Deemed Trust.

67 The Appellants are not attacking the actual grant of the financing or the charges themselves, but rather the "priming" of the charges. In any event, the judge exercised his discretion based on the evidence before him as to the lack of liquidity, the need for financing in order to maintain some form of operations during the sale process and the Proposal Trustee's evidence that greater value would be generated if the Respondents-Debtors' business were continued as a going concern. Given this evidence and the deference due to the judge's exercise of that discretion, there is no basis for this Court to intervene in the judge's decision to grant the interim financing sought and the priming charges.

68 For all of the above reasons, I would dismiss the appeals. Because the parties failed to reproduce, in Schedule II of their briefs, the various statutory enactments to which they refer, as required by s. 51 of the Court's rules, [62] I would not award legal costs.

Apprendix

Provisions under the Income Tax Law

Definitions (...) **224 (1.3)** (...) ***security interest***?means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;?(*garantie*)	**Définitions**[...] **224 (1.3)** [...] ***garantie***?Intérêt ou, pour l'application du droit civil, droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les intérêts ou, pour l'application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.?(*security interest*)

Provisions under the Bankruptcy and Insolvency Act

Order - interim financing **50.6 (1)** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made. (...) **Priority** **(3)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.	**Financement temporaire** **50.6 (1)**Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), 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 du débiteur 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 au débiteur la somme qu'il approuve compte tenu de l'état - visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas - portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance. [...] **Priorité - créanciers garantis** **(3)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur**.**

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(...)

Factors to be considered

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

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

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

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

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

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

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

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Certain Crown claims

60 (1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the Canada Pension Plan or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the Canada Pension Plan, 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 similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

[...]

Facteurs à prendre en considération

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

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

g) le rapport du syndic visé aux alinéas 50(6)b) ou 50.4(2)b), selon le cas.

Certaines réclamations de la Couronne

60 (1.1) Le tribunal ne peut, sans le consentement de Sa Majesté, approuver une proposition qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'approbation, de tous les montants qui étaient dus lors du dépôt de l'avis d'intention ou, à défaut, de la proposition et qui sont de nature à faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du Régime de pensions du Canada ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du Régime de pensions du Canada, 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 et des intérêts, pénalités ou autres montants y afférents;

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

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

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

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal

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

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4

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is filed under subsection 62(1) 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 property of the person is subject to a security or charge - in an amount that the court considers appropriate - in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Deemed trusts

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Exceptions

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

ou une proposition aux termes du paragraphe 62(1), 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 personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priorité

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

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts - notamment en finance et en droit - dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priorité

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

Fiducies présumées

67 (2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Exceptions

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du Régime de pensions du Canada ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

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(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a **provincial pension plan** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,
and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;
b) cette province est **une province instituant un régime général de pensions** au sens du paragraphe 3(1) du Régime de pensions du Canada, la loi de cette province institue **un régime provincial de pensions** au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du Régime de pensions du Canada.
Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Provisions under the Companies' Creditors Arrangement Act

Compromises to be sanctioned by court
6(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
(a) subsection 224(1.2) of the *Income Tax Act*;
(b) any provision of the Canada Pension Plan or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the Canada Pension Plan, 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

Homologation par le tribunal
6(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;
b) toute disposition du Régime de pensions du Canada ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du Régime de pensions du Canada, 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 ou 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 ou autres charges afférents, laquelle somme :
(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

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establishes a provincial pension plan as defined in that subsection.

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 consent of the person in whose favour the previous order was made.

Factors to be considered

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

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

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

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

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

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

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

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

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

paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

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 rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

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

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

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

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

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this *Act*; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this *Act*.

Priority

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

Deemed Trusts

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

Exceptions

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

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a

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

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les débours et honoraires du contrôleur, ainsi que ceux des experts - notamment en finance et en droit - dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées 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.

Fiducies présumées

37 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

Exceptions

(2) Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du Régime de pensions du Canada ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du Régime de pensions du Canada, la loi de cette province institue un

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provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,
and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du Régime de pensions du Canada.
Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Footnotes

1 *In the Matter of the Notice of Intention to Make a Proposal of Chronométriq Inc. and Health Myself Innovation Inc.*, Quebec Sup. Ct., No. 500-11-060355-217, October 27, 2021, Castonguay, J.S.C.

2 R.S.C. 1985, c. B-3 ["*BIA*"].

3 R.S.C. 1985, c. 1 ["*ITA*"].

4 *Tax Administration Act*, CQLR, c. A-6.002, s. 20.

5 *Canada v. Canada North Group Inc.*, 2021 SCC 30 ["*Canada North*"].

6 R.S.C. 1985, c. C-36 ["*CCAA*"].

7 At the hearing, counsel for the Attorney General of Canada agreed that the judge could grant a super-priority charge limited to the necessary payment of salaries and operating expenses for two weeks, after which there should be another hearing.

8 *Canadian Imperial Bank of Commerce v. Chronometriq Inc.*, 2021 QCCA 1923.

9 *Canadian Bankers' Association v. Richter Advisory Group Inc.*, 2022 QCCA 191.

10 *Agence du revenu du Québec v. Richter Advisory Group Inc.*, 2022 QCCA 187.

11 *Insolvency Institute of Canada v. Richter Advisory Group Inc.*, 2022 QCCA 303.

12 *In the Matter of the Notice of Intention to Make a Proposal of Chronométriq Inc. and Health Myself Innovation Inc.*, Quebec Sup. Ct., No. 500-11-060355-217, November 25, 2021, Immer, J.S.C.

13 *Canada North*, *supra*, note 5.

14 *Canada North*, *supra*, note 5.

15 *ITA*, *supra*, note 3.

16 *Canada North*, *supra*, note 5, paras. 28-30.

17 *Id.*, para. 31.

18 *Canada North*, *supra*, note 5, paras. 43-49.

19 *Id.*, para. 50; see *First Vancouver Finance v. M.N.R.*, 2002 SCC 49.

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20 *Canada North*, *supra*, note 5, para. 57.

21 *Id*., para. 62.

22 *Id.*, para. 70.

23 *Id*., paras. 80, 165 and 167.

24 *Id*., para. 132.

25 *Ibanescu v. R.,* , 2013 SCC 31.

26 *Canada North*, *supra*, note 5, paras.111, 117, 128-129, 133 and 153.

27 *Canada North*, *supra*, note 5, paras. 192, 197 and 223.

28 *Canada North*, *supra*, note 5, paras. 4 and 57.

29 *Canada North*, *supra*, note 5, paras. 80, 165 and 167.

30 *Canada North*, *supra*, note 5, paras. 233 and 246.

31 *Canada North*, *supra*, note 5, para. 254, where Justice Moldaver expresses general agreement with his colleagues.

32 *R. v. Henry*, 2005 SCC 76.

33 Individuals may make proposals under the *BIA* but not under the *CCAA*.

34 *Century Services inc. v. Canada (Attorney general),* , 2010 SCC 60, para. 15 ["*Century*"]; *9354-9186 Québec inc. v. Callidus Capital Corp*, 2020 SCC 10, para. 40 ["*Callidus*"].

35 *Callidus*, *supra*, note 34, para. 74; *Century*, *supra*, note 34, para. 24.

36 *Callidus*, *supra*, note 34, para. 65; *Century*, *supra*, note 34, paras. 61, 62 and 65.

37 *Canada North*, *supra*, note 5, paras. 36, 154 and 155.

38 Section 86 *BIA*.

39 Section 54(2.1) *BIA*.

40 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(2).

41 *Canada North*, *supra*, note 5, paras. 29-31.

42 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, para. 59.

43 *Canada North*, *supra*, note 5, para.14.

44 *Interpretation Act*, *supra*, note 40, s. 12.

45 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, paras. 57-59; *United Used Auto & Truck Parts Ltd. v. Aziz*, 2000 BCCA 146, paras. 16, 18 and 29-31, leave to appeal granted in [2000] S.C.C.A. No. 142 (subsequently settled before the hearing), citing *Canadian Asbestos Services Ltd. v. Bank of Montreal*, 1992 CanLII 7570 (ON SC); *Re Starcom International Optics Corp*., 1998 CanLII 3832, para. 48 (BC SC); *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 709, paras. 12 and 17 (ON SC); *Royal Oak Mines Inc., Re*, [1999] O.J. No. 864, para. 4 (ON SC); *Hunters Trailer & Marine Ltd. (Re),* 2001 ABQB 546, para. 32; *MEI Computer*

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Technology Group Inc., [2005] R.J.Q. 1558, paras. 22 and 24 (QC CS); *Temple City Housing Inc. (Companies' Creditors Arrangement Act)*, 2007 ABQB 786, para. 14, leave to appeal denied in *Canada (National Revenue) v. Temple City Housing Inc.*, 2008 ABCA 1, para. 13; *Conporec inc. (Arrangement relatif à)*, 2008 QCCS 4813, paras. 55 and 56, leave to appeal denied in *Parc industriel Laprade Inc. v. Conporec Inc.*, 2008 QCCA 2222.

46 *Bearcat Explorations Ltd (Re)*, 2004 CarswellAlta 1183, paras. 5-9 (AB QB); *M Farmpure Seeds Inc. (Re)*, 2008 SKQB 381, paras. 12-15; *Comstock Canada Ltd. (Re)*, 2013 ONSC 4700, para. 20.

47 Which applies, as provided for in s. 72 *BIA*.

48 *Meubles Poitras (2002) inc. (Syndic de)*, 2013 QCCA 1671, paras. 12-13; *Syndic d'Avi Life-Lab inc.*, 2023 QCCA 297, para. 30; *Sam Levy & Associés inc. v. Azco Mining inc.*, 2001 SCC 92, para. 20.

49 *In the Matter of The Proposal of Gordon Gerard Garritty*, 2006 ABQB 238, para. 56. See Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*, Toronto, Thomson Carswell, 2008, p. 41.

50 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013, pp. 119 and 122, notes 21 and 123.

51 See Antoine Leduc, « Grands pas et faux pas de la compétence inhérente des tribunaux en droit canadien de l'insolvabilité : qui fait la loi? » (2009) 111:2 *Revue du notariat*, p. 425.

52 *Endean v. British Columbia*, 2016 SCC 42, para. 24.

53 *Ontario v Criminal Lawyers' Association*, 2013 SCC 43, para. 23.

54 *Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc. (Trustee of)*, 2006 ABCA 293, paras. 20-21; *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 3264, para. 41.

55 *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552, paras. 65-71, citing *Endean v. British Columbia*, 2016 SCC 42. In the same vein of relief in the context of COVID-19, in Quebec, see *Proposition de St-Pierre*, 2020 QCCS 1374.

56 *Supra*, note 4.

57 *Palardy v. Québec (Sous-ministre du Revenu)*, 2010 QCCA 383, para. 9.

58 *Callidus*, *supra*, note 34, para. 53.

59 *Royal Oak Mines Inc., Re*, [1999] O.J. No. 709, paras. 11-13 (ON SC).

60 *Transglobal Communications Group Inc. (Re)*, 2009 ABQB 195, para. 48, cited in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, para. 41.

61 *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, para. 15; *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 709, paras. 10-11 (ON SC); *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, paras. 48-52, confirmed in 2019 ABCA 314 and 2021 SCC 30.

62 *Regulation of the Court of Appeal of Quebec in Civil Matters*, c. C-25.01, r. 0.2.01.

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TAB 10

2006 ABCA 293
Alberta Court of Appeal

Residential Warranty Co. of Canada Inc., Re

2006 CarswellAlta 1354, 2006 ABCA 293, [2006] 12 W.W.R. 213, [2006] I.L.R. I-4552, [2006] A.W.L.D. 3143, 153 A.C.W.S. (3d) 273, 25 C.B.R. (5th) 38, 275 D.L.R. (4th) 498, 410 W.A.C. 153, 417 A.R. 153, 65 Alta. L.R. (4th) 32

Kingsway General Insurance Company (Appellant / Applicant) and Deloitte & Touche Inc., Trustee In Bankruptcy of Residential Warranty Company of Canada Inc. and Residential Warranty Insurance Services Ltd. (Respondent)

J. Côté, M. Paperny JJ.A., D. Sulyma J. (ad hoc)

Heard: September 5, 2006
Judgment: October 10, 2006 *
Docket: Edmonton Appeal 0603-0093-AC

Proceedings: affirming *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABQB 236, 2006 CarswellAlta 383, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.)

Counsel: E.A. Dolden, B.D. Rhodes for Appellant
K.A. Rowan for Respondent

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications

Bankruptcy and insolvency

XIV Administration of estate

XIV.2 Trustees

XIV.2.d Remuneration of trustee

Headnote

Bankruptcy and insolvency --- Administration of estate — Trustees — Remuneration of trustee — General principles

Bankrupts were in process of winding up home warranty business — Trustee was appointed interim receiver in context of minority shareholder's oppression remedy — Creditor was insurance underwriter of home warranty policies brokered or administered by bankrupts — Creditor filed proofs of claim in estates for approximately $11 million pursuant to contractual, statutory and common law trusts and brought related concurrent action against bankrupts — Trustee gave notice that trust claim was disputed — Trustee maintained that all or substantially all insurance premiums collected by bankrupts for insurance policies were paid to creditor and that balance of estate of bankrupts was income derived from business operations — Creditor appealed trustee's decision — Creditor also brought application for order that trustee was not entitled to utilize realizations of assets and property of bankrupts for purpose of fees and expenses — Application was dismissed and charge for trustee's fees was granted against property that was subject to conflicting, undetermined trust claims — Creditor appealed — Appeal dismissed — There was no basis to disturb case management judge's exercise of discretion — Inherent jurisdiction exists to grant charge on property subject to undetermined trust claims in appropriate circumstances — Case management judge considered relevant factors and applicable law, and carefully constructed limited charge that she viewed as suitable in circumstances — Unique circumstances of case and centrality of trust claims to bankruptcies underscored necessity of trustee's involvement and payment of its fees from property subject to disputed trusts.

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Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [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 85, 1975 CarswellMan 3, [1976] 2 S.C.R. 475 (S.C.C.) — considered

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Beetown Honey Products Inc., Re (2003), 2003 CarswellOnt 3755, 46 C.B.R. (4th) 195, 67 O.R. (3d) 511 (Ont. S.C.J.) — referred to

Beetown Honey Products Inc., Re (2004), 3 C.B.R. (5th) 204, 2004 CarswellOnt 4316 (Ont. C.A.) — referred to

C.J. Wilkinson Ford Mercury Sales Ltd., Re (1986), 60 C.B.R. (N.S.) 289, 1986 CarswellOnt 211 (Ont. S.C.) — distinguished

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

City Construction Co., Re (1961), 29 D.L.R. (2d) 568, 1961 CarswellBC 21, 35 W.W.R. 557, 2 C.B.R. (N.S.) 245 (B.C. C.A.) — considered

Gill, Re (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401, 2002 CarswellBC 2294 (B.C. S.C.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045 (S.C.C.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — considered

Kern Agencies Ltd. (No. 3), Re (1932), 1932 CarswellSask 2, 13 C.B.R. 333, [1932] 1 W.W.R. 585 (Sask. K.B.) — referred to

Murphy Oil Co. v. Predator Corp. (2006), [2006] 5 W.W.R. 385, 384 A.R. 251, 367 W.A.C. 251, 2006 ABCA 69, 2006 CarswellAlta 233, 55 Alta. L.R. (4th) 1 (Alta. C.A.) — considered

Nakashidze, Re (1948), 29 C.B.R. 35, [1948] O.R. 254, [1948] 2 D.L.R. 522, 1948 CarswellOnt 98 (Ont. H.C.) — referred to

Northstone Power Corp. v. R.J.K. Power Systems Ltd. (2002), 317 A.R. 192, 284 W.A.C. 192, 2002 ABCA 201, 2002 CarswellAlta 1111, 36 C.B.R. (4th) 272 (Alta. C.A.) — considered

NRS Rosewood Real Estate Ltd., Re (1992), 9 C.B.R. (3d) 163, 1992 CarswellOnt 204 (Ont. Bktcy.) — referred to

Olympia & York Developments Ltd., Re (1997), 1997 CarswellOnt 1600, 18 C.B.R. (4th) 243, 146 D.L.R. (4th) 382, (sub nom. *Olympia & York Developments Ltd. (Bankrupt), Re)* 39 O.T.C. 396 (Ont. Bktcy.) — considered

P.A.T., Local 1590 v. Broome (1986), 61 C.B.R. (N.S.) 233, 1986 CarswellOnt 219 (Ont. S.C.) — distinguished

Ramgotra (Trustee of) v. North American Life Assurance Co. (1996), 1996 CarswellSask 212F, 1996 CarswellSask 418, [1996] 3 W.W.R. 457, 37 C.B.R. (3d) 141, 10 C.C.P.B. 113, 13 E.T.R. (2d) 1, [1996] 1 C.T.C. 356, (sub nom. *Ramgotra (Bankrupt), Re)* 193 N.R. 186, (sub nom. *Ramgotra (Bankrupt), Re)* 141 Sask. R. 81, (sub nom. *Ramgotra (Bankrupt), Re)* 114 W.A.C. 81, (sub nom. *Royal Bank v. North American Life Assurance Co.)* 132 D.L.R. (4th) 193, (sub nom. *Royal Bank v. North American Life Assurance Co.)* [1996] 1 S.C.R. 325, (sub nom. *Royal Bank v. North American Life Assurance Co.)* 96 D.T.C. 6157 (S.C.C.) — followed

Ridout Real Estate Ltd., Re (1957), 1957 CarswellOnt 34, 36 C.B.R. 111 (Ont. S.C.) — referred to

Tlustie, Re (1923), 1923 CarswellOnt 12, 3 C.B.R. 654, 23 O.W.N. 622 (Ont. S.C.) — considered

Wasserman, Arsenault Ltd. v. Sone (2002), 33 C.B.R. (4th) 145, 157 O.A.C. 183, 2002 CarswellOnt 989 (Ont. C.A.) — considered

Statutes considered:

Insurance Act, R.S.A. 2000, c. I-3

Generally — referred to

s. 504 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 38 — referred to

s. 41(4) — referred to

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s. 67 — referred to

s. 67(1) — considered

s. 67(1)(a) — considered

s. 81 — referred to

s. 81(2) — referred to

s. 183(1)(d) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 128 — referred to

APPEAL by creditor from judgment, reported at *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABQB 236, 2006 CarswellAlta 383, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.), granting charge for trustee's fees against property subject to undetermined trust claims.

***M. Paperny J.A.*:**

Introduction

1 This is an appeal from a case management judge, sitting in bankruptcy, granting a charge for trustee's fees against property subject to conflicting, undetermined trust claims.

Background

2 The bankruptcy judge reviewed the facts in her reasons: (2006), 21 C.B.R. (5th) 57, 2006 ABQB 236 (Alta. Q.B.). The following is a summary.

3 Residential Warranty Company of Canada ("RWC") and Residential Warranty Insurance Services ("RWI") operated a home warranty business in Alberta and British Columbia. The appellant Kingsway General Insurance ("Kingsway") underwrote warranty policies sold by RWI and RWC.

4 RWI collected insurance premiums on behalf of Kingsway pursuant to a broker agreement. RWC and RWI also received funds from home builders by way of fees for membership in the warranty programs and by way of cash deposits or letters of credit as security for repairs covered by the warranty policies.

5 RWC and RWI became bankrupt on May 31, 2005. The respondent, Deloitte & Touche, is the trustee in bankruptcy of their estates.

6 Kingsway filed proofs of claim pursuant to s. 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") asserting that all property in the bankrupt estates is subject to a trust in Kingsway's favour. Unsecured creditors, Canada Revenue Agency and other competing trust claimants (home builders) also claim interests in the property.

7 Kingsway claims that the entirety of the bankrupts' estates is comprised of premiums which the bankrupts collected on its behalf and therefore is impressed with a trust under the *Insurance Act*, R.S.A. 2000, c. I-3 and corresponding legislation in British Columbia. Section 504 (formerly 124) of the Alberta statute provides that an insurance agent who acts for an insurer in negotiating, renewing or continuing a contract of insurance and who receives insurance premiums from an insured, is deemed to hold the premiums in trust for the insurer. Kingsway submits that these premiums cannot be subject to the charge granted because as trust funds they do not form part of the bankrupts' estates. Kingsway also asserts an express trust by virtue of the broker agreement and a constructive or resulting trust. The broker agreement between Kingsway and RWI provides that "[a]ll

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money received by the Broker [RWI] on behalf of the Company [Kingsway] less the Broker commission shall be the property of the Company and shall be held...as Trust Funds...".

8 The trustee disallowed Kingsway's trust claim and notified Kingsway pursuant to s. 81(2) of the *BIA*. The trustee's review of the records indicated to it that all premiums owing had been paid to Kingsway and that the funds in the estate represent other income from the operation of the business.

9 Kingsway appealed the trustee's decision to the Court of Queen's Bench, a summary proceeding under s. 81(2) of the *BIA*. That appeal is pending.

10 Kingsway applied to the bankruptcy judge seeking that Deloitte & Touche be prohibited from accessing any property in the estates for any purpose, including paying its past and future fees and expenses for appearing on the appeal and otherwise, pending the determination of Kingsway's trust claim.

11 The trustee opposed Kingsway's application and sought a retrospective and prospective charge against all assets under its administration.

12 The trustee has been administering the estates of RWC and RWI in accordance with the *BIA*, including: conducting financial analysis; securing and retaining possession of property of RWC and RWI; communicating with Kingsway and builders who are also advancing trust claims; establishing and executing a process to deal with builder claims to cash security deposits held by RWC and RWI; communicating with home owners claiming insurance coverage pursuant to policies issued by Kingsway; and administering insurance claims on a limited basis.

13 The trustee anticipates future costs arising from dealing with the validity and priority of the trust claims of Kingsway and various builders.

14 The trustee asserts that because Kingsway's trust claims encompass the entirety of the property under the trustee's administration, the ultimate determination of Kingsway's claim is critical to the administration of these bankruptcies. The trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to Kingsway's appeal of the disallowance due to lack of funding.

Decision Below

15 The case management judge denied Kingsway's application and granted the trustee's application for a retrospective charge. She also granted the trustee's application for a prospective charge, subject to the trustee filing an interim report with the court confirming the inspectors approved the actions proposed by the trustee, including its involvement in the proceedings to determine Kingsway's trust claim. She stipulated that both the retrospective and prospective charges were subject to challenge by builders with trust claims who had not been given notice of the applications before her. She further ordered the trustee to minimize general estate administration, not to pursue further asset realization without Kingsway's consent or the court's approval, and that Kingsway's appeal from the trustee's disallowance proceed on an expedited basis.

Issues on Appeal

16 This appeal raises the following issues:

1. Does a bankruptcy judge have jurisdiction to order that a trustee's fees be paid from property that is subject to undetermined trust claims?

2. If so, does that jurisdiction include the trustee's fees associated with determination of a trust claim?

3. If jurisdiction exists, what factors should a court consider in exercising its discretion to make such orders?

4. If jurisdiction exists, did the case management judge properly exercise the discretion?

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Standard of Review

17 The first three issues raise a question of law, subject to the standard of correctness: *Murphy Oil Co. v. Predator Corp.* (2006), 384 A.R. 251, 2006 ABCA 69 (Alta. C.A.). The fourth issue involves the exercise of discretion of a case management justice and cannot be interfered with in the absence of a palpable or overriding error: *Northstone Power Corp. v. R.J.K. Power Systems Ltd.* (2002), 36 C.B.R. (4th) 272, 2002 ABCA 201 (Alta. C.A.).

Discussion

1. Jurisdiction to order trustee's fees be paid from property subject to undetermined trust claims

18 The *BIA* does not address the ability of a trustee to obtain a charge for its fees on property that is subject to undetermined trust claims. The trustee submits that the jurisdiction to do so is found in the inherent jurisdiction of the bankruptcy court.

19 Section 183(1) of the *BIA* preserves the inherent jurisdiction of the Court of Queen's Bench of Alberta sitting in bankruptcy, stating in part:

> 183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancilliary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> . . . . .
>
> (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;...

20 Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), at 480; *Wasserman, Arsenault Ltd. v. Sone* (2002), 33 C.B.R. (4th) 145 (Ont. C.A.). In *Wasserman*, the trustee applied for an increase in fees in a summary administration bankruptcy. Rule 128 of the *BIA* Rules caps the trustee's fees in summary administration bankruptcies with no permissive or discretionary language. The Ontario Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

21 Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: *Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.); *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]). It has also been used where there is no other alternative available: *Olympia & York Developments Ltd., Re* (1997), 18 C.B.R. (4th) 243 (Ont. Bktcy.); *City Construction Co., Re* (1961), 2 C.B.R. (N.S.) 245 (B.C. C.A.) and to accomplish what justice and practicality require: *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*.

22 Kingsway asserts that s. 67(1) of the *BIA* prohibits such a charge. That section states:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person...

23 Kingsway relies on s. 67 to assert that property held by a bankrupt in trust for others does not form part of the estate and therefore use of inherent jurisdiction to grant a charge on that property would be contrary to the Act. Section 67 does not mean, however, that trust property does not fall within a trustee's administration. It only addresses the division of the bankrupt's property among the creditors; it does not address what property forms the estate that must be administered by the trustee.

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24 The Supreme Court of Canada addressed this issue in *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 (S.C.C.) at para. 61:

> Unlike provisions of the [BIA] such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property...the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). *While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.*
>
> (Emphasis added)

25 In any event, Kingsway's argument in regard to s. 67 rests on the premise that the property is in fact trust property, a proposition that remains undetermined.

26 Kingsway also asserts that there is no jurisdiction to order that a trustee's fees be paid from property subject to a statutory trust, citing *P.A.T., Local 1590 v. Broome* (1986), 61 C.B.R. (N.S.) 233 (Ont. S.C.) and *C.J. Wilkinson Ford Mercury Sales Ltd., Re* (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.).

27 In both of those cases, however, the validity of the trusts in question was clear and accepted by the trustee. Further, the question of fees for sorting out their validity was not squarely in issue in either decision. Here, a statutory trust as well as several other trust claims have been asserted but not accepted by the trustee and all remain to be determined by the Court of Queen's Bench.

28 Kingsway also relies on *Gill, Re* (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401 (B.C. S.C.), at paras. 29-32 in support of its statutory trust argument. In that case, however, Sigurdson J. recognized the jurisdiction to grant a charge for trustee fees over assets subject to trust claims. He determined on the distinct facts before him not to grant the charge requested.

29 I therefore accept that inherent jurisdiction exists to grant a charge on property subject to undetermined trust claims.

2. Permitting trustee costs involved in determining the validity of the trust to be paid out of trust property

30 Kingsway objects to the trustee being paid to "defeat" its claim out of what it alleges to be its property. Kingsway's opinion on the merits of its trust claim differs from the trustee's. However, Kingsway does not suggest that the trustee has acted improperly or unfairly in its disallowance of its claim.

31 I do not characterize the actions of the trustee as an attempt to "defeat" Kingsway's claims. Upon receiving a proof of claim claiming property in possession of the bankrupt, the trustee must respond in one of two ways according to s. 81(2) of the *BIA*. The trustee can either admit the claim and deliver possession of the property to the claimant, or give notice in writing to the claimant that the claim is disputed, indicating the reasons for the dispute. The section provides for an appeal to the Court of Queen's Bench if the trustee disputes the claim. The trustee is not to function as an adversary. Rather, it functions to advise the court of the relevant facts as its officer in a dispassionate manner, in furtherance of its role to administer the estates to completion, leaving the court to decide the matter: see *Beetown Honey Products Inc., Re* (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.), aff'd (2004), 3 C.B.R. (5th) 204 (Ont. C.A.) and *BIA*, s. 41(4). The trustee's conduct to date has been in accordance with requirements of the Act and its participation in the appeal is necessary in this case. Kingsway's claims purport to cover the entire estates of both bankrupts, against which there are competing property claims and unsecured claims.

32 There is precedent for allowing a trustee to be remunerated from trust property for efforts in sorting out trust claims and distributing the trust *res* to beneficiaries: see for example, *Nakashidze, Re* (1948), 29 C.B.R. 35 (Ont. H.C.); *Ridout Real Estate Ltd., Re* (1957), 36 C.B.R. 111 (Ont. S.C.); *Kern Agencies Ltd. (No. 3), Re* (1932), 13 C.B.R. 333 (Sask. K.B.); *NRS Rosewood Real Estate Ltd., Re* (1992), 9 C.B.R. (3d) 163 (Ont. Bktcy.). In *NRS Rosewood*, for example, Austin J. faced the same argument

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made by Kingsway in this case that the trustee had no entitlement to share in assets which were not the property of the bankrupt. Austin J. concluded that "[a]s the question had to be settled one way or another, and as the Trustee took the initiative, it is only reasonable that some part of the Trustee's fees be paid out of the property in issue".

33 I do not suggest that a trustee will in every case be entitled to be paid from trust property. On the contrary, such an order, based on inherent jurisdiction, must be granted sparingly. The situation before us is unique in many respects:

> 1. Kingsway asserts a trust on various grounds, none of which are obvious. Kingsway has delayed determination of its claim, resulting in additional work by the trustee;
>
> 2. Kingsway's claim encompasses the entirety of the estate;
>
> 3. There are other trust claimants making claims to the same funds;
>
> 4. There are significant sums in dispute;
>
> 5. This bankruptcy occurred as a result of a failed proposal. Deloitte & Touche went from interim receiver to trustee and the typical guarantee of the trustee's fees is not in place;
>
> 6. There is no other reasonable and more expeditious alternative but to have the trustee participate in the appeal process as part of its administration of these bankruptcies. Most of the other creditors are owed small amounts, aside from a government claim;
>
> 7. There is no suggestion that the trustee is acting improperly in disputing the claims; and
>
> 8. Kingsway seeks to link the appeal from the trustee's disallowance with the trial of other unrelated issues.

These circumstances and the centrality of the trust claims to the bankruptcies underscore the necessity of the trustee's involvement and the payment of its fees from the property subject to the disputed trusts.

34 Even if Kingsway is ultimately successful in its appeal of the trustee's disallowance, the trustee has been administering the property and a significant part of its work will likely have benefited Kingsway. The trustee has expended and will continue to expend considerable effort in sorting out other claims on the property, including the formulation of a plan that Kingsway has joined in for resolving builder claims. It has offered assistance to Kingsway in related proceedings concerning proposals made by directors and officers of the bankrupts. It has also formulated, coordinated and attended case management meetings throughout the course of its administration.

35 Kingsway suggests its claim will not go unchallenged if the trustee is not funded to defend the litigation on behalf of the estates; it asserts that one or more of the creditors can pursue the litigation at their own cost pursuant to s. 38 of the *BIA*. However, the litigation is central to these bankruptcies and not merely an action that interests select creditors. The validity and priority of Kingsway's trust claims must be determined and follows from the claims review process mandated by the *BIA*. That process is designed to ensure that only proper claimants share in the bankrupt's property and in these circumstances, the trustee plays an integral part.

36 Kingsway also submits that the appeal to the Queen's Bench from the trustee's disallowance will be complex, as it intends to bring other solvent parties into the action. Accordingly, Kingsway argues, the *res* of the estates could be frittered away with fees. However, the appeal to the Queen's Bench is intended to be a summary and efficient process to determine the issue relevant to the bankruptcy. To the extent that Kingsway chooses to increase the scope and complexity of the appeal, it must similarly accept the increased costs of the trustee in dealing with that action.

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3. Factors in exercise of discretion

37 Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse. The following non-exhaustive factors should be considered before invoking inherent jurisdiction here:

> 1. The strength of the trust claim being asserted. The mere assertion of a trust claim is not determinative of the validity of the trust and cannot preclude the trustee from investigating concerns. In some cases, the trust claim may be obvious, as was the case in *C.J. Wilkinson*, where the claim was based on statutory trusts in favour of employees or tax authorities and the interim receiver conceded their validity. In other circumstances, a trustee will have no choice but to have the issue of the trust determined in order to further the administration of the bankruptcy. In that event, the ultimate beneficiary of the trust may have to shoulder the costs of the determination;
>
> 2. The stage of the proceedings and the effect of such an order on them. For example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue;
>
> 3. The need to maintain the integrity of the bankruptcy process. The equitable distribution of the bankrupt estate must remain at the forefront. The court should recognize the expertise of the trustee in this regard and in effective management of bankruptcy: see *GMAC* [*GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 CarswellOnt 4621 (S.C.C.)] at para. 50. Also, the court should assess the extent to which the determination is necessary to administer the bankruptcy and discourage academic or potentially unrewarding litigation;
>
> 4. The realistic alternatives in the circumstances. This could include a s. 38 order, deferring a decision or empowering a court to review the decision in the future, for example, after final determination of the claims and the extent of the property available for distribution. The court should consider whether there is an existing guarantee of the trustee's fees, whether the party ultimately determined to be the beneficiary might bear some responsibility for the costs, and whether counsel might be hired on contingency;
>
> 5. The impact on the trust claimants and on the trust property as well as on other creditors. The court should examine the breadth of the trust claims, the existence of competing proprietary claims, and whether the trust claims leave any assets in the estate for unsecured creditors in assessing which stakeholder is going to suffer most from the trustee's disputing of the trust claim. In that exercise, the court should assess what part of the estate would ideally bear the burden of costs. It is important to consider whether the determination would proceed by default if the trustee were not fully funded;
>
> 6. The anticipated time and costs involved. The court should contemplate whether the proposed determination represents an efficient and effective means of resolving the issue to the benefit of all stakeholders. Consideration should be given to expediting the process;
>
> 7. The limits that can be placed on the fees or charge; and
>
> 8. The role that the trustee will take in the determination process.

4. Exercise of discretion by the case management judge

38 The case management judge considered the relevant factors and the applicable law. She carefully constructed a limited charge that she viewed as suitable in the circumstances. The order for a prospective charge is subject to the trustee filing a report confirming the bankruptcy inspectors had approved the steps the trustee proposed to take. She delayed the operation of her order to give builder claimants an opportunity to challenge it. She held that if all the property was not ultimately found to be impressed with a trust in Kingsway's favour, that a further hearing be held in order to prorate the trustee's fees between estate and trust assets. Further, she directed that the trustee only address urgent matters of general administration, and that Kingsway's claim be addressed as quickly and efficiently as possible. I see no basis to disturb her exercise of discretion.

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39 One of the fundamental purposes of the *BIA* is to ensure equitable distribution of a bankrupt debtor's assets among the estate's creditors: *Ramgotra* at para. 15, citing *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Determination of the validity of Kingsway's trust claims is central to these bankruptcies. This trustee's participation in that process furthers appropriate distribution of the assets, whether that be to unsecured creditors in the event all or part of Kingsway's trust claim is rejected by the Court of Queen's Bench, or whether the estate stays out of reach of other creditors as trust property.

40 The ultimate purpose of the administrative powers granted a trustee under the *BIA* is to manage the estate in order to provide equitable satisfaction of the creditors' claims: *Ramgotra* at para. 45. The trustee will be assisting the court and all of the claimants in the bankruptcies in coordinating Kingsway's claims, as well as dealing with the validity and priority of the other trust claims and in providing the necessary information to the Court of Queen's Bench to resolve these issues. For these reasons, it is also just and practical that inherent jurisdiction be used to grant the charge for the trustee's fees.

Conclusion

41 There is inherent jurisdiction to permit trustee's fees to be paid from property that is subject to undetermined trust claims in appropriate circumstances. The case management judge recognized the power must be used sparingly and did not err in exercising jurisdiction in this case. The appeal is therefore dismissed.

***J. Côté J.A.*:**

I concur.

***D. Sulyma J.* (ad hoc):**

I concur.

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on October 18, 2006 has been incorporated herein.

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TAB 11

2012 BCSC 1501
British Columbia Supreme Court

0487826 B.C. Ltd., Re

2012 CarswellBC 3079, 2012 BCSC 1501, [2013] B.C.W.L.D. 1452, 221 A.C.W.S. (3d) 263, 97 C.B.R. (5th) 105

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 0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd. (Petitioner)

Fitzpatrick J.

Heard: September 19, 2012
Judgment: October 11, 2012 *
Docket: Vancouver S122514

Counsel: D.E. Gruber for Petitioner
P.J. Reardon for Monitor, McMillan LLP
D. Hyndman for S.I.P. Holdings Ltd., Fama Holdings Ltd.
J. McLean, Q.C. for Henry Company Canada Inc., Stone Industries Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.7 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Debtor was granted protection under Companies' Creditors Arrangement Act — Debtor sold majority of its assets and resulting proceeds were being held for benefit of unsecured creditors — Substantial portion of claims was advanced by two creditors who were related to debtor — Unsecured creditors brought motion for order permitting them to investigate claims of related creditors, with up to $50,000 in fees ranking in priority to all other creditors except administrative charge — Motion granted — Proofs of claim filed by related creditors had only disclosed limited information and limited documentation — Debtor's chief restructuring officer had not been forthcoming about related creditors' claims — Unsecured creditors were justified in harbouring concerns in face of chief restructuring officer and related creditors essentially saying "trust us" — Investigation would benefit all creditors so it was appropriate for debtor's estate to bear cost.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Pine Valley Mining Corp., Re (2008), 2008 CarswellBC 579, 2008 BCSC 356, 41 C.B.R. (5th) 43 (B.C. S.C.) — referred to

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

Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — considered

Statutes considered:

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

s. 135 — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.52(1)(c) [en. 2007, c. 36, s. 66] — considered

MOTION by unsecured creditors for order permitting them to investigate claims of creditors who were related to debtor, with up to $50,000 in fees ranking in priority to all other creditors except administrative charge.

***Fitzpatrick J.*:**

1 The question raised on this application is whether certain unsecured creditors should obtain funding within this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceeding for the purpose of investigating the claims of other creditors who are related to the petitioner, 0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd. ("Steels").

Background Facts

2 Steels was a supplier of construction materials in British Columbia and Alberta. It operated from various leased premises across those provinces. On April 5, 2012, Steels sought protection from its creditors pursuant to the *CCAA*. On that same date, I granted an initial order staying proceedings and granting other ancillary relief. Alvarez & Marsal Canada Inc. was appointed as Monitor.

3 The ancillary relief included the appointment of Wayne Wood as Chief Restructuring Officer ("CRO") of Steels, since all the directors had resigned. Mr. Wood was the Vice-President, Finance and Administration of Steels. It was intended that he would be assisted in his duties relating to the restructuring to some extent by Steels' financial advisor, Ernst & Young Inc. ("E&Y").

4 Steels resolved fairly quickly, with the assistance of E&Y and with the concurrence of the Monitor, to commence a sale and investment solicitation process toward selling its assets. On July 30, 2012, I approved a sale of the majority of Steels' assets to Brock White Canada Company, LLC. That sale has now completed and net proceeds of sale, which are discussed in more detail below, are being held for the benefit of unsecured creditors.

5 In anticipation of a sale of the assets, I approved a Claims Process Order on June 8, 2012.

6 By the date of the granting of the Claims Process Order, it was apparent that a substantial portion of the claims would be advanced by related parties. In fact, Mr. Wood discussed these claims in his affidavit sworn April 5, 2012 in support of the granting of the Initial Order.

7 Mr. Wood's evidence indicated that Steels is a wholly owned subsidiary of S.I.P. Holdings Ltd. ("S.I.P. Holdings") and that S.I.P. Holdings is, in turn, a wholly owned subsidiary of Fama Industrial Supplies Ltd., a privately owned company. Mr. Wood's evidence further indicated that S.I.P. Holdings also owns Steels Holdings (BTC) Ltd. ("Holdings BTC"). Mr. Wood attached various financial documentation in respect of claims against Steels by both S.I.P. Holdings and another company, Fama Holdings Ltd. ("Fama Holdings"):

> a) S.I.P. Holdings' audited consolidated financial statements for the 12 months ending December 31, 2010. These consolidated financial statements included both Steels and Holdings BTC;
>
> b) Unaudited financial statements for Steels for the 12 months ending December 31, 2011; and
>
> c) Steels' unaudited financial statements for the two months ending February 29, 2012.

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8 Mr. Wood stated that there is a shareholder loan in the amount of approximately $17.3 million owed to Fama Holdings. He stated:

> The Shareholder Loan is owed to Fama Holdings Ltd. ("FHL"). It does not bear interest, and there are no repayment terms. In 2005, Steels consolidated with Gasmaster Industries Ltd. ("Gasmaster") for the purposes of utilizing Gasmaster's tax losses to offset Steels' profits. Gasmaster owed the amount of $17.3 million to FHL. Gasmaster is no longer a division of Steels, having been spun off, but the amount owing from Gasmaster to FHL remains on Steels' books.

9 Indeed, Note 9 of the consolidated balance sheet in the 2010 audited financial statements (entitled "Related Party Balances and Transactions") does reference an amount owing to Fama Holdings in the amount of approximately $17.3 million as at the end of 2010. The statements refer to Fama Holdings as a "company under common control", although the relationship between Fama Holdings, on the one hand, and S.I.P. Holdings and Steels, on the other, is not apparent.

10 Similarly, the unaudited financial statements as at December 31, 2011 indicate a "shareholder loan" owing in the amount of approximately $17.3 million.

11 In his April 5 affidavit, Mr. Wood also referred to a balance due to "affiliated companies" of approximately $7.9 million. With respect to this amount, he stated as follows:

> The balance owing to affiliated companies is due to SIP Holdings. This amount relates to certain proceeds from the sale of the Lands. Some of the Lands were transferred to Steels before the sale, so the amount owing to SIP [Holdings] is in respect of the purchase price paid for the Lands.

12 Given that the 2010 audited financial statements are consolidated and include both Steels and S.I.P. Holdings, there is no reference in those statements to the amount said to be due to S.I.P. Holdings by Steels. Nevertheless, the unaudited financial statements of Steels as at December 31, 2011 do reference an amount owing to "affiliated companies" of $7,018,037.

13 Despite the above evidence of Mr. Wood relating to these claims at the outset of this proceeding, there was no question in the minds of Steels, and in particular that of Mr. Wood as the CRO, that issues might be raised with respect to these related party claims. The Claims Process Order, in paragraph 21, provided that filed Proofs of Claim were to be reviewed by Steels with the assistance of both the Monitor and E&Y. The Claims Process Order further provided:

> 25. Any Creditor (a "Disputing Creditor") may apply to this Court to dispute any such accepted Claim by filing a Notice of Application ... Upon receipt of any such filed application, the Petitioner shall provide the Disputing Creditor with any Proof of Claim and other material documents in its possession in respect of the disputed Claim, and paragraphs 26, 27 and 28 of this Order apply.
>
> 26. In the event that the Petitioner, with the assistance of the Monitor, is unable to resolve a dispute regarding any Claim with a Creditor or between two Creditors, the Petitioner shall so notify the Monitor and the Creditor, and either of the Petitioner, Monitor, or Creditor may apply to the Court to resolve the dispute. ...
>
> 27. In the event an application is filed pursuant to paragraphs 25 or 26 of this Order, there shall be a preliminary hearing before the Court to determine the procedure for the application and to determine whether the matter will be decided based on the material before the Petitioner or on a *de novo* basis.

14 This additional procedure by which another creditor could challenge any claim was a matter raised by the Monitor in relation to these third party claims. The Monitor stated in its Third Report dated June 6, 2012, in support of the application for the Claims Process Order, that "any creditor(s) will have the right, possibly at its (their) own cost, to challenge the claims of others":

> ... in order to provide additional stakeholder protection before any distribution is made to creditors ...

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15 Accordingly, the Claims Process Order specifically contemplated a procedure by which other unsecured creditors, who might be affected by the acceptance of the related party claims, were entitled to take steps to independently review those proofs of claim and have the dispute heard by the Court if it could not be resolved otherwise.

16 In July 2012, S.I.P. Holdings and Fama Holdings filed their Proofs of Claim with Steels.

17 Fama Holdings' Proof of Claim is in the amount of $13,159,689.25. Few particulars are provided. The amount is said to be derived from the $17.3 million figure from the 2010 audited financial statements (which are attached) less reductions in the amounts of $1,776,634, which is identified as a credit from a portion of the proceeds of sale of real estate owned by S.I.P. Holdings, and $4,101,845. This latter figure is stated to have "occurred as reflected in the financial statements of Steels, as prepared by Steels and accordingly, details of the constitution of the loan repayment are known to Steels". No other documentation is provided in support of this claim.

18 S.I.P. Holdings' Proof of Claim is in the amount of $5,954,155.75. Documents in support include the 2010 consolidated financial statements (which do not in fact disclose any amount owed to S.I.P. Holdings, as noted above), together with various promissory notes dated January 1, February 1, March 1 and July 1, 2011. As with the Fama Holdings Proof of Claim, some particulars are also provided. Specifically, the Proof of Claim refers to Steels being indebted to S.I.P. Holdings in the amount of $7,018,036.85 as of July 1, 2005. This is the amount reflected on the 2011 unaudited financial statements. The Proof of Claim also indicates:

> ... Subsequent to that date, SIP sold real estate in Surrey, Kamloops, Calgary and Edmonton occupied by Steels as tenant to Steels in consideration of preferred shares and $7,924,498.29 evidenced by promissory notes as follows:
>
> | | |
> |---|---|
> | (i) Surrey property: | $2,150,780.64 |
> | (ii) Kamloops property: | $573,539.00 |
> | (iii) Calgary property: | $2,016,181.46 |
> | (iv) Edmonton property: | $3,183,989.19 |
>
> for a total indebtedness of $14,942,527.14. This indebtedness was reduced during the course of 2011 and 2012 by $8,988,372.26 through payment by Steels of lease payments and other real estate related indebtedness. The particulars of such payments are known to Steels and are reflected in the financial statements of Steels.

19 No detail is provided by S.I.P. Holdings with respect to the origins of the original $7,018,036.85 said to be owed as of July 1, 2005.

20 In its Fifth Report dated July 26, 2012, the Monitor states that Steels and the CRO had accepted the claims of S.I.P. Holdings and Fama Holdings, together with a small claim by another related party. Importantly, the Monitor also stated that Steels did not request the assistance of E&Y with respect to the review and evaluation of these claims. Nor did the Monitor perform any further work on these claims - beyond a review of the documentation provided - pending a determination as to whether any other creditors wished to challenge the claims under paragraph 25 of the Claims Process Order.

21 The significance of these related party claims cannot be understated. The amount available for distribution to unsecured creditors is expected to be in the range of $4 to $4.2 million. The total claims filed to date pursuant to the Claims Process Order amount to approximately $31 million, which indicates an estimated recovery of between 13% and 14%. Given that the amounts claimed by both Fama Holdings and S.I.P. Holdings total approximately $19.2 million, these two creditors alone stand to recover approximately 62% of the total monies that will be available for distribution to unsecured creditors.

Discussion

22 This application is brought by two unsecured creditors: Henry Company Canada Inc. and Canadian Stone Industries Inc. These two creditors are owed approximately $900,000. They say Wolrige Mahon Ltd., a forensic accountant, should be retained

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to assist them in reviewing and assessing the claims of Fama Holdings and S.I.P. Holdings. They are applying for an order that the reasonable fees and expenses of Wolrige Mahon Ltd.'s services be secured by a priority charge on Steels' assets ranking in priority to all other charges except for the existing Administrative Charge. They seek a priority charge not to exceed $50,000.

23 It appears that other unsecured creditors of Steels have joined with the applicants. At this time, the total unsecured creditor group (who I will refer to as the "Disputing Creditors") who wish to have these related claims investigated have aggregated claims of approximately $2.6 million, which represents 8% of the present claims.

24 The Disputing Creditors assert that given the nature of the Fama Holdings and S.I.P. Holdings claims, it is not possible to assess them without the assistance of an accountant with forensic experience. The expertise of Michael Cheevers, President of Wolrige Mahon Ltd., is well known to this Court. In fact, Mr. Cheevers has been appointed by this Court in many instances as a receiver, trustee and bankruptcy monitor. In addition, Mr. Cheevers practices as a forensic accountant and his qualifications in that area are not in question.

25 Mr. Cheevers indicates that he expects that if appointed, he would review the accounting records of Steels, including banking records and relevant contracts, going back as far as 2005 (which is a date referred to in the S.I.P. Holdings Proof of Claim). He estimates that the fees of Wolrige Mahon Ltd. to undertake this engagement would be between $25,000 and $50,000.

26 As mentioned earlier in these reasons, it is clear that, contrary to the terms of paragraph 21 of the Claims Process Order, neither the Monitor nor E&Y, as Steels' financial advisors, have assisted Steels or Mr. Wood as CRO in reviewing these Proofs of Claim toward either accepting or revising or rejecting them. The Monitor acknowledges that it was never intended that a review by only Mr. Wood as CRO would be sufficient for a final determination in respect of the Proofs of Claim to be accepted for distribution.

27 The only evidence from Mr. Wood filed on this application was a very general response on August 23, 2012:

> I have also spent significant time managing the Petitioner's claims process, the details of which are set out [in] the Monitor's Fifth Report to Court filed in this proceeding. I understand that certain creditors have sought information related to those related parties claims, and I have spent time reviewing information related thereto and expect to spend more time on that issue going forward.

28 Notwithstanding Mr. Wood's comment, he has not engaged in any meaningful dialogue with the Disputing Creditors toward providing clarification about these related party claims. I was advised by counsel there has been some exchange of correspondence between counsel for the Disputing Creditors and counsel acting for both Steels and the CRO (the same counsel acts for both Steels and the CRO). Despite being invited to provide further information concerning these claims, and despite what appears to have been his earlier intention, Mr. Wood has declined to provide further detail or documentation regarding these claims, save in response to a specific request which the Disputing Creditors did not provide.

29 Counsel for Steels/the CRO and S.I.P. Holdings and Fama Holdings argue that any further review of the related party claims is not necessary. They say that the 2010 financial statements were audited and thus confirmed the amounts owing in that document. In addition, they say that Mr. Wood, as the CRO and the accountant of Steels, has "independently" reviewed these claims. It is apparent from Mr. Wood's prior involvement with Steels, as the Vice-President of Finance and Administration, that he would have some knowledge of these claims. They further argue that as the CRO, he is an independent officer of the court and, in particular, independent of the related parties. The suggestion is made that his review of the claims is entitled to substantial deference and that funding for any further review should be refused. I would note again, however, that even as late as August 23, 2012, Mr. Wood indicated that he was still in the process of reviewing information regarding these claims.

30 For all that Mr. Wood appears to have some knowledge of these claims, it is of some significance to me that he has provided no assistance, as an officer of this Court, to the Court in terms of the level of his knowledge with respect to all aspects of these claims. Nor has he disclosed any further work that he has done in reviewing these claims subsequent to receiving the Proofs of Claim and the objections of the Disputing Creditors.

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31 Furthermore, I consider that the Proofs of Claim, with the limited information disclosed and limited documentation attached, leave much to be desired in terms of fully understanding these claims.

32 There is absolutely no backup with respect to the amounts claimed by S.I.P. Holdings as of July 1, 2005. There appear to be complex transactions after that date involving sales of real estate and tenancy arrangements. No doubt, there is a wealth of documentation which supports those transactions and presumably, the amounts or debts said to arise from those transactions and reductions or payments made.

33 With respect to the Fama Holdings claim, I appreciate that this amount is referenced in the audited 2010 financial statements. But later reductions are said to arise from real estate sales by S.I.P. Holdings and no details relating to those transactions are provided.

34 Support for both Proofs of Claim is sparse in terms of particulars provided; there appear to be only vague references to figures that are "reflected in the financial statements of Steels" or "known to Steels". Such general statements do little to provide the necessary backup so that other creditors may fully understand these claims and determine whether they are valid.

35 To a large extent, the submissions made by Steels/the CRO, S.I.P. Holdings and Fama Holdings amount to them saying "trust the auditors" and "trust me". Despite this, the Disputing Creditors continue to harbour concerns and I think justifiably so.

36 We are therefore at the stage where, despite some efforts, the parties have failed to advance a better understanding of these related party claims through the provision of further information and documentation. The Disputing Creditors' position is, in any event, that a forensic accountant, such as Mr. Cheevers, will be required to fully review the matter.

37 Under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the claims process is undertaken by a trustee in bankruptcy. Pursuant to s. 135, a trustee is required to examine every proof of claim and may require further evidence in support of a claim prior to determining, valuing or disallowing a claim. The cost of that review is borne by the estate as a whole since it is intended to benefit the body of creditors.

38 Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc., Re*, 2011 ABQB 399 (Alta. Q.B.), Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".

39 Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp., Re*, 2008 BCSC 356 (B.C. S.C.). To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at paras. 24 and 47.

40 Indeed, this was the underlying basis upon which the Claims Process Order was granted, particularly as it related to a review of the third party claims. That Order clearly contemplated that other creditors would have the ability to challenge these third party claims, even in the face of the claims process as originally crafted. Again, as stated above, the process set out in the Order was not followed in that there was no independent involvement or assistance by the Monitor or E&Y, as was initially intended. Nor did Steels provide any of the Disputing Creditors with "other material documents in its possession" as contemplated by paragraph 25 of that Order.

41 In this case, no report from the Monitor has been prepared in any case. As for Mr. Wood in his capacity as CRO, I do not accede to the arguments that this Court should grant any particular deference to his review or conclusions, particularly in the face of the evidentiary deficiencies with respect to the Proof of Claims and his failure to further assist the Court in addressing

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such deficiencies. Fama Holdings and S.I.P. Holdings have the burden of proving their claims, and this requires more than providing general statements and unclear financial statements.

42 In all of these circumstances, I have no hesitation in concluding that an independent review of these related parties claims is appropriate and should be undertaken. In addition to understanding how these particular transactions arose and the financial consequences arising from those transactions, an independent review would also focus on the proper characterization of the amounts said to be owed. It is possible, as suggested by counsel for the Disputing Creditors, that some or all of these amounts may have been equity investments in Steels, as opposed to debt. In that event, such equity claims would only be satisfied after all unsecured claims were paid. A similar issue was raised by the disputing creditors in *Pine Valley Mining*.

43 Counsel for Steels/the CRO and also counsel for S.I.P. Holdings and Fama Holdings contend that the application is premature. Counsel for Steels/the CRO states that Mr. Wood will cooperate in speaking to counsel for the Disputing Creditors in providing documents as requested. No similar offer has been made by S.I.P. Holdings and Fama Holdings. Further, it is suggested that paragraph 27 of the Claims Process Order contemplates a preliminary hearing to discuss the claims and that the issues, including the provision of any further information and documentation, can be addressed at that time.

44 I would not accede to these arguments that the application is premature. The related party claims have been presented and it does not appear that there is cooperation between the parties, at least to this point in time, with respect to providing the necessary information and backup documentation. In addition, even once such information and documentation is provided to counsel for the Disputing Creditors, it is evident to me that a forensic accounting of these claims will be required in the circumstances. I see no need to engage the court process in addressing these claims until that full review has taken place and positions are crystallized. It may be, for example, that upon that full review, the Disputing Creditors are satisfied that there are no issues to be addressed and that these are valid claims.

45 I would also note that there is some urgency in dealing with these third party claims. I understand that matters relating to the assets sale are moving to a conclusion which will dictate the actual amount of funds to be distributed. It is intended that a plan will be submitted later this year which will provide for distributions to unsecured creditors. A failure to resolve issues relating to these claims, or resolve them in a timely manner, will result in delayed payment to all unsecured creditors. This is to be avoided if at all possible.

46 In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

47 The question then becomes who should complete this independent review and who should bear the costs of the review.

48 The Monitor to this point in time has risen above the fray while these procedural matters are being sorted out. Nevertheless, the Monitor indicates that if directed by the Court, it will, of course, complete an independent review of the claims. In that event, as with any review of a claim that they would have undertaken from the outset, the cost will be borne by the estate. The Monitor, however, raises the issue that if it completes such a review and prepares a report, it would share that report with others who would be interested in the issue.

49 Counsel for the Disputing Creditors submits that Wolrige Mahon Ltd. should be the party to complete this review. At this stage, it is, at least on the face of it, an adversarial process and the Monitor can remain as the neutral third party in respect of the matter. There would not appear to be any costs considerations in that respect; the Monitor has no vested knowledge of the related party claims that would reduce the cost of completing this review. It is also stated that Wolrige Mahon Ltd.'s expertise with respect to forensic accounting is of particular importance in this case, while the Monitor does not advocate any particular expertise in that regard.

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50 I noted that in *Pine Valley Mining*, the monitor had reviewed and accepted the claim that was the subject of the dispute in *CCAA* proceedings. Madam Justice Garson (as she then was), at para. 13, concluded that the role of the monitor was to determine the validity and amount of the claim, but that it did not do so in an adversarial process. As such, while the monitor's report was to be considered in the dispute, there was no deference to be accorded to that report "in the sense that would alter the burden of proof ordinarily imposed on the claimant".

51 In my view, the appropriate disposition of this matter is to have the review completed by Wolrige Mahon Ltd. In that event, counsel for the Disputing Creditors can deal directly with Wolrige Mahon Ltd. in terms of the review, which may not necessarily result in a formal report being prepared. This may alleviate the higher costs normally associated with preparing a formal report.

52 The next issue is whether the results of Wolrige Mahon Ltd.'s review should be shared. Under a *BIA* claims process, a trustee in bankruptcy would review claims. Normally, a trustee would seek the input of the inspectors appointed, however, it may not do so if, for example, there was some concern that an inspector had an interest relating to a potentially disputed claim. If the cost of the report is to be borne as an administrative cost, there is no reason why other interested parties should not have equal access to Wolrige Mahon Ltd.'s work product in respect of this independent review. Accordingly, I am ordering that Wolrige Mahon Ltd.'s work product be shared with the Monitor and any other unsecured creditor (other than the related parties) who wishes to join in a challenge of the related party claims, on terms as might be agreed between then.

53 The Disputing Creditors seek a charge in favour of Wolrige Mahon Ltd. in an amount limited to $50,000. The *CCAA* provides:

> s. 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of:
>
> . . .
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

54 I consider that it would be unfair to the Disputing Creditors for them to bear the costs of retaining Wolrige Mahon Ltd., which will not only provide the independent review that was contemplated by the Claims Process Order, but will also potentially benefit the unsecured creditors as a whole. In my view, this charge in favour of Wolrige Mahon Ltd. is necessary for the effective participation by the Disputing Creditors in these proceedings (and perhaps others who might join in or benefit from such a review).

55 The final issue is raised by S.I.P. Holdings and Fama Holdings. They take the position that while a charge may be granted at this time, there should be a provision in the order allowing them to seek recovery of some or all of the amounts paid to Wolrige Mahon Ltd. in the event that a review of the related party claims is not fruitful or alternatively, any challenge to those claims is not successful. Such a "comeback" provision is opposed by the Disputing Creditors.

56 Usually, the cost of an independent review would be borne by the estate and would be indirectly borne by the creditors whose claims were potentially subject to challenge. In this case, I see no reason to depart from the usual manner in which this independent review is to be conducted, which would not include any ability to recoup these expenses. I would note, in any event, that if a challenge to these related party claims is brought against S.I.P. Holdings and Fama Holdings, and that challenge is ultimately unsuccessful, then the related parties will have the ability to seek costs against the unsuccessful applicant creditors at the end of the day.

57 Accordingly, the order sought is granted. There will be a priority charge in favour of Wolrige Mahon Ltd. not to exceed $50,000, for the purpose of Wolrige Mahon Ltd. assisting the Disputing Creditors to review and assess the claims of Fama Holdings and S.I.P. Holdings. This charge is to rank in priority to all other charges except for the existing Administrative Charge.

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Motion granted.

Footnotes

* Corrigendum issued by the court on December 3, 2012 has been incorporated herein.

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TAB 12

2024 BCSC 1111, 2024 CarswellBC 1828

2024 BCSC 1111
British Columbia Supreme Court

1057863 B.C. Ltd. (Re)

2024 CarswellBC 1828, 2024 BCSC 1111

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

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

And In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC (Petitioners)

Fitzpatrick J.

Heard: May 31, 2024
Judgment: May 31, 2024
Docket: Vancouver S206189

Counsel: H. L. Williams, A. Bowron, for Petitioners
S. Foreman, K.C., D. Brown, for Province of Nova Scotia
P.J. Reardon, for Paper Excellence Canada Holdings Corporation
E. Pillon, for Monitor, Ernst & Young Inc.
B. Brammall, for Harbor North American Resources Ltd.
B. Hebert, for Pictou Landing First Nation
R. Pink, K.C., for Unifor Local 440

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court
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Re TOYS "R" US (CANADA) LTD. (2018), 2018 ONSC 609, 2018 CarswellOnt 962, 56 C.B.R. (6th) 271 (Ont. S.C.J. [Commercial List]) — referred to
Soccer Express Trading Corp. (Re) (2020), 2020 BCSC 749, 2020 CarswellBC 1233, 80 C.B.R. (6th) 133 (B.C. S.C.) — referred to
Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — referred to
Walter Energy Canada Holdings, Inc. (Re) (2017), 2017 BCSC 1968, 2017 CarswellBC 3037, 54 C.B.R. (6th) 57 (B.C. S.C.) — referred to
1057863 B.C. Ltd. (Re) (2020), 2020 BCSC 1057, 2020 CarswellBC 1752 (B.C. S.C.) — referred to
1057863 B.C. Ltd. (Re) (2022), 2022 BCSC 759, 2022 CarswellBC 1183, 99 C.B.R. (6th) 109 (B.C. S.C.) — referred to

Statutes considered:

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

s. 2(1) "company" — referred to

s. 11 — considered

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

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

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

APPLICATION by petitioners for approval of settlement.

***Fitzpatrick J.*:**

Reasons for Judgment

Introduction

1 This hearing was convened in this restructuring proceeding to obtain approval of a significant milestone — a settlement between the major stakeholders — in what has been a long, complex and difficult proceeding.

2 The petitioners seek an order approving a comprehensive settlement agreement and also, a claims process order. No party or stakeholder opposed the relief.

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3 In June 2020, these proceedings began when the petitioners sought creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. At the time, the petitioners' business was the operation of a pulp mill (then in hibernation) and related timberland operations in Pictou County, Nova Scotia.

4 The proceedings were very contentious between the petitioners, its shareholders, its major secured creditor, and the Province of Nova Scotia (the "Province"), who is also a major secured creditor. Major issues arose between the parties concerning the petitioners' intention to restart the pulp mill and/or obtain financial compensation from the Province for legislation that had mandated its closure. This conflict had led to litigation and judicial reviews in Nova Scotia and allegations against the Province as to their conduct in the face of these restructuring proceedings.

5 In May 2022, I granted an order directing a mandatory mediation process between the parties, against the wishes of the Province: *1057863 B.C. Ltd. (Re)* 2022 BCSC 759 [*Mediation Order Reasons*]. I appointed the Honourable Thomas Cromwell, C.C., as the Mediator.

6 Despite the rocky start to the mediation process, including the Province seeking to appeal the mediation order, the mediation continued for the next two years to address the multiple complex issues between the various parties. The parties have been assisted in the process to a large degree by not only Mr. Cromwell, but also the Monitor and its counsel.

7 The proposed settlement represents a significant and very positive turn of events that will bring certainty to the parties as to the path forward in these restructuring proceedings.

8 For the reasons discussed below, I approved the settlement and granted the claims process order, with reasons to follow. These are those reasons.

The Settlement Agreement

9 The settlement agreement is a global resolution of all claims between the petitioners and its shareholders, the interim lenders and the Province, including the litigation arising from the Province's legislation that directly affected the pulp mill and the petitioners' ability to operate the pulp mill.

10 The provisions of the settlement agreement are complex, but can be generally described as including either a "New Mill Scenario" or a "No Mill Scenario". Specifically:

> a) The "New Mill Scenario": the first step is to obtain a feasibility study for the development of a new mill in Liverpool, Nova Scotia (the "New Mill"). That study is to be obtained within nine months of today and the parties have set out the specifics of what will determine whether the New Mill will be financially viable in terms of a rate of return. If a positive result arises, the petitioners will seek third-party financing. If that financing is obtained, the petitioners will pay $15 million to the Province and fund amounts required to wind-up the existing pension plans and deficiencies; and
>
> b) The "No Mill Scenario": if the plans for the New Mill do not materialize, the petitioners will liquidate the timberlands. The parties have agreed upon a waterfall of payments from those sale proceeds, including payment of the interim financing, amounts to wind-up the pension plans, payment of $30 million to the Province plus $15 million to maintain the existing pulp mill and implement a closure plan. The petitioners may seek to sell the existing mill.

11 In either scenario, the parties have agreed to dismiss or withdraw the various litigation claims, including challenges to the Province's legislation, a judicial review of certain environmental decisions, the appeal from the mediation order and allegations in these *CCAA* proceeding against the Province.

12 Given what is described as the Mediator's "instrumental" assistance in the past, the parties intend to continue to retain Mr. Cromwell in the event that any issues arise in the implementation of the steps contemplated by the settlement agreement.

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13 This Court may approve the settlement agreement under its broad statutory jurisdiction under s. 11 of the *CCAA*, which refers to a court making such orders as are necessary to achieve the remedial objectives of the *CCAA*.

14 Settlement agreements have frequently been approved in *CCAA* proceedings where a settlement avoids complex and costly legal contests and which contribute to advancing the restructuring on a timely and efficient basis: *Walter Energy Canada Holdings, Inc. (Re),*2017 BCSC 1968 [*Walter Energy*] at paras. 35-36; *Great Basin Gold Ltd. (Re),*2012 BCSC 1773 at para. 16; *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation* 2013 ONSC 1078 [*Sino-Forest*] at para. 44.

15 Factors that are considered in deciding whether to approve a settlement under the *CCAA* include: whether the settlement is fair and reasonable; whether the settlement provides substantial benefits to stakeholders; and whether the settlement is consistent with the purpose and spirit of the *CCAA*: *Sino-Forest* at para. 49; *Walter Energy* at para. 33.

16 In assessing whether the proposed settlement is fair and reasonable, the court can consider the settlement's balancing of the interests of all parties, equitable treatment of the parties, including the creditors who are not signatories to the agreement, and its benefit to the petitioners and its stakeholders generally: *Nortel Networks Corporation (Re),*2010 ONSC 1708 at para. 73.

17 I accept the parties' joint submissions, supported by the Monitor, that approval of the settlement agreement is appropriate in the circumstances. In particular:

a) The settlement agreement provides a significant benefit to the petitioners and their stakeholders. It facilitates a global resolution of all of the claims amongst the parties which will avoid significant cost and effort to resolve those claims;

b) This result will bring certainty to what has been, in the past, a difficult and complex restructuring that, to a large degree, was hampered by uncertainty;

c) The settlement agreement also provides the petitioners with the time and resources necessary to start working towards a solution for the benefit of all creditors. There is no alternative to the settlement agreement that provides a better outcome for the petitioners' stakeholders in the short or medium term;

d) The settlement agreement also represents a significant step forward to permit the petitioners to implement either one of the two scenarios. This includes:

i. The agreement allows for the opportunity for development of the New Mill based on objectively determined criteria to assess its financial viability in a location that all parties have identified as preferable. If the New Mill meets these criteria, there is the possibility of the petitioners restarting business in Nova Scotia, which would include use of the timberlands. This would allow for further contribution to the Nova Scotia economy and employment of thousands of Nova Scotia residents;

ii. Alternatively, the No Mill Scenario allows the petitioners to resolve their outstanding financial matters through an organized liquidation and a transparent and clearly stated waterfall of payments; and

e) The settlement agreement provides certainty and clarity on a number of high-stakes issues for a variety of stakeholders, including those not directly involved in the settlement. In either scenario, there is a framework for the repayment of the outstanding pension obligations and ensuring that the petitioners' environmental obligations on the Mill Site are addressed in a responsible manner. In addition, the Pictou Landing First Nation ("PLFN") will be treated as an unaffected creditor in any future plan of arrangement that may be brought by the petitioners in the *CCAA* proceeding.

18 I recognize the substantial efforts that have brought the parties to the proposed settlement agreement. The mediation process has been lengthy and the outcome — the settlement — is the result of a significant good faith efforts of the parties. As stated above, the Monitor has had a significant role in advancing the mediation over that time and I accept the Monitor's support and recommendations on this application.

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19 I conclude that the settlement agreement should be approved. It is fair and reasonable. Of course, the parties' agreement is indicative of their view of that fact. However, the benefits and fairness to the other stakeholders who are not parties is also evident from its terms. Finally, the settlement agreement is consistent with the remedial purposes and objectives of the *CCAA*: *Century Services Inc. v. Canada (Attorney General),*2010 SCC 60 at para. 70.

Interim Financing

20 The settlement agreement also involved various amendments to the interim financing that has been in place for some years now, as approved by the Court.

21 The negotiated amendments include: (i) extending the maturity date to March 31, 2025; (ii) removing the "Milestones" (which principally related to a restart of the existing mill); (iii) clarifying the principal amount available does not include interest (which ensures sufficient liquidity during the requested stay extension); and (iv) increasing the interest rate to 13% per annum, applicable to the entirety of the principal amount of the Interim Financing Facility. Any draws under the Interim Financing Facility will be in the amounts required, in consultation with the Monitor.

22 These amendments will ensure that the petitioners have sufficient funding during the proposed stay extension period. This funding will allow the petitioners to maintain their assets while the feasibility study is being completed.

23 In the New Mill Scenario, the Interim Financing Facility will remain in place. The petitioners will either repay the Interim Financing Facility with the financing of the New Mill or negotiate another solution with the interim lenders. In the No Mill Scenario, the Interim Financing Facility will be repaid from the proceeds from the sale of the timberlands given its senior priority.

24 In addition, the parties have agreed to an amendment of the Subordinated Interim Financing to extend the maturity date to March 31, 2025.

25 With the DIP Amendments (comprised of Third Amended and Restated DIP Financing Term Sheet and the Subordinated Amending Agreement), the petitioners have also confirmed that they will have sufficient liquidity to meet their obligations during the stay extension.

26 This Court has jurisdiction to consider and approve the proposed amendments to the interim financings pursuant to s. 11.2 of the *CCAA*, taking into account various non-exhaustive factors set out in s. 11.2(4).

27 I conclude that the proposed amendments are necessary and appropriate in terms of advancing this restructuring:

a) the amendments will allow the petitioners to preserve value in the existing mill and the timberlands, the petitioners' only current source of revenue and most valuable assets;

b) the amendments will also enhance the prospects of a viable restructuring by allowing the petitioners breathing room to determine whether the New Mill is feasible or whether to proceed with the orderly liquidation contemplated in the settlement agreement;

c) the terms of the amendments are consistent with how the petitioners' affairs will be managed in the *CCAA* proceedings, in terms of their projected cash flow needs to maintain *status quo* operations to complete the feasibility study;

d) the 3% increase to the interest rate is proportional to the change in the economic conditions since the Interim Financing Facility was originally negotiated; and

e) the Province, the petitioners' primary secured creditor, does not oppose approval of the amendments and no other stakeholder or creditor will be materially prejudiced by reason of the amendments.

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The Claims Process

28 The proposed Claims Process is designed to provide clarity and certainty in this *CCAA* proceeding by revealing the types of claims that may be asserted against the petitioners as part of their restructuring efforts.

29 The petitioners, in consultation with the Monitor, are of the view that conducting a claims process at this time to confirm the nature, quantum and priority of claims will help to ensure orderly execution of any plan of arrangement the petitioners put forward after the feasibility study in the New Mill Scenario, or a distribution in the No Mill Scenario. They both anticipate that this will dovetail with the timing of the feasibility study and use that time efficiently.

30 The Claims Process is structured on what I would generally describe as the usual terms. Claims that will be addressed include: Pre-Filing Claims, Restructuring Claims and Directors/Officers Claims. A number of claims will be excluded from the Claims Process, including of course those that cannot be addressed under the *CCAA*. Excluded claims will also cover any claims arising on or after the filing date (other than the Restructuring Claims and Directors/Officers Claims), the Province's claims relating to the environmental remediation of the existing mill and any claims raised in PLFN's litigation.

31 The proposed Claims Process is primarily a negative claims process.

32 The Claims Bar Date will be August 30, 2024 or, for the Restructuring Claims, such later date as is specified if there is a notice of disclaimer or resiliation.

33 The Monitor is to run the Claims Process and adjudicate any claims, in consultation with the petitioners. The petitioners, with oversight of the Monitor, will have an opportunity to resolve any proof of claim or disputed claim during the course of the Claims Process. Any claim that is referred to the Court for adjudication in accordance with the Claims Process is to be adjudicated on a *de novo* basis.

34 The jurisdiction of the Court to approve a claim process is found in s. 11 of the *CCAA*: *Soccer Express Trading Corp. (Re)*, 2020 BCSC 749 at para. 106.

35 Claim processes are frequently granted in *CCAA* proceedings. They bring some certainty to the proceedings. Claim processes are a commonly recognized element of such proceedings and are an important step in achieving the remedial objectives in a *CCAA*restructuring: *Bul River Mineral Corp. (Re)*, 2014 BCSC 1732 (B.C. S.C.) (B.C. S.C.) (B.C. S.C.) at paras 29-32; *Quest University Canada (Re)* 2020 BCSC 1845 [*Quest University*] at paras. 20-21.

36 I agree with the petitioners that the Claims Process is fair and reasonable to the affected stakeholders. The Claims Process was designed in consultation with the Monitor and the Monitor supports the proposed Claims Process. I agree that commencing the Claims Process at this time will, among other benefits, allow the Monitor to efficiently and effectively assess any potential claims, which will permit the determination of the nature, quantum, and priority of potential claims.

37 Also, the negative aspect of the Claims Process is fair to stakeholders, as it will minimize unnecessary costs by eliminating the need for creditors who receive a notice to fill out proof of claim forms and gather supporting evidence. This aspect of the Claims Process is acceptable as these proceedings have been underway and they have been well publicized: *Quest University* at para. 26; *Toys "R" Us (Canada) Ltd. (Re)*, 2018 ONSC 609 at para. 14. The negative Claims Process will also ensure that known claims are not lost due to a failure to file by the Claims Bar Date.

38 Finally, the Claims Process follows the usual steps and procedures.

39 I conclude that the terms of the proposed Claims Process are fair and reasonable and that the implementation of the Claims Process is appropriate and prudent as this time.

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The Stay Extension

40 The petitioners seek an extension of the stay of proceedings to March 31, 2025.

41 The petitioners cite the need to preserve the *status quo* while implementing the settlement agreement. The proposed extension is said to be appropriate to provide them with time to complete the feasibility study in order to determine whether the New Mill is financially viable. They anticipate that this time will be sufficient to advance the next steps under the settlement agreement to the point that they can then decide upon a course of action based on the results of the feasibility study and the outcome of the Claims Process.

42 The proposed stay extension period is supported by the petitioners' cash flow projections which evidence sufficient liquidity to continue operations and complete the next steps contemplated by the settlement agreement.

43 This Court has the discretion to grant a stay extension for a period that it considers necessary on any terms that this Court may impose: s. 11.02(2) of the *CCAA*. I must be satisfied that the stay extension is appropriate and that the petitioners have acted and continue to act in good faith and with due diligence: s. 11.02(3), *CCAA*.

44 The Monitor states that, in its view, the stay extension period is reasonable in the circumstances and that the requirements of s. 11.02(3) have been met.

45 I am satisfied that the stay period should be extended to March 31, 2025. In a significant way, this stay extension is an integral part of allowing the parties to achieve the benefits of the settlement agreement.

Limited Partnership Relief

46 Pursuant to s. 2 of the *CCAA*, only "companies" are eligible to receive the protection afforded by the *CCAA*.

47 However, courts frequently exercise their jurisdiction under s. 11.02(2) of the *CCAA* to extend the protections of the *CCAA* to partnerships where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the partnerships were not included: *Lehndorff General Partners Ltd. (Re)* 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (O.N.C.J.); *Canwest Publishing lnc./Publications Canwest Inc. (Re)*, 2010 ONSC 222 at paras. 33-34; *Cinram International Inc. (Re)* 2012 ONSC 3767, Schedule "B" at para. 64; *Miniso International Hong Kong Limited v. Migu Investments Inc.*,2019 BCSC 1234 at paras. 58-62.

48 In this proceeding, I extended the benefit of the initial stay of proceeding in favour of the limited partnerships that are part of the Northern Pulp group: *1057863 B.C. Ltd (Re)*,2020 BCSC 1057 at para. 5. In addition, the mediation process was also directed toward these entities: *Mediation Order Reasons* at para. 124.

49 I am satisfied that it is appropriate to continue to include the limited partnerships in the relief granted.

50 I am also satisfied that it is appropriate to include the limited partnership in the Claims Process because the limited partnerships are an integral part of the Northern Pulp group and this will provide further clarity regarding any claims to be presented and/or accepted. The petitioners refer to many examples where such entities have been included in claim processes: *Re Nordstrom Canada Retail Inc.* (30 May 2023), Toronto CV-23-00695619-00CL (O.N.S.C.) (Claims Procedure Order); *Re Old MM GP Inc.* (8 March 2024), Toronto CV-23-00710259-00CL (O.N.S.C.) (Claims Procedure Order); and *Joseph Richard Hospitality Group Ltd. (Re)* (27 July 2023), Vancouver S235026 (B.C.S.C.) (Order Made After Application (Claims Process Order)).

The Wind Farms

51 The petitioners also raise an issue that has not been previously addressed by the Court. In years past, the petitioners had identified that a portion of the timberlands had the potential to accommodate wind farms as a source of revenue.

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52 Prior to the *CCAA* proceedings, the petitioners granted an option to lease land for the purpose of a wind farm. In April 2023, this option was extended. In December 2023, the option was exercised and, on April 25, 2024, the petitioners entered into a lease with Higgins Mountain Wind Farm Limited Partnership. The next steps involve the development of the lands for the project.

53 In addition, in September 2021, the petitioners entered into an option and lease agreement with Renewable Energy Systems Canada Inc. by which an option is granted to develop wind farms on the petitioners' lands.

54 None of these post-*CCAA* transactions were approved by the Court, as was required under the existing court orders.

55 I accept the petitioners' submissions that the failure to bring these matters to the Court arose through inadvertence. The Province, who has security on the lands, supports the transactions. In any event, the counterparties to these agreements now require court approval to regularize the transactions and provide certainty for the developments to proceed.

56 I am satisfied that, had the matters been raised at the outset, approval would have been granted. I approve these transactions and retroactively authorize the petitioners having entered into them.

Conclusion

57 The orders are granted on the terms sought. I approve the settlement agreement, the changes to the interim financing and approve, retroactively, the arrangements with respect to the wind farms. I extend the stay of proceedings to March 31, 2025. Finally, I grant the Claims Process order.

58 On a final note, as did many counsel on this application, the Court wishes to extend its thanks to the many people whose hard work led to this significant resolution, one that allowed this restructuring to go forward. That group of people includes the Court appointed Mediator, the Honourable Thomas Cromwell, the Monitor and the Monitor's counsel, who were all able to assist in the mediation process. In addition, the Court's thanks go to the other parties and their counsel whose good faith efforts and hard work resulted in this resolution that provides significant benefits to all concerned.

Application granted.

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TAB 13

2018 ONSC 609
Ontario Superior Court of Justice [Commercial List]

Re TOYS "R" US (CANADA) LTD.

2018 CarswellOnt 962, 2018 ONSC 609, 288 A.C.W.S. (3d) 16, 56 C.B.R. (6th) 271

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 TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

F.L. Myers J.

Heard: January 25, 2018
Judgment: January 25, 2018 *
Docket: CV-17-00582960-00CL

Counsel: Brian F. Empey, Bradley Wiffen for Applicant
Jane Dietrich for Monitor, Grant Thornton Limited
Linc Rogers for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton for Crayola Canada
Linda Galessiere for Various landlords
Timothy R. Dunn for CentreCorp Management Services Limited
Adam Slavens, Jonathan Silver for LEGO
Sean Zweig for Unsecured Creditors Committee of Toys "R" Us Inc. and other debtors in Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Debtor company brought motion to extend time it remained under protection of Companies' Creditors Arrangement Act while it attempted to restructure, and for approval of draft claims procedure by which outstanding claims of creditors could be recognized and quantified — Motion granted — No significant stakeholder opposed relief sought — Company was acting in good faith and with due diligence in pursuit of restructuring process — Company had sufficient liquidity to operate in normal course throughout proposed extended period without drawing upon its extraordinary financing — Extension of time would allow company to advance going concern restructuring process here and in coordination with United States affiliates — Monitor supported request — Proposed draft claims procedure allowed creditors who disagreed with amounts set out in claims statements to file notices of dispute with monitor by claims bar date to engage review process — Negative option scheduled claim process would eliminate need for filing proofs of claim and supporting evidence in majority of cases, and it ensured that known claims were not lost in procedural uncertainty — Creative scheduled claims procedures like this one that streamlined claims processes, made it easier for all known creditor claims to be recognized and counted, and saved significant time and money were encouraged — Proposed negative option scheduled claim process was both fair and reasonable.
Table of Authorities
Statutes considered:

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 12 — considered

MOTION by debtor company to extend time it remained under protection of *Companies' Creditors Arrangement Act*, and for approval of draft claims procedure.

***F.L. Myers J.*:**

1 Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee asks the court to extend the time that it remains under protection of the *CCAA* while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

2 No significant stakeholder opposed the relief sought and I have granted it accordingly.

3 I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant's financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

4 The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the *CCAA* requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

5 In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

6 In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

7 In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The *CCAA*, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

8 Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the *CCAA*. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

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9 The claims processes in bankruptcy do not necessarily fit well in a *CCAA* proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the *BIA* statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout *CCAA* processes.

10 Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

11 Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

12 The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

13 This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

14 This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

15 Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

16 Order signed accordingly.

Motion granted.

Footnotes

* A corrigendum issued by the court on January 31, 2018 has been incorporated herein.

End of Document

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TAB 14

2009 ABQB 90
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2009 CarswellAlta 167, 2009 ABQB 90, [2009] A.W.L.D. 1593,
[2009] A.W.L.D. 1594, [2009] A.J. No. 129, 52 C.B.R. (5th) 131

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC (Applicants)

B.E. Romaine J.

Heard: January 19, 2009
Judgment: February 11, 2009
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Cynthia L. Spry, Douglas Schweitzer for Applicants
David R. Byers, Ashley J. Taylor, Maya Poliak for The Bank of America
Patrick T. McCarthy, Josef A. Kruger for Monitor
Chris Simard for Iteration Energy Ltd. Plains Canada Marketing, L.P. Plains Midstream Canada ULC, Sabre Energy Partnership (by its Managing Partner Sabre Energy Ltd.), 1316751 Alberta Ltd., Northern Sun Exploration Inc., ATCO Midstream Ltd., Devon Canada Corporation
Craig McMahon for Barnwell of Canada, Limited, Celtic Exploration Ltd.
Douglas S. Nishimura, Brian O'Leary for ARC Resources Ltd., City of Medicine Hat, PennWest Petroleum, Avenir Operating Corp., NuVista Energy Ltd., Black Rider Resources Inc., Wolf Coulee Resources Inc., Profound Energy Inc., Orleans Energy Ltd., Baytex Energy Ltd., Daylight Energy Ltd., Crew Energy Inc., Trilogy Energy LP
Brendan O'Neill for Fortis Capital Corp.
Travis Lysak for Nexen Marketing, Keyera Energy Partnership
William E.J. Skelly for Fractal Systems Inc. Bellamont Exploration Ltd., Enersul Limited Partnership, Dynamysk Automation Ltd.

Subject: Insolvency; Estates and Trusts; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.1 Fraudulent preferences
XI.1.d Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Administration of estate — Miscellaneous issues
Interim distribution — Group of energy companies obtained protection under Companies' Creditors Arrangement Act — Owner of group was located in United States, where it faced insolvency-related proceedings — Credit arrangement existed for benefit of one company in Canada and one in United States, with five companies in group as guarantors — Over $2.5 billion was owed on credit American facility — From liquidation of owner, Canadian borrower received $113 million — Three debtors in

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group brought application for interim distribution of $90 million to lenders on credit arrangement — Application adjourned — More information regarding potential harm to Canadian unsecured creditors required — Application was premature — Rights of unsecured creditors could be prejudiced by granting order — American unsecured creditors could be in superior position if order granted — As proceedings had progressed as insolvency protection and not receivership, stay should be honoured — Distribution of funds did not necessarily require resolution of American proceedings.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — General principles

Group of energy companies obtained protection under Companies' Creditors Arrangement Act — Owner of group was located in United States, where it faced insolvency-related proceedings — Credit arrangement existed for benefit of one company in Canada and one in United States, with five companies in group as guarantors — Over $2.5 billion was owed on credit American facility — From liquidation of owner, Canadian borrower received $113 million — Three debtors in group brought application for interim distribution of $90 million to lenders on credit arrangement — Application adjourned — More information regarding potential harm to Canadian unsecured creditors required — Application was premature — Rights of unsecured creditors could be prejudiced by granting order — Debtors not required to file further information regarding fraudulent preference — Declaration that no fraudulent preference occurred affected distribution proceedings only and would not prevent future action if warranted — Clause rendering guarantee void if company rendered insolvent was matter of American law and had no applicability in Canada, and did not limit liability of guarantors to asset value on certain dates.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

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

Generally — referred to

APPLICATION by debtors for interim distribution of funds.

***B.E. Romaine J.*:**

Introduction

1 Three of this group of CCAA debtors have applied for an order authorizing an interim distribution of funds to a banking syndicate, their major secured creditor under a guarantee of the indebtedness of the entire corporate group, including debtors engaged in Chapter 11 proceedings in the United States.

Background to Application

2 SemCanada Energy Company ("SemCanada Energy") and its subsidiaries A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") are three of a group of seven companies referred to as the SemCanada Group that obtained protection from their creditors pursuant to an Order granted under the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, on July 30, 2008. Prior to the initial order, SemCanada Energy, AES and CEG had commenced proceedings under the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, on July 24, 2008 and those proceedings were then converted to proceedings under the CCAA.

3 On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the "U.S. Debtors") filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

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4 According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup's credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

5 The SemCanada Group are indirect wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

(a) SemCanada Crude Company ("SemCanada Crude"), a crude oil marketing and blending operation;

(b) SemEnergy Group, whose business is gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS ULC; ("SemCAMS"); and

(c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

6 SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the "Lenders") entered into a credit agreement in 2005 (the "Credit Agreement"). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. $2.5 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

7 Five of the SemCanada Group of companies, including SemCanada, have provided a guarantee of all obligations under the Credit Agreement to the Lenders, who rank as senior secured lenders, and to a US $600 million bond indenture issued by SemGroup. The amount owing under these instruments is in excess of US $3.3 billion. The guarantee is secured by a security and pledge agreement (the "Security Agreement") signed by five members of the SemCanada Group.

8 While it is intended to present a plan of arrangement or compromise with respect to at least one of the other two businesses, the SemEnergy Group is in self liquidation and has no significant ongoing operations. As a result of liquidation proceedings and the collection of outstanding accounts receivable, SemCanada Energy, AES and CEG now hold $113 million in cash.

9 The SemEnergy Group proposes to make an interim distribution payment to the Lenders of $90 million. The remainder of the $113 million would be held back to satisfy claims that may rank in priority to that of the Lenders, costs and fees related to the CCAA proceedings and the employee retention plan, potential claims under the Directors' Charge and a general contingency reserve. Since the time of the first application, the Lenders have requested that the outstanding and continuing fees of their Canadian advisors be paid by the SemEnergy Group. The current outstanding fees amount to approximately $1.8 million. It is common ground that if such interim payment is allowed, there will be nothing left from the $113 million to be distributed to unsecured creditors, subject to certain recovery measures in the United States proceedings that will be referred to later in this decision.

10 A number of unsecured creditors objected to the application, and it was adjourned to allow the unsecured creditors access to the security opinion of the Monitor's counsel, cross-examination on affidavits and the preparation of a report from the Monitor on the status of the restructuring efforts of the U.S. Debtors to date.

11 The unsecured creditors of the SemCanada Group that object to the application have raised a number of issues. They can be summarized as follows:

(a) the obligations of the SemCanada Group under the guarantee to the Lenders may be voidable as fraudulent preferences or fraudulent conveyances. The Court has insufficient evidence on that issue to grant the order sought, and the SemCanada Group should be compelled to provide further financial information and to answer specific questions on the issue during cross-examination on the affidavits;

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(b) the amounts that the SemCanada Group are obligated to pay under the guarantee are expressly limited by the terms of the guarantee itself;

(c) the interim distribution may unfairly prejudice Canadian unsecured creditors and bestow an unwarranted benefit on unsecured creditors in the United States proceedings; and

(d) there is no urgency and a delay may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings.

Analysis

(a) The Fraudulent Preferences Issue

12 The opinion obtained by the Monitor from counsel on the validity of the Lenders' security does not address any issue of fraudulent preference. It would not be normal practice in this kind of proceeding for the Monitor's counsel to address the possibility of fraudulent preference unless the Monitor is alerted to some evidence that this may be an issue. The Monitor has not identified any such concern in this case. Thus, in the normal course, it would be up to creditors, if they believe circumstances exist, to bring appropriate proceedings to attack the guarantee and Security Agreement. The SemCanada Group points out that the unsecured creditors have not brought any action (which might leave them open to sanctions of costs if unsuccessful) and submit that they are attempting to use the proceeding as a fishing expedition to delay and obfuscate the application. The applicants and the Lenders submit that the analysis of the possibility of fraudulent preference submitted by the unsecured creditors is flawed at any rate and lacking in merit.

13 There is, however, a complication in the argument as to who has the onus to address the possibility of fraudulent preferences. The unsecured creditors point out that the draft order proposed by the applicants for the interim distribution seeks a declaration that the Lenders' security (as embodied in the guarantee and the Security Agreement, which was executed by all five major companies in the SemCanada Group) constitutes a valid and enforceable obligation of the SemEnergy Group and that the payment of the interim distribution will not be void or voidable at the instance of creditors and does not constitute an unjust preference, fraudulent conveyance or reviewable transaction. Pursuant to the proposed order, this declaration would be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the debtors. Thus, the unsecured creditors argue, the issue of fraudulent preferences is relevant and the SemCanada Group should be obligated to file more complete affidavits providing financial statements at relevant periods at and around the time the loan documents and guarantee were entered into and to answer cross-examination questions on the value of the assets of the SemEnergy Group at such times.

14 The declaratory language at issue is common to this type of order, and the SemEnergy Group and the Lenders submit that it applies only to the interim distribution, not the underlying guarantee and Security Agreement that precedes it. They also submit that, at any rate, language can be crafted to ensure that the declaration is not given effect beyond a limited purpose. While it could be argued that declaratory relief relating to the interim distribution could be construed as extending to the underlying guarantee obligations, I accept that the language of the proposed order was not intended to protect the guarantee and the Security Agreement from the possibility of attack as a fraudulent preference, conveyance or reviewable transaction.

15 It is not inappropriate for the applicants to ask for a declaration that the interim distribution is not a fraudulent preference or conveyance and such a declaration would arise from the Court's review of the relief sought as a part of CCAA process. Given the limited nature of what is being sought and the purpose of the proceedings, the creditors are not entitled to a full review of the possibility of historical fraudulent preferences or fulsome financial information from the CCAA debtors arising from this application standing alone. This does not preclude the unsecured creditors from applying to lift the stay to bring an independent action if they believe that it is justified by evidence.

16 The applicants and the Lenders raised a number of arguments about the weakness of any allegations of fraudulent preference, the passing of limitation periods and the absence of any intent that could form the basis for such an action. It is not necessary to address these submissions at this point in time.

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17 I therefore decline to require the CCAA debtors to file further financial information on this application or to answer the questions or provide the undertakings previously refused.

(b) The Guarantee is Limited - Section 2(f) of the Guarantee

18 The guarantee signed by SemEnergy and the other guarantors includes the following provision:

> 2(f) The liability of each Guarantor hereunder shall be limited to the maximum amount of liability that can be incurred without rendering this Guaranty, as it relates to such Guarantor, voidable under applicable Law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount.

2(f)

19 It appears from academic commentary that this clause was designed to address an issue that exists under United States corporate law relating to the inability of a corporation to grant a guarantee if it causes the guarantor to become insolvent: Corporate Guarantees As a Form of Financial Assistance: The Banker's View, S.D.N. Belcher and Peter J. Lewarne, (1990)5 B.F.L.R. at 1. While certain insolvency tests under corporate legislation historically limited Canadian corporations in granting guarantees, they have now been repealed, and the same issue does not exist under Canadian law.

20 Thus, while this clause may have effect when construed under U.S. law to limit the guarantee to an amount that would not render the guarantors insolvent at relevant periods of time, there are no corresponding obligations under the laws of Alberta (the governing law of the guarantee) or the corporate statutes of Nova Scotia, Alberta and Saskatchewan that govern SemEnergy, AES and CEG, respectively, that would limit the amount of the guarantee arising from the potential of insolvency when the guarantee was granted, or to the asset value of the guarantor, net of unsecured indebtedness, as suggested by the unsecured creditors. The "next asset value" limitation argued by the unsecured creditors appears to arise from either the wording of Section 6(c) of the guarantee (set out later in these reasons) or a representation as to solvency given by the SemGroup companies to the banking syndicate in the Credit Agreement for the indebtedness that underlies the guarantee.

21 The wording of Section 6(c) relating to the concept of "net worth" is restricted to the subsection and plainly refers only to the calculation of a limited right of subrogation.

22 While the breach of the representation in the Credit Agreement may form the basis for an action by the banking syndicate under the Credit Agreement it if is established to be incorrect, there is no evidence incorporating this representation into Section 2(f) of the guarantee, or that would warrant it being read into the section or otherwise modifying the section's plain meaning.

23 While Section 2(f) may take effect in addition to the standard statutory remedies if the guarantee is determined to be a fraudulent conveyance or fraudulent transfer under applicable Canadian insolvency law, that argument refers back to the issue of fraudulent preferences in the more generally understood "all or nothing" sense, and the current lack of any persuasive evidence that would indicate a fraudulent preference. Thus, Section 2(f) of the guarantee does not, as submitted by the unsecured creditors, limit the liability of each individual guarantor to its net asset value on certain relevant dates, either by its plain language, the operation of any ambiguity or cross-reference to another agreement or a reference to applicable Canadian law, and there is no reason arising from this provision of the guarantee to require further financial information from the applicants.

(c) Potential Prejudice to Canadian Unsecured Creditors

24 The unsecured creditors submit that the payment of the interim distribution may give rise to the development of inequities among the unsecured creditors of the SemCanada Group and the U.S. Debtors. They note that, according to material filed with the application for the initial order, all the CCAA applicants were solvent but for their secured guarantee obligations. The declaration filed at the commencement of Chapter 11 proceeding in the United States disclosed that the consolidated assets of the SemGroup as of May 31, 2008 totalled approximately $6.14 billion. It appears that subsequent events have reduced the value of the SemGroup's assets by approximately $2 billion and it must be noted that the value declared is book value. However,

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given that secured and senior debt totals approximately $3.3 billion, it does not appear that there are insufficient assets in the U.S. estate to fully pay the Lenders.

25 There have been no distributions made to the Lenders in the United States since the commencement of the U.S. proceedings. The unsecured creditors submit that, if the interim distribution is authorized, an inequitable situation arises whereby the SemEnergy Group of debtor companies will have applied all of their assets to the secured debt, leaving their unsecured creditors without the possibility of recovery, while other debtor companies, including in the U.S. proceedings, will have their burdens reduced, making it possible that U.S. unsecured debtors will benefit disproportionally.

26 The applicants and the Lenders point out, firstly, that the guarantee is an unconditional guarantee and that the Lenders are not required to exhaust their remedies against any other party before invoking its provisions against the applicants. That is clear from the language of the guarantee and the law. However, the contractual rights of the Lenders, in common with the contractual rights of many stakeholders, have been stayed by the CCAA proceedings. The rights of a secured creditor are not awarded a unique status under the CCAA: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (B.C. C.A.) at page 92. It is not uncommon for contractual rights to be affected by CCAA proceedings and it is important to note that what is being proposed by the applicants is a deviation from the normal course of such proceedings, which are designed to prevent manoeuvring for position among creditors while a reorganization is attempted.

27 While orders allowing interim distributions to creditors for one reason or another are not without precedent, at the least, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. The court is required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders of the debtor entity.

28 The applicants and the Lenders point out that the Lenders have established the indebtedness of the SemEnergy Group and that their security is valid and ranks first in priority. While the Lenders have not made a formal demand of payment or filed a notice of intention, they are only precluded from doing so by the stay provisions of the initial order. The SemEnergy Group has been liquidated, and, they submit, these companies were only included in the CCAA proceedings for administrative convenience. The unsecured creditors counter that the SemEnergy Group sought the protection of the CCAA in July of 2008 purportedly to "reorganize and/or liquidate", that the CCAA applicants argued that adding the SemEnergy Group to the CCAA proceedings made sense given the inter-relationship of the SemCanada Group's businesses, and that, having chosen to use the CCAA process, the SemEnergy Group should be compelled to live with its choice.

29 I agree that I cannot ignore the fact that this is a CCAA proceeding and not a receivership merely because it is more convenient for the applicants and the Lenders at this point to characterize the proceedings in those terms. While the SemEnergy Group standing alone may have liquidated with no current intention of formulating a reorganization plan, the whole of the SemGroup is under the protection of the CCAA in Canada and Chapter 11 in the United States. This is not only for the convenience of the debtors and the Lenders, but to allow the corporate group time to accomplish the goals of such legislation in terms of attempting to reorganize its business, maximizing the value of its estate for the benefit of all stakeholders, and ensuring fairness of treatment. I am not only permitted but required in my supervisory role under the CCAA to consider the implications of the corporate group's cross-border reorganization efforts as a whole.

30 The applicants argue that if the application does not succeed, the Lenders will apply to appoint a receiver. The Lenders in fact invite the Court to convert the proceedings to a receivership on its own motion. That application is not before me and not likely to be unopposed in any event.

31 The applicants and the Lenders submit that the interim distribution would not prejudice the SemEnergy's Group's other creditors because SemCanada Energy has rights of indemnification and subrogation from the other members of the corporate group.

32 Sections 6(a) and 6(c) of the guarantee, however, read as follows:

Section 6. Limited Subrogation

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> (a) Until all of the Obligations have been paid and performed in full, no Guarantor shall have any right to exercise any right of subrogation, reimbursement, indemnity, exoneration, contribution or any other claim which it may now or hereafter have against or to any Obligor or any Security in connection with this Guaranty (including any right of subrogation under any law, as amended), and each Guarantor hereby waives any rights to enforce any remedy which such Guarantor may have against either Borrower or any other Obligor and any right to participate in any Security until such time. ...
>
> (c) Upon full and final payment of the Obligations, each guarantor of the Obligations which has made payments upon the Obligations shall be entitled to contribution from each other guarantor of the Obligations, to the end that all such payments upon the Obligations shall be shared among all such guarantors in proportion to their respective net worth, provided that the contribution obligations of each Guarantor shall be limited to the maximum amount that it can pay at such time without rendering its contribution obligations voidable under applicable Law relating to fraudulent conveyances or fraudulent transfers. As used in this subsection, the "Net Worth" of each guarantor means, at any time, the remainder of (i) the fair value of such guarantor's assets (other that such right of contribution), minus (ii) the fair value of such guarantor's liabilities (other than its liabilities under its guaranty of the Obligations).

33 It appears, therefore, that the SemEnergy Group's right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless and until all the indebtedness to the Lenders is paid in full. It also appears that the right to contribution from other members of the SemGroup may be limited under U.S. law to amounts that would not result in the insolvency of such a entity in proportion to such entity's net worth. At this stage of proceedings, both in Canada and in the United States, it is not possible to say with certainty that the reorganization of the corporate group will result in the payment of indebtedness to the Lenders in full or in such a fashion that the limitation upon subrogation is not triggered. It is possible, for example, that a reorganization may compromise the claims of the Lenders or may have them continue the loans on revised terms to a reorganized corporate group. The SemEnergy Group's right of subrogation and indemnity could prove to be a hollow or inadequate remedy.

34 The unsecured creditors submit that the language of the guarantee prevents the SemEnergy Group from filing a claim for subrogation in the U.S. proceedings. The applicants submit that, if payment under the guarantee is authorized, they would file a claim and the Lenders agree that, in their view, such a filing would not be a breach of Section 6 of the guarantee. What is not clear is whether the U.S. debtors would also agree. Even if they did, the filing of a claim does not eliminate the contractual limits on subrogation.

35 The Lenders submit that making the payment and subsequently filing a claim in the U.S. proceedings may ultimately be beneficial to the SemEnergy Group's other creditors, as it allows the timely filing of a claim. The unsecured creditors do not appear to agree.

36 The Lenders submit that there is no good reason to delay the rights of the Lenders to collect on the guarantee, and that to refuse the application would be to improve the position of the unsecured creditors to the detriment of the secured creditor. I am satisfied that an interim distribution to the Lenders gives rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighs the benefits of an early payment on the guarantee to the Lenders. To suggest, as the Lenders do, that if the right to subrogation is contractually barred or is compromised by a plan of arrangement in the United States, the unsecured creditors are where they would be if the Lenders had exercised their contractual rights in any event is to treat the Canadian CCAA proceedings as a mere administrative convenience.

37 The unsecured creditors made certain representations regarding a claim by NGX Financial Inc. Given the decision I have reached, it is not necessary that I address this issue at this time.

(d) The Lack of Urgency and Benefit of Delay

38 The unsecured creditors submit that the applicants have shown no urgency to this application, and the only evidence before this court to justify the application is the statement of the Chief Executive Officer of the SemEnergy Group that, given

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the status of the group and the significant proceeds in their bank accounts, an interim distribution is appropriate. The Monitor, in commenting that the interim distribution is appropriate, repeats these reasons and notes that the claims bar date has passed and that it has received its security opinion from counsel. While the Monitor's recommendations are entitled to great deference, the Monitor has not delved into or addressed the issues of potential prejudice raised by the unsecured creditors in its analysis of the issue.

39 The unsecured creditors submit that even a short delay in the distribution of funds may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings. They refer to media reports that indicate that a third party may be purposing a plan of arrangement or reorganization to the U.S. Debtors in the near future, and the Monitor reports that it understands that business plans and confidential information memorandums have been prepared for some of the significant U.S. Debtors and the SemGroup's intention is to either seek a sale of certain operating units or companies or restructure under the ownership of Semgroup. The Monitor advises, however, that it is premature and unrealistic to estimate the timing for the conclusion of the U.S. proceedings.

40 It is not necessarily the case that a distribution of funds from the Canadian estate must await the resolution of Chapter 11 proceedings in the United States. The Canadian CCAA proceedings may advance at a different pace if the Court is satisfied by evidence before it that it is appropriate to do so. In the case of this application, however, it is prudent to delay an interim distribution until there is sufficient information to better evaluate the potential of prejudice to Canadian creditors.

Conclusion

41 I find the application to be premature, and adjourn it sine die with leave to the applicants and the Lenders to reapply with more current information if it becomes apparent that the potential prejudice identified to the unsecured creditors is unlikely to materialize, can be avoided by other measures or that the balance of prejudice and benefit has shifted.

Application adjourned.

End of Document

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TAB 15

2014 BCSC 1855
British Columbia Supreme Court

Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.

2014 CarswellBC 2916, 2014 BCSC 1855, [2014] B.C.W.L.D. 7241, [2014] B.C.W.L.D. 7242, [2015] 1 W.W.R. 606, 17 C.B.R. (6th) 41, 245 A.C.W.S. (3d) 21, 72 B.C.L.R. (5th) 294

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd., Petitioners and P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal, Respondents

G.C. Weatherill J.

Heard: September 24, 2014
Judgment: October 2, 2014
Docket: Vancouver S-139627

Counsel: J.D. Schultz, J.R. Sandrelli, for Receiver, Ernest & Young Inc.
D.E. Gruber, for Petitioners
J.D. Shields, for Valiant Trust Company
C.K. Wendell, for 0964502 B.C. Ltd.
S.A. Dubo, for Interior Savings Credit Union
R.H. Harrison, for Maynards Financial Ltd.

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.4 Miscellaneous
Bankruptcy and insolvency
V Bankruptcy and receiving orders
Headnote
Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous
Two-phase retail, office and residential real estate development went into receivership — Receiver decided to complete phase one of development and sell it by "stalking horse" sale process — Receiver entered into agreement with stalking horse bidder — Receiver brought application for, inter alia, approval of stalking horse bidding process (bidding procedures order) and conditional order vesting title to development in bidder — Application granted in part on other grounds — Application for bidding procedures order and conditional vesting order dismissed — Receiver failed to prove stalking horse agreement was in best interests of creditors as whole — No course of action other than stalking horse bidding process appeared to have been considered, including traditional tendering process — There was no evidence on extent to which receiver tried to identify other developers who might be interested in bidding through stalking horse bid — Dated appraisals might not accurately reflect current value of development — There was insufficient evidence as to reasonableness of termination fee.

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Bankruptcy and insolvency --- Receivers — Miscellaneous

Two-phase retail, office and residential real estate development went into receivership — Receiver decided to complete phase one of development and sell it by "stalking horse" sale process — Receiver entered into agreement with stalking horse bidder — Receiver brought application for, inter alia, approval of stalking horse bidding process; increase in receiver's borrowing charge; and approval of receiver's activities — Application granted in part — Receiver's request for increase in borrowing charge granted, particularly given that more work would be required regarding valuation and marketing of development — Increase allowed on condition that financial terms for increase are no less favourable to creditors than current terms of receiver's borrowing charge — Receiver's first report approved, but it was premature to approve receiver's activities related to stalking horse bid — Receiver fulfilled its mandate with respect to completion of phase one, but failed to show stalking horse bid process was entered into prudently.

Table of Authorities

Cases considered by *G.C. Weatherill J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 1993 CarswellOnt 216, 17 C.P.C. (3d) 296, 20 C.B.R. (3d) 223 (Ont. Gen. Div.) — referred to

Bank of America Canada v. Willann Investments Ltd. (1996), 1996 CarswellOnt 2969 (Ont. C.A.) — referred to

Bank of Montreal v. Baysong Developments Inc. (2011), 2011 ONSC 4450, 2011 CarswellOnt 8285 (Ont. S.C.J.) — referred to

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 CarswellOnt 3158, 2012 ONSC 1750, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — referred to

Digital Domain Media Group Inc., Re (2012), 3 C.B.R. (6th) 320, 2012 BCSC 1567, 2012 CarswellBC 3245 (B.C. S.C. [In Chambers]) — referred to

Lang Michener v. American Bullion Minerals Ltd. (2005), 2005 BCSC 684, 2005 CarswellBC 1106 (B.C. S.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Words and phrases considered:

stalking horse sale process

[A] stalking horse sale process . . . involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. . . . If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

APPLICATION by receiver for approval of "stalking horse" bid and other relief.

***G.C. Weatherill J.*:**

Introduction

1 This proceeding concerns the receivership of a retail, office and residential real estate development in Kelowna, British Columbia called "Sopa Square" (the "Development").

2 The Receiver (the "Receiver") of the Respondents, P218 Enterprises Ltd., Wayne Holdings Ltd. and The Sopa Square Joint Venture (collectively the "Debtors"), seeks the following orders:

> a) approval of a stalking horse bidding process in respect of the sale of the assets of the Development in the form of the Bidding Procedures Order attached as Schedule B to the Notice of Application;
>
> b) a vesting of title to the Development in the stalking horse bidder, subject to the outcome of the stalking horse bidding process;

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c) approval of a pre-stratification contract for purchase and sale of one of the proposed strata lots in the retail/office phase of the Development;

d) an increase in the Receiver's borrowing charge by $1 million from $2.5 million to $3.5 million; and

e) approval of the Receiver's activities as set out in the Receiver's First Report dated January 30, 2014 and the Receiver's Second Report dated August 26, 2014.

3 The Receiver also seeks an order sealing an appraisal of the Development dated March 3, 2014 on the basis that it may unduly prejudice the marketing of the Development.

Background

4 The Development consists of two phases: Phase 1 is a two story building comprised of retail outlets on the first floor and office space on the second floor and Phase 2 is a multi-story residential tower.

5 The Respondent, Valiant Trust Company ("Valiant Trust"), is the trustee for 36 original investors in the Development, each of whom holds a bond from the Debtors entitling the bondholder to purchase a unit in the Development (the "Bond Holders").

6 The Development ran into financial difficulty several times over the course of its development and construction. Builders liens were filed and the project was halted due to lack of financing. As part of a recapitalization plan, these lien claimants (the "Lien Claimants") agreed to discharge their liens and consolidate the amounts they were owed into a subordinated mortgage, which allowed additional financing to be provided by the lead lender, the Petitioner, Leslie & Irene Dube Foundation Inc. ("Dube Foundation").

7 Ultimately the recapitalization plan failed prior to completion of Phase 1, resulting in the commencement of this receivership proceeding in December 2013. The Receiver was appointed on January 27, 2014.

8 The Receiver is empowered by its appointment to market the Development and to negotiate such terms and conditions of sale as it, in its discretion, deems appropriate.

9 The Receiver determined that the best course of action to preserve value was to complete Phase 1 of the Development and to market it without completing Phase 2. It did so, at least substantially, and has begun to market the units in Phase 1. Construction of Phase 2 has not yet commenced.

10 In order to complete Phase 1, the Receiver borrowed $2.5 million from Maynards Financial Ltd. ("Maynards") secured by a priority Receiver's Borrowing Charge subordinate only to the existing first mortgage of Interior Savings Credit Union ("ISCU"). This borrowing charge was approved by a court order dated February 6, 2014.

11 The Receiver has entered into various leases of the first floor retail space. It has also entered into a contract of purchase and sale with respect to proposed Strata Lot 6 in the second floor office space with Dr. Keith Yap. Dr. Yap has spent substantial money on improvements to that space and, pursuant to an arrangement with the Receiver, is currently occupying the space for his medical practice awaiting stratification and completion of the purchase and sale agreement.

12 The major creditor in the receivership, Dube Foundation, is currently owed approximately $21.3 million and has made it clear to the Receiver that it will oppose any sale of the Development that results in it receiving less than substantially all of its mortgage security. Dube Foundation's mortgage ranks behind the ISCU mortgage (approx. $5.0 million), the Maynards mortgage ($2.5 million) and property taxes owing of approx. $275,000. In order for Dube Foundation to be paid out in full, sale proceeds for the Development of at least $29 million will be required.

13 An appraisal of the Development dated April 22, 2013, nine months before the appointment of the Receiver and prior to the completion of Phase 1, valued the Development as follows:

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a) Phase 1:	$21,575,000
b) Phase 2:	$6,830,000
	$28,405,000

14 The Receiver obtained a second appraisal of Phase 2 by Altus Group dated March 3, 2014 which was based upon an inspection of the Development on December 30, 2013. The Receiver seeks an order that this appraisal be sealed on the basis that it may compromise any future bidding process in respect of the sale of the Development.

15 Instead of implementing a tender process in which bidders can submit a bid within a specific period without knowledge of other bids, the Receiver concluded that the most effective and efficient way to sell the Development was through a stalking horse sale process. That process involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. The premise is that the stalking horse has undertaken considerable due diligence for determining the value of the assets and other bidders can then rely, at least to some extent, on the value attached by the stalking horse to those assets. If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

16 In July 2014, Dube Foundation, with the assistance of the Receiver, entered into a Term Sheet with an experienced real estate developer known as the Aquilini Investment Group ("Aquilini"). It contemplated that Aquilini would submit a stalking horse bid to the Receiver and Dube Foundation would provide financing to Aquilini if its bid was successful, on terms to be negotiated.

17 By agreement dated August 12, 2014 (the "SH Agreement"), Aquilini (through an entity called AD Sopa Limited Partnership) entered into a stalking horse bid agreement with the Receiver, the key terms of which are:

a) a purchase price of $29.5 million;

b) a deposit of $1.0 million;

c) the bid is conditional on approval of the court, the granting of a conditional vesting order and the completion of a stalking horse bidding process with no better bid being submitted; and

d) a termination fee of $1.5 million if a better bid is submitted in the bidding process (the "Termination Fee").

18 The SH Agreement includes detailed stalking horse bidding procedures (the "Bidding Procedures").

19 The Receiver seeks an order approving the SH Agreement and vesting the assets in Aquilini, subject to the Bidding Procedures and no better bid being received.

Analysis

The Stalking Horse Bid

20 The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7 [*CCM*]; *Bank of Montreal v. Baysong Developments Inc.*, 2011 ONSC 4450 (Ont. S.C.J.) at para. 44 [*Baysong*]; *Digital Domain Media Group Inc., Re*, 2012 BCSC 1567 (B.C. S.C. [In Chambers]).

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21 The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) at para. 16:

> a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> b) the efficacy and integrity of the receiver's sale process by which offers were obtained;
>
> c) whether there has been unfairness in the working out of the process; and
>
> d) the interests of all parties.

22 The Receiver submits that the SH Agreement is reasonable based upon the appraisals it has received. If the SH Agreement is approved, the Receiver proposes to follow the Bidding Procedures by publishing several newspaper advertisements and retaining the firm of Colliers International ("Colliers"), a well know firm that provides a variety of real estate services, to assist in the marketing of the project to potential bidders. The Receiver has populated a detailed data room to streamline due diligence by potential bidders.

23 The Receiver submits that the stalking horse bidding process will provide a public and transparent process under which potential purchasers will be identified and the Development will be marketed. The Receiver has put forward a detailed timetable by which it expects the Bidding Procedures to be completed.

24 The Receiver submits that each of the factors set out in *Soundair* has been or will be met in this case. It says that the process has been designed to obtain the highest price for the assets because the SH Agreement sets a floor price that is at least sufficient to pay the majority of the claims of the major creditors in a reasonable period of time.

25 The Receiver submits further that the Termination Fee is reasonable because it not only reflects the expenses that Aquilini has incurred in conducting its due diligence and the structuring of the transaction, which will be of benefit to any other bidder that submits a bid exceeding that set out in the SH Agreement, but also provides compensation to Aquilini for having committed the deposit funds, thereby foregoing the use of the funds for other potential opportunities. It says that the Termination Fee also provides value for the cost of stability that is being achieved through the process. It also submits that the Termination Fee in this case is within the range for termination fees of 1% to 5% that have been approved in other stalking horse cases: *Baysong* at para. 44.

26 Mr. Shields, counsel for Valiant Trust, strenuously opposes an approval by the court of the SH Agreement. He submits that there is a complete absence of evidence that would allow the court to make a determination as to whether the SH Agreement is reasonable. He argues that there is no evidence from the Receiver regarding what, if any, alternate marketing steps have been considered or taken or why, if any were considered or taken, they were rejected. He points out that the first appraisal is approximately 18 months old, was done before Phase 1 was completed and has not been updated. The second appraisal report is based upon an inspection of the Development that took place over nine months ago, also before Phase 1 was completed. Moreover, he says that the veracity of the second appraisal cannot be tested due to the non-disclosure restrictions placed upon it by the Receiver.

27 He argues that the Receiver has, to date, not marketed the Development at all. Instead, the Receiver identified three potential developers, who are all located in Western Canada, entered into negotiations with two of them and chose Aquilini to be the stalking horse. It has not provided the court with any particulars of how the three developers were chosen or why, what was discussed or what took place during the negotiations. As a result, he argues, the court is in no position to say that the proposed stalking horse bidding process will likely result in a more favourable outcome.

28 Moreover, Mr. Shields argues that the Receiver's submission that the Termination Fee is justified because it will minimize the due diligence costs of other potential bidders cannot be supported. Plainly, he says, Aquilini is not about to disclose to competitors its strategies or the due diligence it performed and, as a result, all other bidders will have to do their

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own due diligence, saving them nothing. Moreover, he emphatically submits that the Termination Fee of $1.5 million will put a "millstone" around the necks of potential bidders because they will have to bid at least $1.5 million more than the SH Agreement price in order to qualify. This, he argues, effectively gives Aquilini a $1.5 million credit in the bidding process.

29 Simply put, Mr. Shields submits that, while the SH Agreement may be in the best interests of the ISCU and the Dube Foundation, the Receiver has not properly considered the interests of the Bond Holders and Lien Claimants who will lose everything if the SH Agreement completes.

30 There are many stakeholders in this matter. They include the Bond Holders and the Lien Claimants who will likely end up with nothing if significantly better bids are not received and the Stalking Horse Bid ultimately completes.

31 To be effective for such stakeholders, the sale process must allow a sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of the project requires that interested parties move relatively quickly in order that the value of the project is preserved and not allowed to deteriorate. The timetable must be realistic.

32 In this case, I have several concerns.

The Stalking Horse Process

33 No course of action other than a stalking horse bidding process appears to have been considered, including the traditional tendering process. There is no evidence that the Receiver has attempted to market the Development beyond discussions with three developers. There is no evidence regarding the extent to which the Receiver attempted to identify other developers who might be interested in bidding through a stalking horse bid. There is no evidence from which the court can assess whether the economic incentives behind the SH Agreement are fair and reasonable or whether they are excessive given the circumstances of the Bond Holders and the Lien Claimants.

The Appraisals.

34 The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process.

35 The appraisals of the Development are dated. Neither of them was prepared after the completion of Phase 1. I am not satisfied that the appraisals accurately reflect the current value of the Development.

Termination Fee

36 While I accept that the SH Agreement effectively serves as a guaranteed floor bid over the course of the proposed marketing process and that a termination fee is warranted if a higher qualified bid is approved, the mere fact that the proposed Termination Fee is within the "range of reasonableness" as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. The court is not simply a rubber stamp for the agreement that was made.

37 The foregoing notwithstanding, given the Receiver's function and role, the Court will often defer to the Receiver's recommendation unless there is a compelling reason to reject it. In Frank Bennett's *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 329, the learned author writes:

> ...The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it has made its decision. If the receiver's recommendation is challenged, the court should have evidence of other offers that are significantly or substantially higher before it can adjudicate on this point. The court should readily accept the receiver's recommendation on the motion for court approval and reject the receiver's recommendation

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only in the exceptional cases since it would weaken the role and function of the receiver. The receiver deserves respect and deference.

38 In this case, there is no evidence regarding how the Termination Fee was arrived at or how the $1.5 million fee compares to the expenses incurred by Aquilini in respect of its due diligence, the SH Agreement or its lost opportunity cost with respect to the deposit. Indeed, there is no evidence whatsoever upon which the court is able to gauge whether the Termination Fee is reasonable other than that it is within the "range", albeit the high end of the range. In my view, such evidence is required. A termination fee of $1.5 million may well have a substantial adverse effect on the Bond Holders and the Lien Claimants.

39 I accept that the court must balance the expenses, efficiencies and delays that will necessarily result if the Receiver has to go through what may prove to be a fruitless additional process due to the possibility that a more provident bid will be received which results in some recovery for the Lien Claimants and Bond Holders. However, the dearth of evidence regarding (i) the extent to which marketing processes other than a stalking horse process have been considered; (ii) the value of the Development; and (iii) the basis upon which the Termination Fee was arrived at is such that the court has no benchmark against which to assess the reasonableness of the SH Agreement.

40 There is no evidence before me of any urgency regarding the sale of the Development.

41 Accordingly, I conclude that the Receiver has not demonstrated that the SH Agreement is in the best interests of the creditors as a whole. The application for a Bidding Procedures Order is dismissed.

Conditional Vesting Order

42 Given my finding regarding the reasonableness of the SH Agreement and my decision regarding the Bidding Procedures Order, there is no need to consider this issue.

The SL6 Purchase Agreement

43 At the time of the Receiver's appointment, the Debtors had entered into a contract of purchase and sale with Dr. Keith Yap and 0720609 B.C. Ltd. ("Dr. Yap") in respect of certain office space, known as SL 6, in Phase 1 of the Development (the "SL 6 Purchase Agreement"). The space is intended to become Strata Lot 6 following stratification of the building.

44 Prior to the Receivership and in anticipation of completion of construction of the Development, Dr. Yap spent considerable sums improving SL 6.

45 The Receiver has entered into an addendum to the SL 6 Purchase Agreement on terms that it considers to be commercially reasonable. The addendum contemplates a sale of SL 6, after stratification, at a price of $628,000. Before entering into the SL 6 Purchase Agreement, the Receiver considered comparable sales for strata office property in the Kelowna marketplace.

46 The Receiver seeks court approval of the addendum. The Bond Holders and the Lien Claimants oppose such an order on the basis that a further appraisal is required.

47 On the basis of the evidence before me, particularly that Dr. Yap has already installed fixtures and has set up a specialized office for his medical practice, that the terms of the SL 6 Purchase Agreement are considered reasonable by the Receiver and Aquilini and that Dr. Yip will be paying his portion of the Development's operating costs thereby not only reducing, at least to a small degree, the overall operating costs being paid by the Receiver but also adding occupancy to the Development which will undoubtedly assist in the lease or sale of other portions, I am satisfied that the SL 6 Purchase Agreement should be approved.

Increasing the Receiver's Borrowing Charge

48 The Receiver has provided to the court a breakdown of the additional expenses it anticipates will be incurred through to the end of the stalking horse process as follows:

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a)	Phase 1 completion costs:	
	i. completion payables:	$200,000
	ii. parking lot and courtyard landscaping:	$100,000
b)	interest and fees on financing:	
	i. Interest accrued to date:	$150,000
	ii. future fees and interest:	$100,000
c)	Professional fees:	$450,000
d)	fees from leasing activities:	$125,000
e)	engagement of Colliers for SH Process:	$50,000
f)	other consulting fees:	$75,000
g)	office, utility and operating expenses:	$52,500
h)	contingency:	$55,000
	TOTAL	$1,357,500

49 The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

50 The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

51 I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

52 I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

53 The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

54 The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 1647 (Ont. Gen. Div.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (Ont. C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, 2005 BCSC 684 (B.C. S.C.) at para. 21.

55 I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

56 After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

57 Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

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Conclusion

58 The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

59 The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

60 The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.

61 The activities of the Receiver as set out in its first report dated January 30, 2014 are approved. Approval of the Receiver's activities as set out in its second report dated August 14, 2014 is premature.

62 The Receiver's application for an order sealing the appraisal of the Development dated March 3, 2014 by Altus Group is adjourned.

Application granted in part.

End of Document

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TAB 16

2004 CarswellOnt 428
Ontario Superior Court of Justice [Commercial List]

Regal Constellation Hotel Ltd., Re.

2004 CarswellOnt 428, [2004] O.J. No. 365, 128 A.C.W.S. (3d) 646, 37 C.L.R. (3d) 207, 50 C.B.R. (4th) 253

IN THE MATTER OF the Receivership of Regal Constellation Hotel Limited, of The City of Toronto, In the Province of Ontario

AND IN THE MATTER OF s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40.

Farley J.

Heard: January 15, 2004
Judgment: January 15, 2004 *
Docket: 03-CL-5044

Proceedings: affirmed *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 2653 (Ont. C.A.)

Counsel: John J. Pirie for Deloitte & Touche Inc., Court Appointed Receiver and Manager, and for HSBC Bank Canada
Mahesh Uttamchandani for Interim Receiver, Deloitte & Touche Inc.
Robert Rueter for Debtor, Regal Pacific (Holdings) Limited

Subject: Corporate and Commercial; Civil Practice and Procedure; Property; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Real property
III Sale of land
III.6 Judicial sale
III.6.d Vesting order
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Receiver brought motion for approval of activities as set out in various reports, including sale of hotel to numbered company — Motion granted — Objective of any receiver is to receive highest value for asset for benefit of stakeholders — All cash and unconditional offers are generally to be preferred, keeping in mind that one must do reasonable risk/reward analysis — Receiver acted properly and within mandate given to it by court — Receiver fulfilled its prime purpose of obtaining as high a value as it could for hotel after approved marketing campaign — Identity of principals of purchaser and fact that there was some overlap with principals involved in earlier aborted purchase was of no consequence.

MOTION by receiver for approval of activities as set out in reports.

***Farley J.*:**

1 Mr. Rueter, counsel for Regal Pacific (Holdings) Limited ("Holdings") asked for an adjournment of the Receiver's (Deloitte & Touche Inc.) motion for various approvals, but specifically the approval of the Receiver's activities as reflected in their various reports (5 plus a supplemental to the 1 st which was sealed until the closing of the sale to 2031903 Ontario Inc. ("203")). He wanted a 4-week adjournment indicating that he had just determined that principals involved in 203 were also involved in

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Hospitality Investors Group LLC ("HIG") as per the *Toronto Star* article of January 10, 2004. A corporate profile report on 203 was obtained on January 13, 2004 afternoon. I asked Mr. Rueter to put his concerns in writing and he did so as per the attached, which I have marked Appendix A.

2 I appreciate that Holdings, faced with a shortfall on the hotel realization by the Receiver of some $9 million, would wish to reopen the whole matter and as Mr. Rueter stated, have a new Receiver appointed who would conduct a new sales process - all with the hope that there would/might be a better result which either would generate a surplus or perhaps minimize the amount of the shortfall.

3 As this was a last minute adjournment request, I indicated that I would reserve on the question of an adjournment, but would continue to hear the Receiver's motion (with a view to minimizing cost, delay and expense), on the contingency that I did not grant the adjournment but that if the adjournment were granted, then that hearing would vaporize into the ether and be a nullity.

4 Having now reviewed the material once again in light of the unanticipated objection and "new" information (to be fair it would have been new no earlier than January 8, 2004 as Mr. Rueter did not get the unsealed supplemental report to report #1 until then), I have concluded that it is unnecessary and inappropriate to grant the requested Holdings adjournment - and that in refusing that request, I do not see that Holdings will suffer any prejudice. In that respect, I will deal with certain non-Receiver aspects later as to the effect of this order on others aside from the Receiver.

5 In order to stop interest continuing to accrue, the Receiver paid $23.5 million (having received $24 million on the sale which closed January 5/6, 2004 with 203) to HSBC Bank ("Bank") on January 6, 2004; this, as Mr. Rueter acknowledged, would be beneficial to Holdings in minimizing to that extent its exposure. That payment is hereby approved.

6 The fees and disbursements of the Receiver appear regular and in accordance with the detailed activities by it, all of which were encompassed by various orders of this court. I would note as well that the hotel was operated (albeit with a sub-contract) for a month before it was decommissioned; there were difficulties with getting accepted offers to close, but the Receiver was diligent in obtaining non-refundable substantial deposits, all of which ($3 million) also went to reducing Holdings' exposure; and the hotel "project" in all other respects a reasonably complicated and difficult asset to deal with and dispose of. Apparently legal fees were directly paid by Bank except to the extent of $22,000 regarding a tax appeal. I am satisfied that the Receiver's fees and disbursements are reasonable and incurred in satisfactorily carrying out its activities; they are approved.

7 What apparently truly causes Mr. Rueter concern is the issue of approval of the Receiver's activities as detailed in its various reports. However, with respect, while understanding Holdings' concerns about the same principals being involved in various offers, I see no cause to be concerned with the Receiver in this regard. This hotel has been a difficult property for a number of years; it is old and in need of refurbishing; it has been marketed extensively before the receivership. As indicated by Mr. Rueter, before the receivership there was a deal with a corporation which had some principals in common with 203 and HIG. However, this deal did not close and the vendor interests are suing. Nothing in the motion for approval of the Receiver's activities affects that lawsuit. I would note that the objective of any receiver is to receive the highest value for an asset for the benefit of the stakeholders (creditors according to their priority, and below them the shareholders). All cash and unconditional (or easy, certain to fulfill conditions) offers are generally to be preferred, keeping in mind that one must do a reasonable risk/reward analysis. The skill, expertise and experience of a court appointed officer such as a receiver (court appointed) will assist it in doing an analysis to bring to a common level (apples to apples, converting at appropriate rates various other fruit into apples) comparison and conclusion on which to base a recommendation to the court. As outlined in the Receiver's reports, certain of the higher value offers received (13 in total, as a result of the approved marketing campaign) were eliminated in favour of the 203 one for $25 million because of riskier conditions or the question of having to obtain financing. The HIG offer was withdrawn on September 2, 2003. While the 203 deal for $25 million did not close (while it was unconditional and no mention was made with regard to the need for financing, and with it being understood that the person involved (presented as being the principal of 203) had no funding problem because of past knowledge as to this person), it would not appear that the failure to close can be laid at the door of the Receiver. If the Receiver had not recommended 203's $25 million deal, then it would have had to go further down the ladder (on a risk/reward analysis) which would mean that in "present value" money terms (i.e. at the time of the recommendation after discounting for risk), the proceeds would have been less than $25 million.

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8 Indeed when 203 was unable to close on the specified closing date, the Receiver conducted another analysis and determined that it would likely maximize the proceeds by doing another deal with 203, albeit at $24 million, but keeping in mind the forfeit deposit and the obtaining of a further non-refundable deposit.

9 While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.

10 Mr. Rueter points out the Cocov (one of the principals) affidavit of June 25, 2003 that the property had an "as is" value of $30.65 million. However, this fails to take into account that not only was this affidavit before the receivership commenced (July 4, 2003), but it was in fact in an effort to convince the court that a receiver need not be appointed because there was sufficient value to cover the Bank indebtedness. Affidavits of this nature must be taken with a grain of salt regarding puffery. I note as well that receivership sales are believed generally to generate lower amounts than a sale in the ordinary course of a non-pressed vendor.

11 It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

12 Holdings, of course, is free to make whatever allegations it feels appropriate against these entities and their principals and pursue whatever remedies it feels that it may have against them; the approval of the Receiver's activities is not intended in any way to have any impact or in any way to act as a shield for them.

13 In the end result, it appears to me that the adjournment request is merely to facilitate what Holdings believes is in its best interests - namely, it is under water as to its obligations to the Bank and so is drowned by the sale to 203; it hopes that if enough confusion is created in this approval of the Receiver's activities motion, that it will have the opportunity of being raised from the depths and artificial respiration applied. If it is presently drowned, a new sales process cannot do anything worse vis-à-vis it than drown it at a deeper depth. It will still be drowned, but the Bank in first priority position will be prejudiced in having to look to other sources, including Hong Kong based Holdings, for recovery of the deficit, in that case a greater deficit.

14 In the end result, the activities of the Receiver as detailed in its various reports are approved. For greater certainty, the activities of no one else are approved.

Motion granted.

APPENDIX — A

HSBC Bank of Canada and Regal Constellation Hotel Limited

My submission respecting the sale process is that neither my client nor the Court to my knowledge were aware that the purchaser under the offer to purchase recommended to the Court by the Receiver, were the same principals as the principals of the purchaser under the $45,000,000 agreement to purchase with Regal marked as Exhibit 1 to the Affidavit of Fernandez sworn June 25, 2003, in Responding Motion Record.

The Court and Regal were advised by the Receiver's counsel on September 9/03 that there was an offer from the purchasers under the Regal Agreement but it was withdrawn when the deposit could not be certified.

Therefore the Court was not aware that the principals behind the offer #1 in the sealed Supplemental Report of the Receiver were the same as the principals behind purchaser #4 who was being recommended to the Court. The sale process was manipulated in that the same principals made offer #1 at $31.0 million and offer #4 at $25 million and that one of those principals, Mr. Cocov, deposed in an affidavit before this Court sworn 25 June 03, that the Hotel has a value of $30,650,000

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on an "as is" basis (Responding Motion Record 25 June 03 filed by Goodman and Carr) but it was not known he was a principal of the recommended offeror.

My submission is that these are material facts bearing upon the integrity of the sale process which may well have affected the Court in approving the offer from 2031903 Ontario Inc.

The Supplemental Receiver's Report 8 Sept. 03 was not disclosed to me until last Friday, 8 Jan./04.

Respectfully submitted,

"Robert Rueter"

Counsel for Regal Pacific (Holdings) Limited

Footnotes

* Affirmed at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258 (Ont. C.A.)

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