Clerk's Stamp

COURT FILE NUMBER	2301- 10358
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MANTLE MATERIALS GROUP, LTD.
DOCUMENT	BOOK OF AUTHORITIES
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOWLING WLG (CANADA) LLP** Suite 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Telephone: 403-298-1938 / 403-298-1018 Fax: 403-263-9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A171561 **Attention: Tom Cumming / Sam Gabor / Stephen Kroeger**

APPLICATION BEFORE THE HONOURABLE JUSTICE CAMPBELL
AUGUST 8, 2023 AT 3:00 PM ON THE CALGARY COMMERCIAL LIST

TABLE OF AUTHORITIES

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

50.4(2)Certain things to be filed

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50.4(4)Exception

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

50.4(8)Where assignment deemed to have been made
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

50.4(9)Extension of time for filing proposal
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11)Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Currency
Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50.6

s 50.6

Currency

50.6

50.6(1)Order — interim financing

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.

50.6(2)Individuals

In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

50.6(3)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

50.6(4)Priority — previous orders

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.

50.6(5)Factors to be considered

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.

Amendment History
2005, c. 47, s. 36; 2007, c. 36, s. 18

Currency
Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 64.1

s 64.1

Currency

64.1

64.1(1)Security or charge relating to director's indemnification

On application by 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) 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.

64.1(2)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

64.1(3)Restriction — indemnification insurance

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

64.1(4)Negligence, misconduct or fault

The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Amendment History

2005, c. 47, s. 42; 2007, c. 36, s. 24

Currency

Federal English Statutes reflect amendments current to May 24, 2023
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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 64.2

s 64.2

Currency

64.2

64.2(1)Court may order security or charge to cover certain costs

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.

64.2(2)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

64.2(3)Individual

In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Amendment History

2005, c. 47, s. 42; 2007, c. 36, s. 24

Currency

Federal English Statutes reflect amendments current to May 24, 2023
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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 65.1

s 65.1

Currency

65.1

65.1(1)Certain rights limited

If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

65.1(2)Idem

Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

"(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed."

65.1(3)Idem

Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

65.1(4)Certain acts not prevented

Nothing in subsections (1) to (3) shall be construed

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

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed;

(b) as requiring the further advance of money or credit; or

(c) [Repealed 2012, c. 31, s. 415.]

65.1(5)Provisions of section override agreement
Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

65.1(6)Powers of court
The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

65.1(7)Eligible financial contracts
Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or a group clearer for an insolvent person in accordance with that Act and the by-laws and rules of that Association.

65.1(8) [Repealed 2007, c. 29, s. 92(1).]

65.1(9)Permitted actions
Despite subsections 69(1) and 69.1(1), the following actions are permitted in respect of an eligible financial contract that is entered into before the filing, in respect of an insolvent person of a notice of intention or, where no notice of intention is filed, a proposal, and that is terminated on or after that filing, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the insolvent person and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

65.1(10)Net termination values
If net termination values determined in accordance with an eligible financial contract referred to in subsection (9) are owed by the insolvent person to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the insolvent person with a claim provable in bankruptcy in respect of those net termination values.

Amendment History

1992, c. 27, s. 30; 1997, c. 12, s. 41; 2001, c. 9, s. 573; 2004, c. 25, s. 36; 2005, c. 47, s. 43; 2007, c. 29, s. 92; 2012, c. 31, s. 415

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S.C. 1997, c. 12, s. 59(2), provides as follows:

> *(2) Application*
> *Subsection (1) [S.C. 1997, c. 12, s. 59(1), which re-enacted s. 67(1)(b) and enacted s. 67(1)(b.1)] applies to bankruptcies in respect of which proceedings are commenced after that subsection came into force [on April 30, 1998].*

67(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.

67(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.

Amendment History
1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32; 2019, c. 29, s. 134

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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.

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

69(2)Limitation
The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed 2012, c. 31, s. 416.]

69(3)Limitation
A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention 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*, 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

(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; 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 Her 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*, 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

(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.

Note:

S.C. 2000, c. 30, s. 145(3), provides as follows:

(3) Subsections (1) [which replaced s. 69(1)(c) and added s. 69(1)(d)] and (2) [which replaced s. 69(3)] are deemed to have come into force on November 30, 1992 except that, before June 30, 1996, the references in subparagraphs 69(1)(c)(ii) and (3)(a)(ii) and (b)(ii) of the Act, as enacted by subsections (1) and (2), to the Employment Insurance Act *shall be read as references to the* Unemployment Insurance Act.

Note:

S.C. 1997, c. 12, s. 62(2), provides as follows:

(2) Application
Subsection (1) [S.C. 1997, c. 12, s. 62(1), which re-enacted s. 69(2)(b) and added (c)] applies to proceedings under Part III that are commenced after that subsection comes into force [September 30, 1997].

Amendment History
1992, c. 27, s. 36(1); 1997, c. 12, s. 62(1); 2000, c. 30, s. 145; 2005, c. 3, s. 12; 2005, c. 47, s. 60; 2007, c. 36, s. 34; 2009, c. 33, s. 23; 2012, c. 31, s. 416

Currency
Federal English Statutes reflect amendments current to May 24, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

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TAB 2

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.4

s 11.4

Currency

11.4

11.4(1)Critical supplier

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.

11.4(2)Obligation to supply

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.

11.4(3)Security or charge in favour of critical supplier

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.

11.4(4)Priority

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

[Editor's Note: S.C. 2000, c. 30, s. 156(2) provides as follows:

> *(2) Subsection (1) [which repealed and replaced s. 11.4 of the Act] applies to proceedings commenced under the Act after September 29, 1997.]*

[Editor's Note: S.C. 2001, c. 34, s. 33(2) provides as follows:

> *(2) Subsection (1) [which repealed and replaced the portion of paragraph 11.4(3)(c) before subparagraph (i) of the Act] applies to proceedings commenced under the Act after September 29, 1997.]*

Amendment History

1997, c. 12, s. 124; 2000, c. 30, s. 156(1); 2001, c. 34, s. 33; 2005, c. 47, s. 128; 2007, c. 36, s. 65

Currency

Federal English Statutes reflect amendments current to May 24, 2023

TAB 3

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

Her Majesty The Queen in Right of Canada (Appellant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada (Respondents) and Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: December 1, 2020
Judgment: July 28, 2021
Docket: 38871

Proceedings: affirming *Canada v. Canada North Group Inc.* (2019), *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111, 11 P.P.S.A.C. (4th) 157, [2019] 12 W.W.R. 635, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 2019 ABCA 314, 2019 CarswellAlta 1815, 95 B.L.R. (5th) 222, Frederica Schutz J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.); affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.iv Income tax, unemployment insurance, and Canada Pension Plan
X.5.a.iv.B Creation of statutory trust
Tax
II Income tax
II.22 Special rules

II.22.c Bankruptcy
II.22.c.i Corporations

Headnote

Tax --- Income tax — Special rules — Bankruptcy — Corporations

In debtors' restructuring proceedings under Companies' Creditors Arrangement Act (CCAA), court granted "super-priority" or priming charges in favour of interim financier and others — Motion by Canada Revenue Agency (CRA) for order that such court-ordered interests did not take priority over statutory deemed trusts for unremitted source deductions was dismissed on basis that CCAA allowed court to rank priority charges necessary for restructuring ahead of CRA's interest — Crown's appeal was dismissed — Crown appealed — Appeal dismissed — CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, even those protected by deemed trusts, and financing was critical aspect of CCAA regime premised on restructuring to preserve debtors' greater value as going concerns — Most important feature of CCAA was broad discretionary power vested in supervising court by s. 11 — Preservation by s. 37(2) of CCAA of deemed trusts created by s. 227(4.1) of Income Tax Act (ITA) does not modify their characteristics — Section 227(4.1) of ITA does not establish proprietary interest because Crown's claim does not attach to any specific asset — Deemed removal of property from debtor's estate does not prevent judge from ordering super priority — There was no conflict between CCAA and ITA, as deemed trust created by ITA has priority only over defined set of security interests into which super-priority charge ordered under s. 11 of CCAA does not fall — Section 227(4.1) of ITA does not create true trust because there is no certainty of subject matter, so Crown's beneficial ownership was weaker than under common law and its content could not be inferred solely from ITA — Broad discretionary power under s. 11 of CCAA permits court to rank priming charges ahead of deemed trust for unremitted source deductions, as s. 6(3) of CCAA gives specific effect to Crown's deemed trust for CCAA purposes by requiring plan of compromise to pay Crown in full Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11; Income Tax Act, s 227(4.1).

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Income tax, unemployment insurance, and Canada Pension Plan — Creation of statutory trust

Taxation --- Impôt sur le revenu — Règles spéciales — Faillite — Sociétés

Dans le cadre des procédures de restructuration des débitrices en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC), le tribunal a accordé des charges super prioritaires en faveur du prêteur intérimaire et d'autres personnes — Requête de l'Agence du revenu du Canada (ARC) en vue d'une ordonnance déclarant qu'une telle sûreté ou charge super prioritaire accordée par le tribunal n'avait pas priorité sur les fiducies réputées créées par la loi pour les retenues à la source non versées a été rejetée au motif que la LACC permettait aux tribunaux d'accorder aux charges prioritaires nécessaires au processus de restructuration un rang supérieur à la sûreté de l'ARC — Appel interjeté par la Couronne a été rejeté — Couronne a formé un pourvoi — Pourvoi rejeté — LACC habilite de façon générale les juges surveillants à faire passer des charges super prioritaires devant toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées, et l'obtention d'un financement constituait un aspect fondamental de ce régime fondé sur la prémisse qu'une compagnie débitrice est susceptible de posséder une plus grande valeur lorsqu'elle poursuit ses activités — Caractéristique la plus importante de la LACC est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance par l'art. 11 — Que l'art. 37(2) de la LACC permette aux fiducies réputées créées par l'art. 227(4.1) de la Loi de l'impôt sur le revenu (LIR) de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies — Article 227(4.1) de la LIR ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique — Que des biens soient réputés soustraits au patrimoine du débiteur n'empêche pas un juge d'ordonner des charges super prioritaires — Il n'y avait pas de conflit entre la LACC et la LIR, car la fiducie réputée créée en vertu de la LIR n'a priorité que sur un ensemble bien précis de garanties dont la charge super prioritaire constituée en vertu de l'art. 11 de la LACC ne fait partie — Article 227(4.1) de la LIR ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière, de sorte que le droit de bénéficiaire de la Couronne était plus faible que le sens qui lui est généralement donné en common law, et la teneur du droit de la Couronne dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la LIR — Vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées, car l'art. 6(3) de la LACC donne explicitement effet à la fiducie réputée de la Couronne pour les fins de l'application de la LACC en exigeant que le plan de transaction prévoit le paiement intégral à la Couronne.

Faillite et insolvabilité --- Priorité des créances — Réclamations de la Couronne — Fédérale — Impôt sur le revenu, assurance-chômage, et Régime de pensions du Canada — Création de fiducies statutaires

In restructuring proceedings under the Companies' Creditors Arrangement Act (CCAA), debtor companies received interim financing and the court granted three super-priority charges in favour of the interim financier and the administrators of the monitor, counsel and restructuring officer for their fees, and the debtors' directors and officers for liabilities incurred after the commencement of the proceedings. The motion by the Canada Revenue Agency (CRA) for an order that such court-ordered super-priority security interests or priming charges did not take priority over the statutory deemed trusts in favour of the Minister or the CRA for unremitted source deductions was dismissed. The motion judge found that the CCAA gave the court the ability to rank priority charges necessary for the restructuring ahead of the CRA's security interest arising out of the deemed trusts. The Crown's appeal was dismissed by the majority of the Court of Appeal. The Crown appealed.

Held: The appeal was dismissed.

Per Côté J. (Wagner C.J.C., Kasirer J. concurring): As previously held, the CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, including claims protected by deemed trusts. The view underlying the entire CCAA regime was that debtors would retain more value as going concerns than in liquidation scenarios, and financing was a critical aspect of this system that required the protection of these priming charges. The most important feature of the CCAA, which enabled it to be adapted so readily to each reorganization, is the broad discretionary power vested in the supervising court by s. 11 of the CCAA. The preservation by s. 37(2) of the CCAA of the deemed trusts created by s. 227(4.1) of the Income Tax Act (ITA) does not modify the characteristics of these trusts. Section 227(4.1) of the ITA does not establish a proprietary interest because the Crown's claim does not attach to any specific asset. By choosing not to protect the Crown's claim to any particular asset, Parliament protected the Crown from the risks associated with asset ownership, including damage, depreciation and loss. The statement in s. 227(4.1) of the ITA that property is deemed to be removed from the debtor's estate does not prevent a judge from ordering a super-priority charge over the debtor's property. This interpretation is supported by the existence of s. 227(4.2) of the ITA that specifically anticipates other interests taking priority over the deemed trust, which would be impossible if there was an ownership interest. There was no conflict between the CCAA and the ITA, as the deemed trust created by the ITA has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the CCAA does not fall within the definition in s. 224(1.3) of the ITA. As the Crown had been repaid and the case was technically moot, it was not critical to review the basis in this case for subordinating the Crown's claim to the super-priority charges.

Per Karakatsanis J. (concurring) (Martin J. concurring): Defining the Crown's entitlement as a "security" or "propriety" interest did not resolve the issues in the case. The meaning of "beneficially owned" in s. 227(4.1) of the ITA could only be understood in the specific statutory context. Section 227(4.1) of the ITA does not create a true trust because there is no certainty of subject matter, and so the Crown's beneficial ownership was weaker than would be generally understood by that term at common law. Section 227(4.1) of the ITA is structured as a security interest but also uses the mechanism of deemed trust. The content of the Crown's right for the purposes of insolvency could not be inferred solely from the text of the ITA. Interim financing is crucial to the restructuring process under the CCAA. Section 37(2) of the CCAA continues the Crown's statutory deemed trust but does not explain what to do with that right. Section 11 of the CCAA gives the court broad discretion to consider and give effect to the Crown's interest, while s. 6(3) of CCAA gives specific effect to the Crown's right by barring the court from sanctioning a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's approval or the Crown agrees otherwise. The CCAA thus gives the deemed trust concrete meaning for its purposes, namely that a plan of compromise has to pay the Crown in full. The Crown's interest did not fit within the relevant statutory definition of "secured creditor" under the CCCA as required for ss. 11.2, 11.51 and 11.52 of the CCAA, but the broad discretionary power under s. 11 of the CCAA permits the court to rank priming charges ahead of the deemed trust for unremitted source deductions.

Per Brown, Rowe JJ. (dissenting) (Abella J. concurring): The text of the ITA and other fiscal statutes is clear and gives ultimate priority to the deemed trusts for source deductions over all security interests, notwithstanding the CCAA or any other Act. The priming charges are "security interests" within the meaning of s. 224(1.3) of the ITA such that the Crown's interest under the deemed trust enjoys priority over them pursuant to s. 227(4.2) of the ITA. The fiscal statutes operated harmoniously with the CCAA, since s. 37(2) of the CCAA restricted the court's powers under s. 11 of the CCAA. Section 6(3) of the CCAA protects different reasons than those captured by the deemed trusts. Policy reasons did not support a different interpretation where Parliament chose to prioritize the integrity of the tax system over the interests of secured creditors, and the majority's view that interim financing would simply end without priming charges was not supported by evidence.

Per Moldaver J. (dissenting): While the analysis and conclusions of Brown and Rowe JJ. were largely agreed with, it was unnecessary to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the ITA and whether it amounted to an ownership interest. Further, s. 37(2) of the CCAA does not amount to an explicit and unambiguous restriction on s. 11 of the CCAA but merely preserves the Crown's deemed trust under s. 227(4.1) of the ITA. As such, using s. 11 of the CCAA to prioritize the priming charges over the Crown's deemed trust would conflict with s. 227(4.1) of the ITA. Such direct conflict would trigger the "notwithstanding [. . .] any other enactment of Canada" language in s. 227(4.1) of the ITA that imposes an external restriction on the court's power under s. 11 of the CCAA. Section 6(3) of the CCAA does not give effect to the absolute supremacy of the Crown's deemed trust claim over priming charges.

Dans le cadre de procédures de restructuration sous le régime de la Loi sur les arrangements avec les créanciers des compagnies (LACC), les compagnies débitrices ont obtenu du financement intérimaire et le tribunal a accordé trois charges super prioritaires en faveur du prêteur intérimaire et des administrateurs du contrôleur, des avocats et du directeur de la restructuration pour les frais qu'ils ont engagés, et des administrateurs et dirigeants des débitrices pour les dettes accumulées depuis le début des procédures. La requête de l'Agence du revenu du Canada (ARC) en vue d'une ordonnance déclarant qu'une telle sûreté ou charge super prioritaire accordée par le tribunal n'avait pas priorité sur les fiducies réputées créées par la loi en faveur du ministre ou de l'ARC pour les retenues à la source non versées a été rejetée. Le juge des requêtes a conclu que la LACC conférait au tribunal le pouvoir d'accorder aux charges prioritaires nécessaires au processus de restructuration un rang supérieur à la sûreté de l'ARC découlant des fiducies réputées. L'appel interjeté par la Couronne a été rejeté par les juges majoritaires de la Cour d'appel. La Couronne a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Côté, J. (Wagner, J.C.C., Kasirer, J., souscrivant à son opinion) : Ainsi que la Cour l'a déjà jugé, la LACC habilite de façon générale les juges surveillants à faire passer des charges super prioritaires devant toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées. La vision sous-jacente au régime de la LACC est qu'une compagnie débitrice est susceptible de posséder une plus grande valeur lorsqu'elle poursuit ses activités que lorsqu'elle est liquidée, et l'obtention d'un financement est un aspect fondamental de ce système, ce qui exige que ces charges super prioritaires soient protégées. La caractéristique la plus importante de la LACC, et celle qui la rend assez souple pour s'adapter si aisément à chaque réorganisation, est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance par l'art. 11 de la LACC. Le fait que l'art. 37(2) de la LACC permet aux fiducies réputées créées par l'art. 227(4.1) de la Loi de l'impôt sur le revenu (LIR) de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies. L'article 227(4.1) de la LIR ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique. En décidant de n'associer la créance de Sa Majesté à aucun bien en particulier, le législateur a protégé Sa Majesté des risques que comporte la propriété d'un bien, y compris l'endommagement, la dépréciation et la perte. L'affirmation énoncée à l'art. 227(4.1) de la LIR selon laquelle des biens sont réputés soustraits au patrimoine du débiteur n'empêche pas un juge de grever les biens du débiteur de charges super prioritaires. Cette interprétation est appuyée par l'existence de l'art. 227(4.2) de la LIR, qui prévoit expressément que d'autres intérêts prennent rang devant la fiducie réputée, ce qui serait impossible s'il existait un intérêt à titre de propriétaire. Il n'y a pas de conflit entre la LACC et la LIR, car la fiducie réputée créée en vertu de la LIR n'a priorité que sur un ensemble bien précis de garanties. La charge super prioritaire constituée en vertu de l'art. 11 de la LACC ne répond pas à la définition de l'art. 224(1.3) de la LIR. Puisque Sa Majesté a été payée et que l'affaire est en fait devenue théorique, il n'était pas essentiel d'analyser les fondements permettant, dans la présente affaire, de subordonner la créance de Sa Majesté à des charges super prioritaires.

Karakatsanis, J. (souscrivant à l'opinion des juges majoritaires) (Martin, J., souscrivant à son opinion) : Qualifier le droit de la Couronne de « garantie » ou de « droit propriétal » n'était pas d'une grande utilité dans la présente analyse. Le sens du terme « droit de bénéficiaire » utilisé à l'art. 227(4.1) de la LIR ne peut être saisi que dans le contexte législatif précis et pertinent où il est employé. L'article 227(4.1) de la LIR ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière, de sorte que le droit de bénéficiaire de la Couronne était plus faible que le sens qui lui est généralement donné en common law. L'article 227(4.1) de la LIR est structuré comme une garantie, mais utilise également le mécanisme d'une fiducie réputée. La teneur du droit de la Couronne dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la LIR. Le financement temporaire est essentiel au processus de restructuration sous le régime de la LACC. L'article 37(2) de la LACC maintient la fiducie réputée créée par la loi, mais n'explique pas quoi faire de ce droit. L'article 11 de la LACC confère au tribunal un vaste pouvoir discrétionnaire pour examiner l'intérêt reconnu à la Couronne, tandis que l'art. 6(3) de la LACC donne explicitement effet au droit que possède la Couronne en empêchant un tribunal d'homologuer un plan de transaction qui ne

prévoit pas le paiement intégral à la Couronne des retenues à la source non versées dans les six mois suivant l'homologation, à supposer que la Couronne n'en ait pas convenu autrement. La LACC donne ainsi à la fiducie réputée un sens concret qui convient à ses fins, soit qu'un plan de transaction doit prévoir le paiement intégral des sommes dues à la Couronne. L'intérêt de la Couronne n'entre pas dans la définition applicable de « créancier garanti » contenue dans la LACC, selon ce qui est exigé en vertu des art. 11.2, 11.51 et 11.52 de la LACC, mais le vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées.

Brown, Rowe, JJ. (dissidents) (Abella, J., souscrivant à leur opinion) : Le texte de la LIR et d'autres lois fiscales est non équivoque et accorde à la fiducie réputée créée à l'égard des retenues à la source priorité absolue sur toute garantie, nonobstant la LACC ou toute autre loi. Les charges super prioritaires sont des « garanties » au sens de l'art. 224(1.3) de la LIR de telle sorte que le droit conféré à la Couronne par la fiducie réputée a préséance sur ces charges en vertu de l'art. 227(4.2) de la LIR. Les lois fiscales s'appliquent harmonieusement avec la LACC, puisque l'art. 37(2) de la LACC impose une limite au pouvoir que l'art. 11 de la LACC confère au tribunal. L'article 6(3) de la LACC protège des droits différents de ceux visés par la fiducie réputée. Des considérations de politique générale n'appuient pas une interprétation différente dans laquelle le législateur a choisi d'accorder à l'intégrité du régime fiscal la priorité sur les droits des créanciers garantis, et l'opinion des juges majoritaires selon laquelle le financement temporaire prendrait tout simplement fin sans les charges super prioritaires n'était pas étayée par la preuve.

Moldaver, J. (dissident) : Bien que l'on partageât, pour l'essentiel, l'analyse et les conclusions des juges Brown et Rowe, il n'était pas nécessaire de définir la nature ou le fonctionnement particulier du droit que l'art. 227(4.1) de la LIR confère à la Couronne ou de déterminer s'ils peuvent être assimilés à une certaine forme d'intérêt propriétal. De plus, l'art. 37(2) de la LACC ne constitue pas une restriction explicite et non équivoque à l'application de l'art. 11 de la LACC, mais vise simplement à maintenir la fiducie réputée de la Couronne en vertu de l'art. 227(4.1) de la LIR. Dans cet ordre d'idée, recourir à l'art. 11 de la LACC pour faire passer une charge super prioritaire devant la réclamation de la Couronne au titre d'une fiducie réputée entrerait en conflit direct avec l'art. 227(4.1) de la LIR. Ce conflit direct entraînerait l'application du libellé de l'art. 227(4.1) de la LIR, à savoir « [m]algré [. . .] tout autre texte législatif fédéral », lequel impose une limite externe au pouvoir que l'art. 11 de la LACC confère au tribunal. L'article 6(3) de la LACC n'entraîne pas la primauté absolue de la fiducie réputée de la Couronne sur les autres charges super prioritaires.

Table of Authorities

Cases considered by *Côté J.*:

Banque de Nouvelle-Écosse c. Thibault (2004), 2004 SCC 29, 2004 CarswellQue 1152, 2004 CarswellQue 1153, 39 C.C.P.B. 168, 2004 D.T.C. 6437, 2004 D.T.C. 6449 (Fr.), *(*sub nom. *Thibault v. Banque de Nouvelle-Écosse)* 319 N.R. 340, 239 D.L.R. (4th) 385, 8 E.T.R. (3d) 1, *(*sub nom. *Bank of Nova Scotia v. Thibault)* [2004] 1 S.C.R. 758, [2004] 5 C.T.C. 73, 2004 CSC 29 (S.C.C.) — considered

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — considered

Canada (Procureure générale) c. Banque Nationale du Canada (2004), 2004 CAF 92, 2004 CarswellNat 519, *(*sub nom. *Attorney General of Canada v. Banque Nationale du Canada)* 2004 D.T.C. 6145, 2004 FCA 92, 2004 CarswellNat 1866, 2004 D.T.C. 6527, [2004] 4 C.T.C. 193, 3 C.B.R. (5th) 1, *(*sub nom. *Canada (Procureur général) v. Caisse populaire d'Amos)* 324 N.R. 31 (F.C.A.) — considered

Csak v. Aumon (1990), 69 D.L.R. (4th) 567, 1990 CarswellOnt 915 (Ont. H.C.) — referred to

Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd. (1980), [1980] 1 S.C.R. 1182, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107, [1980] C.T.C. 247, 3 Man. R. (2d) 283, 108 D.L.R. (3d) 257, 31 N.R. 301, 80 D.T.C. 6123, 1980 CarswellMan 169, 1980 CarswellMan 173 (S.C.C.) — considered

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

First Leaside Wealth Management Inc., Re (2012), 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List]) — referred to

First Vancouver Finance v. Minister of National Revenue (2002), 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, *(*sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), *(*sub

> to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also Placer Dome Canada Ltd. v. Ontario (Minister of Finance), 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

65 The *ITA* contains two definitions of "security interest", in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define "security interest" in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: "*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation". The presumption against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they "have a specific role to play in advancing the legislative purpose" (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

66 To come back to *Caisse populaire Desjardins de l'Est de Drummond*, I agree with Rothstein J. that the definition of "security interest" in s. 224(1.3) of the ITA is expansive such that it "does not require that the agreement between the creditor and debtor take any particular form" (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed, in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

67 Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

68 In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the ITA. As a result, there is no conflict between s. 227(4.1) of the ITA and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver's suggestion that there may be a conflict between s. 11 of the CCAA and the *ITA* (para. 258). The Initial Order's super-priority charges prevail over the deemed trust.

C. Was It Necessary for the Initial Order to Subordinate Her Majesty's Claim Protected by a Deemed Trust in This Case?

69 Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court's equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

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 "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.

71 My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the CCAA contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the CCAA is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

72 That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

73 It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

TAB 4

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies'

request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Table of Authorities

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

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

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. 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 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

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

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

amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*[11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XX Miscellaneous
Headnote
Bankruptcy and insolvency --- Miscellaneous
Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

6 Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

7 Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

8 Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

9 Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

10 For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

11 Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

12 Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

13 First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

14 Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

15 Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

17 The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

18 First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

19 Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

20 Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

21 Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

22 The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

23 First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

24 Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

25 Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

26 Lastly, the Proposal Trustee supports the proposed SISP.

27 Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

TAB 6

2009 ABQB 78
Alberta Court of Queen's Bench

EarthFirst Canada Inc., Re

2009 CarswellAlta 142, 2009 ABQB 78, [2009] A.W.L.D. 984, 174 A.C.W.S. (3d) 618, 1 Alta. L.R. (5th) 311

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 EarthFirst Canada Inc.

B.E.C. Romaine J.

Heard: January 28, 2009
Judgment: February 3, 2009
Docket: Calgary 0801-13559

Counsel: Howard A. Gorman, Randal Van de Mosselaer for EarthFirst Canada Inc.
A. Robert Anderson, Q.C. for Monitor, Ernst & Young Inc.
Brian P. O'Leary, Q.C., Doug S. Nishimura, Trevor A. Batty for WestLB AG
Jeffrey Thom, Q.C. for IDL Projects Ltd.
Susan Robinson-Burns for Synergy Engineering Ltd.
Benjamin La Borie for Gisborne Industrial Construction Ltd.
V. Philippe (Phil) Lalonde for Interoute Construction Ltd.

Subject: Insolvency; Environmental
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Corporation was developer of renewable wind energy and was under protection of Companies' Creditors Arrangement Act ("Act") — Corporation applied for order establishing hardship fund to be used to allow payment of pre-filing obligations owing to suppliers in community — Application granted — Local businesses would face bankruptcy if accounts receivable owed by corporation went unpaid — Payments would be considered interim distribution under future plan of arrangement and would be reflected in any final distribution to creditors — Decision to allow hardship fund outweighed prejudice to other creditors — Payments would be limited to bare bone payments to keep suppliers in business — Failure to fund small local businesses that were dependant on continued development of wind farm project could have harsh consequences in surrounding communities — Payment of case specific pre-filing debts would preserve corporation's primary asset, was fair and reasonable in circumstances and in accordance with purpose and objective of Act.
Table of Authorities
Cases considered by *B.E.C. Romaine J.*:
Air Canada, Re (2003), 2003 CarswellOnt 5296, 47 C.B.R. (4th) 163 (Ont. S.C.J. [Commercial List]) — considered
Smoky River Coal Ltd., Re (2000), [2000] 10 W.W.R. 147, 297 A.R. 1, 83 Alta. L.R. (3d) 127, 19 C.B.R. (4th) 281, 2000 CarswellAlta 830, 2000 ABQB 621 (Alta. Q.B.) — referred to
Statutes considered:

8 Counsel for the Monitor noted that the payments are likely necessary in order to preserve the opportunity to complete the Dokie Project, if that option appears to be the best way to maximize recovery for creditors. It was likely the recognition of this factor that led to little opposition to the application, including from the primary secured creditor. The opposition that was expressed related to a lack of certainty over which unsecured creditors would benefit. While the Monitor would not commit to full public disclosure of the recipients of the hardship fund, which might provoke the precise financial embarrassment and consequential business failure that payments from the fund are intended to prevent, the company and the Monitor were clear that payments would be limited to bare-bone payments "essential to keeping the lights of the recipient company on": *Smoky River Coal Ltd., Re*, 2000 CarswellAlta 830 (Alta. Q.B.) at para. 40.

9 I am satisfied that the payment of these case-specific pre-filing debts in a limited amount in order to preserve the value of this CCAA-debtor's primary asset and the option of continuing its development for the benefit of all creditors is fair and reasonable in the circumstances and in accordance with the purpose and objectives of the *Companies' Creditors Arrangement Act*.

Application granted.

End of Document

TAB 7

2022 ABCA 117
Alberta Court of Appeal

Manitok Energy Inc (Re)

2022 CarswellAlta 806, 2022 ABCA 117, [2022] 6 W.W.R. 1, [2022] A.W.L.D. 1734, 2022 A.C.W.S. 680, 468 D.L.R. (4th) 434, 98 C.B.R. (6th) 1

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc. (Appellant) and Prentice Creek Contracting Ltd., Riverside Fuels Ltd. and Alberta Energy Regulator (Respondents) and Stettler County, Woodlands County and Orphan Well Association (Intervenors)

Frans Slatter, Ritu Khullar, Jolaine Antonio JJ.A.

Heard: March 10, 2022
Judgment: March 30, 2022
Docket: Calgary Appeal 2101-0085AC

Proceedings: reversing *Manitok Energy Inc (Re)* (2021), 25 Alta. L.R. (7th) 412, 87 C.B.R. (6th) 255, 2021 ABQB 227, [2021] 7 W.W.R. 557, 2021 CarswellAlta 698, B.E. Romaine J. (Alta. Q.B.)

Counsel: H.A.Gorman, Q.C., M Parker, D.A. Stephenson, for Appellant
G.L. Walters, for Respondent, Prentice Creek Contracting Ltd.
G.S.E. Hamilton, for Respondent, Riverside Fuels Ltd.
M.E. Lavelle, for Respondent, Alberta Energy Regulator
G.G. Plester, for Intervenors, Stettler County and Woodlands County
R. Gurofsky, G.J. Finegan, for Intervenor, Orphan Well Association

Subject: 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.i Liens
X.1.b.i.D Miscellaneous
Headnote
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous
At time of its insolvency, company was Alberta Energy Regulator licensee of wells and facilities with associated deemed liability for end-of-life obligations (EOL obligations) — Two companies filed builders' liens prior to company's bankruptcy — Company's receiver entered into purchase and sale agreement with P Inc. for certain property — Sale approval and vesting order discharged lien registrations, including those of lien claimants, and required receiver to establish separate holdbacks for lien claimants to stand in place of their lien registrations pending further court order — In accordance with partial discharge order, receiver renounced and disclaimed and was discharged over majority of remaining unsold oil and gas assets in company's estate — Receiver anticipated renouncing and disclaiming remaining unsold assets — Total realizations from receivership would be substantially less than cost of satisfying EOL obligations associated with discharged assets — Lien claimants brought application to determine whether EOL obligations had to be satisfied by receiver from estate in preference to satisfying first-ranking builders' lien claims based on services provided by lien claimants before receivership date — Chambers judge concluded that Supreme Court of Canada case law was distinguishable and that builders' lien claimants were entitled to payment out of

proceeds of sale to P Inc. — Receiver appealed — Appeal allowed — If proceeds of sale of bankrupt corporation's valuable assets cannot be used to reclaim "unrelated assets" there would never be any proceeds available to satisfy public EOL obligations — There was nothing in Alberta regulatory scheme, Bankruptcy and Insolvency Act, or binding SCC decision permitting licensee to avoid its EOL obligations by converting valuable licensed assets into cash before enforcement order can be issued — Neither existence of enforcement orders nor sequence in which enforcement action is taken is relevant to receiver's duty to discharge public environmental obligations — That proceeds of P Inc. sale were placed into trust by virtue of court order did not distinguish instant case from SCC decision.

Table of Authorities

Cases considered:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, *(*sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, *(*sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.) — considered

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

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — referred to

PricewaterhouseCoopers Inc v. Perpetual Energy Inc (2021), 2021 ABCA 16, 2021 CarswellAlta 119, 86 C.B.R. (6th) 9, 20 Alta. L.R. (7th) 23, 14 B.L.R. (6th) 161, 457 D.L.R. (4th) 1 (Alta. C.A.) — referred to

Toronto Dominion Bank v. 1287839 Alberta Ltd. (2021), 2021 ABQB 205, 2021 CarswellAlta 618, 14 P.P.S.A.C. (4th) 121 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 7.1(2) — considered

APPEAL by receiver from judgment reported at *Manitok Energy Inc (Re)* (2021), 2021 ABQB 227, 2021 CarswellAlta 698, 87 C.B.R. (6th) 255, [2021] 7 W.W.R. 557, 25 Alta. L.R. (7th) 412 (Alta. Q.B.), finding that builders' lien claimants were entitled to be paid by receiver from estate in preference to end-of-life obligations associated with abandonment and reclamation obligations for oil and gas property.

***Per curiam*:**

1 The issue underlying this appeal, as stated by consent under R. 7.1(2), is:

> Whether end of life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from Manitok's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.

This issue engages the reach of the Supreme Court of Canada's ***Redwater*** decision: ***Orphan Well Association v Grant Thornton Ltd.***, 2019 SCC 5, [2019] 1 SCR 150.

Facts

34 This issue was identified by the majority of this Court in Grant Thornton Ltd v Alberta Energy Regulator, 2017 ABCA 124 at para. 102, 50 Alta LR (6th) 1:

> 102 Secondly, the Regulator does not insist that all of the assets in the bankrupt estate be applied towards environmental liabilities. It only insists on the oil and gas assets being used for that purpose. Thus, if Redwater had valuable non-oil and gas assets (for example, valuable real estate or shareholdings) the Regulator would not insist that the Receiver or Trustee use those assets to meet Redwater's environmental obligations. But again, if the Regulator is correct in its position, it could insist on all of the assets in the bankrupt estate being applied towards the "public duty" to perform the environmental cleanup. For example, if s. 14.06 only deals with personal liability of trustees, there would be no reason to limit the obligation to discharge environmental liabilities to the oil and gas assets themselves. Resort to all the assets in the estate appears to be authorized by the provisions of the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 240(3).

This was the decision overturned by the Supreme Court of Canada in ***Redwater***, but the Supreme Court did not directly address this particular issue.

35 One could read para. 159 of *Redwater* as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in *Redwater* refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example *Redwater* at paras. 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. *Redwater* gives no support to the municipalities' argument.

36 In the final analysis, the assets sold to Persist appear to be indistinguishable from the type of assets that the trustee in *Redwater* sold. *Redwater* confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day.

Enforcement Action by the Alberta Energy Regulator

37 Paragraph 159 of *Redwater* states: " . . . the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case". The respondents argue this means that the outcome in *Redwater* was driven by the fact that the Alberta Energy Regulator had issued Abandonment Orders. The absence or timing of such enforcement orders is said to be critical to the outcome.

38 It is clear, however, that reclamation and abandonment obligations are inherent in oil and gas properties from the minute extraction of the resource commences: *Redwater* at para. 29; PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16 at paras. 86–87; Panamericana De Bienes Y Servicios (Receiver of) v Northern Badger Oil & Gas Ltd, 1991 ABCA 181 at para. 32, 81 Alta LR (2d) 45, 117 AR 44. Abandonment and reclamation obligations are inchoate, but that does not mean that they do not arise until enforcement action is taken by the Alberta Energy Regulator. The public duty on the Receiver to use the assets of the Manitok estate to discharge Manitok's abandonment and reclamation obligations existed independently of any enforcement action taken by the Alberta Energy Regulator.

39 The respondents point out that in *Redwater* the Alberta Energy Regulator had issued abandonment orders after the receivership but before the bankruptcy. In the Manitok insolvency, abandonment and reclamation orders were issued in August 2019, after the date of bankruptcy, but that is not a reason to distinguish *Redwater*. Abandonment and reclamation obligations are imposed by statute on all licensees. As noted in *Redwater* at paras. 160, 212:

> . . . a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage . . . and liability for failure to comply with an order to remedy such a condition or such damage . . . :

Abandonment and reclamation obligations exist independently of the issuance of abandonment orders, which are merely an enforcement mechanism: ***Redwater*** at para. 92; ***Perpetual Energy*** at para. 87. There is also no reason to think that a receiver or trustee in bankruptcy would not discharge a statutory obligation on the estate in the absence of an enforcement order. It would be artificial to have the outcome of a priority dispute like this depend on whether the Alberta Energy Regulator had sufficient information to issue abandonment orders before, as opposed to after the insolvency event.

40 The use of the word "replicate" in para. 159 can best be understood by comparing the French text "reproduisent l'effet". Read in context, para. 159 is merely saying that recognizing the validity of the Alberta Energy Regulator's enforcement of environmental obligations in an insolvency is no more inconsistent with the *Bankruptcy and Insolvency Act* than s. 14.06(7), which also gives priority to the enforcement of environmental obligations.

41 In summary, neither the existence of enforcement orders nor the sequence in which enforcement action is taken is relevant to the Receiver's duty to discharge public environmental obligations. It is irrelevant that no enforcement orders were ever issued with respect to the Persist assets, because the proceeds of the sale of those assets are still a part of the Manitok bankruptcy estate. Contrary to what is implied in the reasons at paras. 39, 42, the fact that the Persist assets were sold before any enforcement orders were issued is not relevant.

The Effect of the Trust and Holdback

42 The chambers judge reasoned at paras. 41, 44 that the proceeds of the sale to Persist were paid into trust, and therefore were not captured by the *Redwater* decision. It is true that the physical oil and gas assets sold to Persist were no longer a part of the Manitok estate, because they had vested in Persist. This appeal, however, is not concerned with those physical assets, but rather with the proceeds resulting from the sale of those assets. Those proceeds are very much a part of the Manitok estate, even though they are held "in an interest bearing trust account". Under the Sale and Vesting Order they were specifically to stand in place of the physical assets that had been sold, without affecting in any way the priorities and claims of various claimants. The claims of the two respondent builders' lien claimants survive in those proceeds, but they are to be dealt with in accordance with the *Redwater* principles.

43 The respondents argue that this case is distinguishable from *Redwater* because the *Redwater* decision "changed the law". They argue that *Redwater* does not apply, because the Persist assets had been sold effective as of a date prior to the "seismic shift" caused by the reasons in *Redwater*, and the funds were paid into trust by court order. That is not an accurate statement of the legal position. The *Redwater* decision did not change the law. It merely stated what the law had always been, despite the opinions of some in the industry to the contrary. The law was always as stated in the *Bankruptcy and Insolvency Act*, *Northern Badger, Abitibi*, and as confirmed in *Redwater*. The 2019 *Redwater* decision stated the law as of the date that Redwater Energy Corporation became bankrupt four years earlier. The *Redwater* decision also stated the law as it existed on the day that Manitok became bankrupt, and it applies fully to these proceedings.

44 The builders' lien claimants overstate the effect of the "trust" created by the Sale and Vesting Order. The assets of an insolvent corporation belong to the estate of that corporation. Those assets are under the control of the receiver or trustee. The receiver or trustee obviously has no beneficial interest in those assets and would keep them segregated, and in that sense it is not inaccurate to say the assets are held "in trust" or "in an interest bearing trust account". But the "trust" is only to hold the assets for the stakeholders in the insolvency, in the same priority as their interests may appear. Any "trust" does not create any new or enhanced rights in any stakeholder, even if recited in a court order, and even if the assets are sub-segregated into smaller pools of assets. A court cannot by such a "trust order" reorder the priorities in an insolvency.

45 The Receiver was obviously required to hold the Persist proceeds "in an interest bearing trust account" for the bankrupt estate and its stakeholders, because the Receiver had no beneficial interest in them. The Order, however, did not create any new rights or trust beneficiaries or vary the entitlement of any stakeholder; it essentially provided that the funds were to be held in escrow pending a determination of entitlement: Toronto Dominion Bank v 1287839 Alberta Ltd, 2021 ABQB 205 at para. 17. The Order specifically stated that the funds were deemed to replace the sold real estate, and the claims of all stakeholders would

TAB 8

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
In September 2015, debtors filed intention to make proposal — Debtors were indirect subsidiaries of HP Inc. — SE Ltd. was competitor of HP Inc., and it expressed interest in purchasing debtors' business as going concern — SE Ltd. offered to make DIP loan of up to $1 million to fund projected shortfall in cash flow — Debtors brought motion for orders consolidating their proposal proceeding, authorizing debtors to enter into an interim financing term sheet with SE Ltd. as DIP lender, approving DIP term sheet and granting SE Ltd. super priority charge to secure all of debtors' obligations to SE Ltd. under DIP term sheet, granting charge not to exceed $150,000 in favour of debtors' legal counsel to secure payment of their reasonable fees and disbursements, granting charge up to $2,000,000 in favour of debtors' directors and officers, approving process for sale and marketing of debtors' business and assets, approving agreement of purchase and sale between SE Ltd. and debtors and granting debtors extension of time to make proposal to their creditors — Motion granted — Consolidation of debtors' notice of intention proceedings was appropriate — It avoided multiplicity of proceedings, associated costs and need to file three sets of motion materials — Three debtors were closely aligned and shared accounting, administration, human resources and financial functions — Debtors' assets were to be marketed together and form single purchase and sale transaction — DIP term sheet was approved and super priority granted — Administration charge was granted — Involvement of professional advisors was critical to successful restructuring — Process was reasonably complex and their assistance was self evidently necessary to navigate to completion — Debtors had limited means to obtain that professional assistance — Directors' of officers' charge was warranted — It was only required in event that sale was not concluded and wind down of facility was required — Directors

and officers whose participation in process was critical might not continue their involvement if relief was not granted — Sale process and stalking horse agreement were approved — It permitted sale of debtors' business as going concern — Stalking horse bid established floor price for debtors' assets — Process seemed fair and transparent and there was no viable alternative — Proposal trustee supported process and agreement — Time to file proposal was extended so sale process could be carried out.

Table of Authorities

Cases considered by *H.A. Rady J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed

Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

Comstock Canada Ltd., Re (2013), 2013 ONSC 4756, 2013 CarswellOnt 9796, 4 C.B.R. (6th) 47, 25 C.L.R. (4th) 175 (Ont. S.C.J.) — considered

Electro Sonic Inc., Re (2014), 2014 ONSC 942, 2014 CarswellOnt 1568, 14 C.B.R. (6th) 256 (Ont. S.C.J. [Commercial List]) — considered

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

Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH (2012), 2012 ONSC 175, 2012 CarswellOnt 2891 (Ont. S.C.J.) — considered

P.J. Wallbank Manufacturing Co., Re (2011), 2011 ONSC 7641, 2011 CarswellOnt 15300, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 13 — considered

s. 14 — considered

s. 15 — considered

s. 16 — considered

s. 17 — considered

s. 50.4 [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2005, c. 47, s. 36] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 64.2(2) [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — considered

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > . . .
> >
> > Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
> >
> > [Emphasis in original]

31 I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

32 The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** 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.

> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

33 In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Colossus Minerals Inc., Re*, 2014 ONSC 514 (Ont. S.C.J.) and the discussion in it.

d) the D & O charge

34 The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **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 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.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

35 I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

36 The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

37 In *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169(Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

TAB 9

2013 ONSC 1780
Ontario Superior Court of Justice [Commercial List]

Northstar Aerospace Inc., Re

2013 CarswellOnt 4056, 2013 ONSC 1780, 227 A.C.W.S. (3d) 929

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 Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company Applicants

Morawetz J.

Judgment: April 9, 2013
Docket: CV-12-9761-00CL

Counsel: C.J. Hill, J. Szumski for Court-Appointed Monitor, Ernst & Young Inc.
J. Wall for Her Majesty the Queen in Right of Ontario, as Represented by the Ministry of the Environment
P. Guy, K. Montpetit for Former Directors and Officers Group
Steven Weisz for Fifth Third Bank

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Applicant companies obtained protection from their creditors under Companies' Creditors Arrangement Act (CCAA) — Court-appointed monitor of applicants brought motion for approval of adjudication process — Monitor also sought final determination as to whether two claims were valid claims for which former directors and officers of applicants ("D&Os") were indemnified pursuant to indemnity contained in initial order — If they were so indemnified, D&Os may have been entitled to benefit of certain funds held in reserve by monitor (D&O charge reserve) to satisfy such claims — Two claims in issue were described in proofs of claim filed by provincial Crown as represented by Ministry of Environment (MOE) and by other party on behalf of certain of D&Os — Motion granted; adjudication process approved; D&Os were not entitled to benefit of D&O charge reserve; D&O charge reserve was to be paid to pre-filing agent — To determine that proofs of claim were claims for which D&Os were entitled to be indemnified under Director's Indemnity would wrongly and inequitably affect priority of claims as between Ministry and bank — It would lead to inconsistent results if MOE could, in CCAA proceedings, improve its unsecured position against bank by issuing Director's Order after commencement of CCAA proceedings, based on environmental condition which occurred long before CCAA proceedings — This would result in Ministry achieving indirectly in these CCAA proceedings that which it could not achieve directly — In CCAA proceedings, Ministry claim was unsecured claim and did not entitle Ministry to obtain remedy sought.
Table of Authorities
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Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to
Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

Northstar Aerospace Inc., Re (2012), 2012 ONSC 3974, 2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List]) — referred to

Northstar Aerospace Inc., Re (2012), 91 C.B.R. (5th) 268, 2012 CarswellOnt 9607, 2012 ONSC 4423 (Ont. S.C.J. [Commercial List]) — followed

Northstar Aerospace Inc., Re (2012), 2012 ONSC 6362, 2012 CarswellOnt 14149 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Generally — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(2) [en. 2005, c. 47, s. 128] — considered

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

MOTION by court-appointed monitor of applicant companies for approval of adjudication process and for final determination with respect to validity of claims and indemnity.

***Morawetz J.*:**

Motion Overview

1 This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the "Monitor") of Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "Applicants"), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the "Claims Procedure") authorized by order of August 2, 2012 (the "Claims Procedure Order") are valid claims for which the former directors and officers of the Applicants (the "D&Os") are indemnified pursuant to the indemnity (the "Directors' Indemnity") contained in paragraph 23 of the Initial Order dated June 14, 2012 [2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the "D&O Charge Reserve") to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the "Pre-Filing Agent").

3 For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

4 In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to "MOE Pre-Filing D&O Claim", "MOE Post-Filing D&O Claim" and "WeirFoulds Post-Filing D&O Claim" have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

5 The two claims at issue are described in proofs of claim (collectively, "the Proofs of Claim") filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the "MOE") and by WeirFoulds LLP ("WeirFoulds") on behalf of certain of the D&Os ("WeirFoulds D&Os").

6 The MOE proof of claim (the "MOE Proof of Claim") asserts, among other things, a "Pre-Filing D&O Claim" (the "MOE Pre-Filing D&O Claim") and a "Post-Filing D&O Claim" (the "MOE Post-Filing D&O Claim") (collectively, the "MOE D&O

for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

24 The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

25 In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

26 The Monitor's counsel appropriately sets out the issues of this motion, as follows:

> (a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;
>
> (b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;
>
> (c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and
>
> (d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

27 I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

28 The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

29 The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) and *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]).

30 In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

> To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

TAB 10

TAB 11

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Perpetual Energy Inc. v. PricewaterhouseCoopers Inc. | 2021 CarswellAlta 1062 | (S.C.C., Apr 16, 2021)

2021 ABCA 16
Alberta Court of Appeal

PricewaterhouseCoopers Inc v. Perpetual Energy Inc

2021 CarswellAlta 119, 2021 ABCA 16, [2021] A.W.L.D. 640, [2021] A.W.L.D. 641, [2021] A.W.L.D. 642, [2021] A.W.L.D. 643, [2021] A.W.L.D. 644, [2021] A.W.L.D. 645, 14 B.L.R. (6th) 161, 20 Alta. L.R. (7th) 23, 327 A.C.W.S. (3d) 20, 457 D.L.R. (4th) 1, 86 C.B.R. (6th) 9

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Appellant / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Respondents / Defendants) and Orphan Well Association (Intervenor) and Canadian Natural Resources Limited (Intervenor) and Cenovus Energy Inc. (Intervenor) and Torxen Energy Ltd. (Intervenor)

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Respondent / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Appellants / Defendants)

PricewaterhouseCoopers Inc., in its personal capacity (Appellant / Not Party to Application) and PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Respondent / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Respondents / Defendants)

Marina Paperny, Jack Watson, Frans Slatter JJ.A.

Heard: December 10, 2020
Judgment: January 25, 2021
Docket: Calgary Appeal 1901-0255-AC, 1901-0262-AC, 2001-0174-AC

Proceedings: reversing in part *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 6, 2020 CarswellAlta 62, 6 B.L.R. (6th) 211, D.B. Nixon J. (Alta. Q.B.); additional reasons at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206, D.B. Nixon J. (Alta. Q.B.); and reversing *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206, D.B. Nixon J. (Alta. Q.B.)

Counsel: R. de Waal, L. Rasmussen, for Appellant / Cross-Respondent, PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity
D.J. McDonald, Q.C., P.G. Chiswell, for Respondents / Cross-Appellants Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp.
S.H. Leitl, G. Benediktsson, for Respondent / Cross-Appellant, Susan Riddell Rose
C.C.J. Feasby, Q.C., M. Wasserman, for Appellant, PricewaterhouseCoopers Inc., in its personal capacity
K.T. Lentz, Q.C., for Intervenor, Orphan Well Association
G.S. Watson, C.W. Ang, for Intervenors, Canadian Natural Resources Limited, Cenovus Energy Inc., Torxen Energy Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.g Fiduciary duties
III.1.g.ix Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.B Standing to apply
III.3.e.ii.B.4 Miscellaneous
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.q Costs
V.3.q.ii Scale and quantum of costs
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Trustee challenged component (asset transaction) of aggregate transaction, on basis that it was at undervalue under s. 96 of Bankruptcy and Insolvency Act — Transaction was also challenged on public policy grounds — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge held that claim under s. 96 of Act could neither be struck out nor summarily dismissed — Pleading respecting public policy claim was struck out for failure to disclose cause of action — Trustee appealed, and defendants cross-appealed — Appeal allowed; cross-appeal dismissed — Section 96 claim would have to be resolved at trial — There was no legally relevant evidence to rebut presumption that related members of defendant group who were engaged in asset transaction were not operating at arm's length — If transaction was entered into in violation of s. 96 of Act, it was no defence that it was connected to number of other transactions that did not engage s. 96 — "Public policy" pleadings should not have been struck out — They set out and engaged important underlying issue in litigation that could only be resolved at trial Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 96.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets — Transaction was also challenged under statutory corporate oppression provisions — Trustee applied for

summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Oppression claim was struck out for failure to disclose cause of action, because trustee was not "proper person" to be complainant, or alternatively because oppression claim lacked merit — Trustee appealed — Appeal allowed — It was unhelpful to blend analysis of "complainant" status of trustee with substance of oppression claim — Former was not matter of "striking pleading" — On record, it was unreasonable to conclude that trustee was not "proper person" — As to merits of oppression claim, case management judge erred in his analysis for several reasons — Judge misread certain case law in finding that it was complete answer to claim — Contrary to judge's finding, abandonment and reclamation obligations were real obligation and liability of oil and gas company — While oppression claim may have been narrower than trustee anticipated, pleadings disclosed cause of action — Trustee was to be granted complainant status if it elected to pursue claim.

Business associations --- Specific matters of corporate organization — Directors and officers — Fiduciary duties — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets — Trustee challenged component (asset transaction) of aggregate transaction, on basis that it was at undervalue under s. 96 of Bankruptcy and Insolvency Act — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Claim against SR was struck out for failure to disclose cause of action, and it was also summarily dismissed on merits, and, in any event, because resignation and mutual release that had been signed was found to be complete defence — Trustee appealed — Appeal allowed — While there was facial merit to claim of breach of director's duties, most of SR's potential liability to corporate entity in question was released by resignation and mutual release — While some portions of claim as against SR were properly summarily dismissed, there was no basis on which claim could be struck for failing to disclose cause of action — It was not possible, on this record, to dispose of alternative of Act claim that was made against SR; this and related issues had to be referred back to trial court.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Claim against SR was arguable; case law did not "nullify" this claim — Case management judge overstated implications of trustee being officer of court — There was no litigation misconduct to justify enhanced costs — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Costs — Scale and quantum of costs

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Trustee does not have to meet administrative law requirements of fairness — There is no independent duty to investigate owed to third parties — There was no litigation

misconduct to justify enhanced costs — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Non-party

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Case management judge overstated implications of trustee being officer of court — Trustee does not have to meet administrative law requirements of fairness — There is no independent duty to investigate owed to third parties — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

Table of Authorities

Cases considered:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, *(*sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, *(*sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

Akagi v. Synergy Group (2000) Inc. (2015), 2015 ONCA 771, 2015 CarswellOnt 17056, 128 O.R. 64 (Ont. C.A.) — referred to

Arthur Williams & Co., Re (1913), [1913] 2 K.B. 88 (Eng. C.A.) — considered

Asian Concepts Franchising Corp., Re (2016), 2016 BCSC 1581, 2016 CarswellBC 2386, 40 C.B.R. (6th) 73 (B.C. S.C.) — considered

Atlantic Lottery Corp. Inc. v. Babstock (2020), 2020 SCC 19, 2020 CSC 19, 2020 CarswellNfld 181, 2020 CarswellNfld 182, 447 D.L.R. (4th) 543, 53 C.P.C. (8th) 1, 67 C.C.L.T. (4th) 1 (S.C.C.) — referred to

BCE Inc., Re (2008), 2008 CarswellQue 12595, 2008 CarswellQue 12596, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, *(*sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 383 N.R. 119, *(*sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 301 D.L.R. (4th) 80, 2008 SCC 69, *(*sub nom. *BCE Inc. v. 1976 Debentureholders)* [2008] 3 S.C.R. 560 (S.C.C.) — considered

Bailey v. Temple (2020), 2020 NLCA 3, 2020 CarswellNfld 23, 443 D.L.R. (4th) 633, 48 C.P.C. (8th) 215, 58 M.V.R. (7th) 186 (N.L. C.A.) — referred to

Biancaniello v. DMCT LLP (2017), 2017 ONCA 386, 2017 CarswellOnt 6974, 1 C.P.C. (8th) 1, 2017 D.T.C. 5061, 411 D.L.R. (4th) 367, 67 B.L.R. (5th) 32, 138 O.R. (3d) 210 (Ont. C.A.) — considered

Cormie v. Principal Group Ltd. (Trustee of) (1989), 66 Alta. L.R. (2d) 340, 74 C.B.R. (N.S.) 124, 99 A.R. 1, 1989 CarswellAlta 335 (Alta. Q.B.) — considered

Doyle Salewski Inc. v. Scott (2019), 2019 ONSC 5108, 2019 CarswellOnt 14145, 76 C.B.R. (6th) 3 (Ont. S.C.J.) — considered

Drummie, Re (2004), 2004 NBQB 35, 2004 CarswellNB 17, 49 C.B.R. (4th) 90, *(*sub nom. *Royal Bank of Canada v. Drummie (Bankrupt))* 272 N.B.R. (2d) 314, *(*sub nom. *Royal Bank of Canada v. Drummie (Bankrupt))* 715 A.P.R. 314 (N.B. Q.B.) — considered

Eagle River International Ltd., Re (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, *(*sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.)* 207 D.L.R. (4th) 385, *(*sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.)* 280 N.R. 155, *(*sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — considered

Elbow River Marketing Ltd. Partnership v. Canada Clean Fuels Inc. (2011), 2011 ABCA 258, 2011 CarswellAlta 1628, 513 A.R. 315, 530 W.A.C. 315, 56 Alta. L.R. (5th) 222 (Alta. C.A.) — referred to

134 If the judge concludes that there is no possible merit to the oppression claim, it would be pointless to grant complainant status to a creditor. That, however, is not the same thing as saying that the proposed complainant is unsuitable. That is one factor to consider, but is not a conclusive consideration in determining his complainant status.

135 In summary, it was unhelpful to blend the analysis of the "complainant" status of the Trustee in Bankruptcy, with the substance of the oppression claim. The former is not a matter of "striking a pleading". On this record, it was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person".

The Merits of the Oppression Claim

136 The case management judge concluded that the oppression claim could be struck out because it failed to disclose a cause of action. In his oral reasons he concluded that the oppression claim could not be summarily dismissed, but in the subsequent written reasons he concluded that summary disposition would have been possible as an alternative: reasons at paras. 233-35.

137 The case management judge concluded that the *Redwater* decision was a complete answer to the oppression claim for two reasons. First of all, *Redwater* "nullified" the claim because it held that Abandonment and Reclamation Obligations were not a true obligation or liability, but merely "an allegation that is based on assumptions and speculations". Secondly *Redwater* concluded that Abandonment and Reclamation Obligations were owed to the public, and not to any "creditor"; neither the Alberta Energy Regulator nor the Orphan Well Association were creditors for that purpose. As previously noted, the first conclusion arises from a misreading of *Redwater*. However, *Redwater* did conclude that there was no "creditor" with respect to Abandonment and Reclamation Obligations, and to that extent *Redwater* is relevant to these appeals.

138 For the reasons previously given, Abandonment and Reclamation Obligations are a real obligation and liability of an oil and gas company: *supra*, paras. 85-89. The outcome of *Redwater* was that the proceeds from the sale of Redwater Energy's valuable assets had to be used to discharge those obligations, and could not be paid to the secured creditor. That in itself demonstrates the reality of these obligations. *Redwater* did not "nullify" Abandonment and Reclamation Obligations.

139 What *Redwater* did decide, however, was that there was no "creditor" associated with Abandonment and Reclamation Obligations. As a result, Abandonment and Reclamation Obligations could not be "claims provable in bankruptcy". These appeals are concerned with the *Business Corporations Act*, not the *Bankruptcy and Insolvency Act*, but there is no principled basis to distinguish *Redwater* on this point, and find that there is a "creditor" associated with Abandonment and Reclamation Obligations for the purposes of s. 242. The definition of "creditor" for oppression purposes may be wider than it is in other contexts, for example by including contingent claims: *Tannis Trading* at paras. 24-25; *Manufacturers Life* at para. 30. However, given the finding in *Redwater* that Abandonment and Reclamation Obligations are not associated with a creditor, they cannot *directly* be used to support complainant status in an oppression claim brought by "creditors".

140 The conclusion that there is no creditor associated with Abandonment and Reclamation Obligations is not fatal to the oppression claim. The oppression claim can still be advanced by the Trustee in Bankruptcy on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct, and remained unpaid on the date of bankruptcy. As previously noted, the quantum of debts of that nature owed to the recognized creditors of Perpetual/Sequoia is unclear on this record. The respondents argue that, with respect to municipal taxes, there are only three municipalities still owed taxes from before 2017, and they have all entered into deferred payment plans.

141 Further, even though the Abandonment and Reclamation Obligations may not be associated with a "creditor", that does not mean that they are irrelevant to an oppression claim brought on behalf of creditors. As *Redwater* confirms, Abandonment and Reclamation Obligations are real liabilities or obligations of oil and gas companies. It is possible that the directors and officers of a corporation might manage those Abandonment and Reclamation Obligations in a manner that is unfairly prejudicial to the interests of creditors.

142 The case management judge also concluded that the proposed oppression claim was contrary to the policies of the Alberta Energy Regulator: reasons at paras. 120-25. He concluded "the Trustee asks the Court to frame a legal regime that has

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: Medipure Pharmaceuticals Inc. (Re) | 2022 BCSC 1771, 2022 CarswellBC 2837, 2022 A.C.W.S. 4034, 3 C.B.R. (7th) 59 | (B.C. S.C., Oct 7, 2022)

2017 ONSC 5571
Ontario Superior Court of Justice [Commercial List]

Re TOYS "R" US (CANADA) LTD.

2017 CarswellOnt 14645, 2017 ONSC 5571, 283 A.C.W.S. (3d) 471

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: September 19, 2017
Judgment: September 20, 2017
Docket: CV-17-00582960-00CL

Counsel: Brian F. Empey, Melaney Wagner, Christopher Armstrong, for Applicant
R. Shayne Kukulowicz, Jane Dietrich, for Proposed Monitor, Grant Thornton Limited
Tony Reyes, for pre-filing ABL lenders
Alexander Cobb, for B4 lenders
Linc Rogers, Chris Burr, for JPMorgan Chase Bank, NA, the lead lender on behalf of the proposed DIP lenders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.viii Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
US parent company of toy and baby product retailer filed for US bankruptcy protection — Both parent company and Canadian subsidiary (T Inc.) defaulted under asset-based lender (ABL) facilities provided to it and parent company — T Inc. brought initial application under Companies' Creditors Arrangement Act (CCAA) and for approval of debtor in possession (DIP) lending facility to repay ABL lender and to fund cash flow needs and restructuring — Application granted in part — T Inc. met definition of debtor company for purposes of initial hearing under CCAA and it was appropriate to grant stay under s. 11.02, but DIP lenders were not granted enhanced enforcement rights — Court-ordered charge was not being used to improve security of pre-filing ABL lenders or to fill gaps in their security coverage — DIP terms were generally limited to standard lending terms — Stay provisions generally prevented creditors from enforcing claims without leave so DIP lenders were well protected without extraordinary power to enforce claims without court scrutiny — Terms of DIP documents limiting T Inc.'s entitlement to oppose DIP lenders could create complex and ambiguous situation — DIP lenders were replacing first secured lenders and did not need special priority when they were likely entitled to step into their priority position under doctrine of equitable subrogation —

DIP lenders would be entitled to take minimal steps to give notice of default and to withhold further advances while parties come to court.

Table of Authorities

Cases considered by *F.L. Myers J.*:

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 2(1) "debtor company" — considered

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

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

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

s. 11.51(3) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

APPLICATION by retailer under Companies' Creditors Arrangement Act for stay and for approval of enhanced terms for debtor in possession lending facility.

***F.L. Myers J.*:**

1 At the conclusion of the hearing I granted the relief sought by the applicant with minor revisions for reasons to be delivered shortly. These are my reasons for doing so.

2 The applicant is Canada's leading retailer of toys and baby products. It operates from 82 stores across all ten provinces and over the internet. It employs nearly 4,000 people. This number increases to more than 6,000 during the peak holiday season. It is an important participant in the Canadian retail economy and a much beloved childhood icon in many Canadians' lives.

3 The applicant is an indirect, wholly owned subsidiary of TOYS "R" US INC. a US company. On September 18, 2017 the US parent, several affiliates, and the applicant filed for bankruptcy protection in the US Bankruptcy Court for the Eastern District of Virginia. They did so in order to protect against stakeholder action that could adversely impact their businesses while they explore restructuring options. Publicity concerning the problems facing the companies has already led some suppliers to take steps to limit the credit terms that they are willing to extend to the retailer. As a result, the businesses found themselves in need of the stability of bankruptcy protection.

4 The Canadian applicant's operations are generally autonomous from the parent's US operations. But, the applicant's pre-filing US$200 million secured revolving credit facility and its US$125 million secured term loan facility were both provided under a wider asset-backed lending facility provided by the pre-filing ABL lenders to the US and Canadian companies.

5 When the applicant and its US affiliates filed for US bankruptcy protection, they committed defaults under their ABL facilities. Therefore, although the applicant is generally cash flow positive and has positive shareholder equity, it found itself without borrowing facilities and within two weeks of being unable to meet its obligations as they come due.

6 As a result of its looming liquidity crisis, the applicant meets the definition of a "debtor company" to whom the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 applies. *Stelco Inc., Re* [2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List])], 2004 CanLII 24933. It has liabilities of more than $5 million and otherwise meets the technical requirements of the statute.

7 The applicant needs the protection of a general stay that is available under the *CCAA*. The stay is a court order that prevents people and companies with claims against the applicant from cancelling their contracts or taking steps to enforce their claims against the applicant during the period of the restructuring. All creditors and claimants are held at bay, together, to maintain a level playing field. At the same time, the stay protects the applicant's business in order to: create conditions under which a lender will advance fresh funds to the applicant to carry it through its restructuring efforts; help prevent suppliers from ceasing or tightening credit terms just prior to the vital holiday selling season; to prevent enforcement efforts by creditors that would deflect the company from its efforts to find a win-win restructuring for the general body of its creditors; and to enable the applicant to continue to operate on a "business as usual" basis to protect the value of its business and brand for all. I am satisfied that this is an appropriate case in which to grant a stay as sought under s. 11.02 of the *CCAA*.

8 The applicant expresses concern that it might be required to pay some pre-filing claims to critical suppliers and others despite the general goal of a bankruptcy proceeding to freeze all claims at the filing date. For example, employees with wages accrued before today need to be paid in the ordinary course in order to keep the workforce engaged. Customers holding gift cards and similar pre-paid rights need to be able to enforce those pre-filing claims in order to protect the company's public customers. There is good reason to allow these types of claims to protect the goodwill of the business in the interests of all creditors even though most others are being prevented from enforcing their claims while these claims are recognized.

9 In addition, a small number of critical suppliers of goods and services may have the ability to avoid the stay order under the CCAA and the US automatic stay. Sometimes those suppliers will threaten to refuse to continue to supply a *CCAA* debtor unless they are paid their pre-filing claims in priority to others. In some circumstances this could imperil the applicant's business. Under s. 11.4 of the *CCAA*, the court may declare a person to be a "critical supplier." A critical supplier can be compelled to supply the applicant with goods and, in return, it can be provided with court-ordered security to protect its right to payment. That situation is quite different than the order sought in this case. Here, the applicant is not seeking to compel anyone to supply on credit against its will. The suppliers of concern in this case may claim to be beyond the reach of the court's orders. Rather, here, the applicant is recognizing that in some specific and limited cases, it may face an inordinate risk of interruption of its operations if it does not agree to pay to a supplier of goods or services the amounts of its claims that would otherwise be frozen at the filing date. Providing such a payment is a form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system. Accordingly, circumstances where payment of pre-filing claims will be allowed to suppliers of goods and services will be few. They will be carefully scrutinized by the applicant and the Monitor. The initial order granted by the court in this proceeding empowers the Monitor to exercise discretion to approve a payment to a critical supplier on its pre-filing claims. The Monitor will do so only in truly critical situations. It will be guided by the factors set out in para. 55 of the applicant's factum as drawn from the discussion by Morawetz J. (as he then was) in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]).

10 The applicant asks for the approval of a debtor in possession (DIP) lending facility to repay its pre-filing ABL indebtedness and to fund its cash flow needs as it bulks up its inventory for holiday sales and then throughout its restructuring. Section 11.2 of the *CCAA* provides for the court to grant security to DIP loans ahead of existing unsecured and secured claims upon a balancing of listed factors. Granting DIP security is a fairly standard and often necessary practice in *CCAA* cases. The section also makes it clear however, that security cannot be granted for pre-filing claims. Here, while it is proposed for DIP funding to be used to pay out pre-filing lenders (a "takeout DIP") all of the loans that will be secured are fresh advances by the DIP lenders. Moreover, the Monitor has obtained an independent legal opinion that the pre-filing ABL security is valid and prior to all claims that will be primed by the court-ordered DIP security. The DIP funds are replacing existing secured collateral. The court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2.

TAB 13

2000 BCSC 1316
British Columbia Supreme Court [In Chambers]

Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.

2000 CarswellBC 1802, 2000 BCSC 1316, [2000] B.C.W.L.D. 1297, 20 C.B.R. (4th) 166, 99 A.C.W.S. (3d) 209

Campbell, Saunders Ltd., Trustee in Bankruptcy of the Estate of Startek Computer Inc., Plaintiff and Samtack Computer Inc., Defendant

Harvey J.

Heard: August 30, 2000
Judgment: September 1, 2000
Docket: Vancouver S001120

Counsel: *C.L. Shaley*, for Plaintiff.
C. Tong, for Defendant.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.6 Effect of proposal
VI.6.b As binding on creditors
Headnote
Bankruptcy --- Proposal — Effect of proposal — As binding on creditors
Bankrupt paid vendor for computer equipment by cheque — Cheque was returned for non-sufficient funds — Bankrupt provided replacement cheque for goods, which was negotiated by vendor — Bankrupt filed notice of intention to make proposal — Four days later, without knowledge or consent of bankrupt or its trustee, vendor renegotiated original cheque which was cleared by bankrupt's bank — Trustee in bankruptcy brought application for summary judgment against vendor — Application granted — Vendor liable to trustee on basis that renegotiating first cheque was remedy prohibited as result of stay of proceedings imposed by s. 69(1) of Bankruptcy and Insolvency Act — Cheques were issued to pay for same three invoices and not for additional goods sold to bankrupt — Knowledge of filing of notice of intention to make proposal is not necessary for stay to be effective as against creditor — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69(1).
Table of Authorities
Cases considered by *Harvey J.*:
Gene Moses Construction Ltd., Re (1999), 9 C.B.R. (4th) 275 (B.C. Master) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — pursuant to

s. 69(1) — referred to

s. 69(2) — pursuant to
Rules considered:
Rules of Court, 1990, B.C. Reg. 221/90
R. 18A — pursuant to

App. B, s. 2(2)(c) — referred to

APPLICATION by trustee in bankruptcy for summary judgment against vendor.

Harvey J. **(In Chambers):**

1 The plaintiff applies for judgment pursuant to Rule 18A against the defendant Samtack Computer Inc. ("Samtack") in the amount of $20,098.88 plus interest and costs.

2 Startek Computer Inc. ("Startek") paid the defendant for certain goods, computer equipment, sold by it to Startek with a cheque. That cheque was returned to the defendant for non-sufficient funds.

3 Startek provided the defendant with a replacement cheque for the goods. The defendant negotiated the replacement cheque.

4 On June 17 two events occurred. Startek filed a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and pursuant to s. 69(2) of the said statute a stay of proceedings was in effect as of June 17, 1999.

5 On or about June 21, 1999 without the knowledge or consent of Startek or the trustee, the defendant renegotiated the original cheque which was cleared by Startek's bank.

6 The matter has a history.

7 On July 6, 2000 the matter came on for hearing before Pitfield J. At that time Samtack claimed that the first cheque and the replacement cheque were not issued to pay for the same three invoices. Samtack claimed it had evidence that supported its position but that evidence was not before the court. As a result, Pitfield J. ordered Samtack to produce this evidence and the application was adjourned accordingly.

8 In due course Samtack forwarded copies of the invoices it claims were paid by the first cheque and the replacement cheque.

9 The issue is framed in counsel for the plaintiff's outline of argument as follows:

> Is Samtack liable to the trustee in the amount of $20,098.88 for cashing both the first cheque and the replacement cheque on the basis that renegotiating the first cheque was a remedy prohibited as a result of the stay of proceedings imposed by section 69(1) of the BIA.

10 The answer to this question is yes.

11 The short answer to this application is that Samtack by renegotiating what has been referred to as the First Cheque on or about June 21, 1999, without the knowledge or consent of Startek or the trustee, exercised a remedy and violated the existing stay of proceedings. Further, upon a comparison of the invoices and particularly the further material ordered to be produced by Pitfield J. it is apparent the cheques were issued to pay for the same three invoices and not as alleged by Samtack invoices in relation to additional goods sold to Startek. In this perspective Samtack was paid twice for the same goods and the same invoices.

12 I do not accept Samtack's assertion that it has some form of defence based upon the fact it was not aware of the filing and the stay of proceedings referred to supra. In this regard in *Re Gene Moses Construction Ltd.* (1999), 9 C.B.R. (4th) 275 (B.C. Master) the Court of Appeal confirms that knowledge of the filing of the Notice of Intention to make a proposal is not necessary for the stay to be effective. It follows that in this case pursuant to the relevant provision of the BIA a stay of proceedings was in effect as of June 17, 1999 and no creditor, including Samtack, had any remedy against it for a claim provable in bankruptcy.

13 I grant the application for summary judgment in the amount as claimed together with interest and costs on Scale 3.

Application granted.

TAB 14

Most Negative Treatment: Check subsequent history and related treatments.

2012 ONSC 948
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 1466, 2012 ONSC 948, 211 A.C.W.S. (3d) 881, 86 C.B.R. (5th) 171, 95 C.C.P.B. 222

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 Timminco Limited and Bécancour Silicon Inc. (Applicants)

Morawetz J.

Heard: January 27, 2012; February 6, 2012
Judgment: February 9, 2012
Docket: CV-12-9539-00CL

Counsel: A. J. Taylor, M. Konyukhova, for Applicants
K. Stuebing, D. Wray, for Communications, Energy and Paperworkers' Union of Canada ("CEP")
L. Rogers, for FTI Consulting Canada Inc.
D. Bish, for QSI Partners Ltd.
C. Sinclair, for United Steelworkers' Union ("USW")
S. Scharbach, D. McPhail, for FSCO
H. Meredith, for AMG Advance Metallurgical Group NV
B. Boake, for Dow Corning
A. Kauffman, for Investissement Quebec
J. Orr, M. Spencer, for Class Action Plaintiffs

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.xii Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.iv Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Pensions
I Private pension plans

I.2 Payment of pension
I.2.l Bankruptcy or insolvency of employer
I.2.l.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Relationship between Act and provincial pensions acts — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Court had jurisdiction to override provisions of provincial pensions acts to extent of approving DIP charge — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial acts — Relevant analysis was found in earlier decision in CCAA proceedings of same insolvent companies, granting super priority to two charges — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy proceedings.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Court had jurisdiction to override provisions of provincial pensions acts to extent of approving DIP charge — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial acts — Relevant analysis was found in earlier decision in CCAA proceedings of same insolvent companies, granting super priority to two charges — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy proceedings.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Miscellaneous

Priority of DIP financing charge over pension payments — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Court had jurisdiction to override provisions of provincial pensions acts to extent of approving DIP charge — Relevant analysis was found in earlier decision in CCAA proceedings of same insolvent companies, granting super priority to two charges — It was unrealistic to expect that commercially motivated party would make advances to insolvent companies for purpose of making special payments to pension plans — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy proceedings.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Miscellaneous

DIP financing — Companies' Creditors Arrangement Act — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court

approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Section 11.2 of CCAA provided court with express jurisdiction to grant DIP financing charge — Considering facts and factors in s. 11.2 of CCAA, DIP facility was necessary — Requirements of s. 11.2 of CCAA were satisfied — Not granting requested relief, as submitted by unions, would do nothing to improve position of union's members — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

DIP financing — Super priority — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Alternative of DIP charge without super priority was not realistic — It was unrealistic to expect that commercially motivated DIP lender would advance funds without receiving super priority — It was essential and necessary to grant super priority DIP charge, in order to provide opportunity for restructuring plan — Objectives of CCAA would be frustrated if super priority was not granted — Failure to grant super priority would likely result in cessation of operations, leading to bankruptcy proceedings, which would be prejudicial to all stakeholders, including pensions members.

Table of Authorities

Cases considered by *Morawetz J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Timminco Ltd., Re (2012), 2012 ONSC 506, 2012 CarswellOnt 1263 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Generally — referred to

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

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(2) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Régimes complémentaires de retraite, Loi sur les, L.R.Q., c. R-15.1

en général — referred to

MOTION by insolvent companies for order approving DIP facility and granting priority charge in favour of DIP lender.

***Morawetz J.*:**

1 Timminco Limited and Bécancour Silicon Inc. (together, the "Timminco Entities") brought this motion for an order approving the DIP Facility (defined below) and granting a priority charge on the current and future assets, undertakings and properties of the Timminco Entities in favour of the DIP Lender (defined below).

45 I have taken the above findings into consideration, as well as the factors set out at [34] above. A review of these factors leads to the conclusion that the DIP Facility is necessary. The requirements of s. 11.2 of the CCAA have, in my view, been satisfied.

46 It is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. It is also unrealistic to expect that any commercially motivated party would make advances to the Timminco Entities for the purpose of making special payments or other payments under the pension plans.

47 The alternative proposed by CEP — of a DIP Charge without super priority — is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.

48 This underscores the lack of other viable options that was fully considered in the first Timminco endorsement (*Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List])). The situation has not changed. The reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative. In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect, as the only alternative is a shutdown. It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.

49 In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.

50 The analysis in the present motion is the same as that set out in *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List])). The outcome of this motion is consistent with that analysis. I am satisfied that bankruptcy is not the answer and, in order to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA.

51 On the facts before me, I am satisfied that it is both necessary and appropriate to approve the DIP Facility. It is also, in my view, both necessary and appropriate to grant the D&O Charge and to provide that the D&O Charge has priority over the Encumbrances, including without limitation any deemed trust created under the OPBA or the QSPPA.

52 The motion is, therefore, granted. The DIP Facility is approved and the DIP Charge is granted with the requested super priority.

Motion granted.

Appendix A

CITATION: Timminco Limited (Re), 2012 ONSC 506

COURT FILE NO.: CV-12-9539-00CL

DATE: 20120202

SUPERIOR COURT OF JUSTICE — ONTARIO

(COMMERCIAL LIST)

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

TAB 15

2021 YKCA 2
Yukon Territory Court of Appeal

Yukon (Government of) v. Yukon Zinc Corporation

2021 CarswellYukon 18, 2021 YKCA 2, 334 A.C.W.S. (3d) 21, 91 C.B.R. (6th) 209

Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources (Appellant / Petitioner) And Yukon Zinc Corporation (Respondent / Respondent) And Welichem Research General Partnership (Respondent)

Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources (Respondent / Petitioner) And Yukon Zinc Corporation (Respondent / Respondent) And Welichem Research General Partnership (Appellant)

Tysoe, MacKenzie, Lyons JJ.A.

Heard: November 17-18, 2020
Judgment: March 5, 2021
Docket: Vancouver 20-YU865, 20-YU866, 20-YU867, 20-YU868

Proceedings: reversing in part *Yukon (Government of) v. Yukon Zinc Corporation* (2020), 2020 CarswellYukon 39, 2020 YKSC 15, 80 C.B.R. (6th) 184, S.M. Duncan J. (Y.T. S.C.); and reversing in part *Yukon (Government of) v. Yukon Zinc Corporation* (2020), 2020 CarswellYukon 40, 2020 YKSC 16, 80 C.B.R. (6th) 229, S.M. Duncan J. (Y.T. S.C.); and reversing in part *Yukon (Government of) v. Yukon Zinc Corporation* (2020), 2020 CarswellYukon 37, 2020 YKSC 17, 80 C.B.R. (6th) 256, S.M. Duncan J. (Y.T. S.C.); additional reasons at *Yukon (Government of) v. Yukon Zinc Corporation* (2020), 2020 YKSC 25, 2020 CarswellYukon 50, 80 C.B.R. (6th) 285, S.M. Duncan J. (Y.T. S.C.)

Counsel: J.T. Porter, L.A. Henderson, for Government of Yukon, as represented by the Minister of the Department of Energy, Mines and Resources
H.L. Williams, M. Sassi, F.D. Finn, for Welichem Research General Partnership
J.R. Sandrelli, T.R.M. Jeffries, E.T.T.Y. Newbery, for Receiver, PricewaterhouseCoopers Inc.

Subject: Civil Practice and Procedure; Environmental; Insolvency; Natural Resources; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Bankruptcy and insolvency
X Priorities of claims
X.2 Preferred claims
X.2.c Costs and expenses of administrators
X.2.c.ii Priority over other claims
Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.b Provincial
X.5.b.i General principles
Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Debtor, whose principal asset was mine in Yukon Territory, experienced financial difficulties and engaged in restructuring — Debtor received loans from secured creditor and used portion of loan proceeds to exercise purchase option under equipment lease, then sold equipment to secured creditor and leased it back under master lease — Receiver was appointed over debtor, and debtor was later deemed to have made assignment into bankruptcy — Receiver assumed responsibility for care and maintenance of mine and took steps to bring equipment up to minimum operating standards — Receiver was unable to negotiate new rental arrangement for equipment with secured creditor and sent notice disclaiming master lease with exception of right to use certain equipment — Receiver developed solicitation plan in which it proposed to evaluate bids based on numerous factors including factors relating to bidder's environmental expertise and ability to obtain regulatory approval — Secured creditor applied for order that disclaimer notice was nullity and receiver affirmed master lease, and receiver applied for order elevating priority of its charges and approving solicitation plan — On secured creditors application, chambers judge concluded that receiver had not affirmed master lease, finding that there was no legal authority allowing receiver to partially disclaim contract, but that receiver's general powers under receivership order to protect and preserve property and s. 243(1) of Bankruptcy and Insolvency Act ("BIA") gave receiver power to use essential equipment — On receiver's application, chambers judge approved solicitation plan finding that receiver was acting appropriately in consulting government, which would not have inappropriate influence over solicitation process — Secured creditor appealed — Appeals allowed in part — Effect of disclaimer notice was to disclaim all obligations under master lease but assert right to use essential equipment — Under s. 243 of BIA, receiver was appointed to take possession of property of insolvent person, and it did not confer authority on court to permit receiver to make unilateral decisions to use property of third parties — Section 26(1) of Judicature Act was not sufficiently broad to give court jurisdiction to authorize receiver to use property of third party without their consent — None of receiver's actions after disclaiming master lease amounted to withdrawal of disclaimer and affirmation of master lease — Receiver's obligation to obtain highest possible sale price did not mean that it was required to accept offer containing highest price — Receiver was entitled to take into account ability of bidder to close transaction and no bidder would be able to close transaction unless government approved assignment of debtor's licence and was able to provide required reclamation security Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 243; Judicature Act, R.S.Y. 2002, c. 128, s 26(1).

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims

Receiver was appointed over debtor and debtor was later deemed to have made assignment into bankruptcy — Receiver assumed responsibility for care and maintenance of mine and took steps to bring equipment up to minimum operating standards — On receiver's application for order elevating priority of its charges, among other things, chambers judge relied on fact that receiver was appointed to preserve and realize assets for benefit of all interested parties to elevate receiver's charges on debtor's property over secured creditors — Secured creditor appealed — Appeals allowed in part — Judge erred in her conclusion that s. 243(1) of Bankruptcy and Insolvency Act (BIA) and s. 26 of Judicature Act gave court jurisdiction to authorize receiver to use essential equipment, which was property of secured creditor, without secured creditor's consent — Explicit language in legislation would be required to give court authority to interfere with property rights of third parties, including authority to give receive charge for its fees and disbursements over property of third party without their consent — Language in s. 243(6) of BIA, which gave such charge priority over secured creditors, was limited to charge over property of insolvent person or bankrupt in respect of whom receiver was appointed.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Provincial — General principles

Debtor, whose principal asset was mine in Yukon Territory, experienced financial difficulties and engaged in restructuring — Debtor had successfully been prosecuted twice and fined on two counts of failure to post security — Following flooding of mine in 2017, government recalculated required reclamation security, increasing it to over $35 million and successfully petitioned for appointment of receiver — Debtor filed intention of notice to make proposal to creditors, but failed to file proposal and was therefore deemed to have made assignment into bankruptcy — On government's application for order declaring it had provable claim, secured by security on real property of debtor, chambers judge concluded that unfurnished reclamation security was not provable claim because it was secondary in nature and was not obligation recoverable by legal process, but that s. 14.06(7) of Bankruptcy and Insolvency Act ("BIA") applied once government had incurred remediation costs, that claim for remediation costs was not unsecured, and that government's security could be extended to debtor's mineral claims as they constituted real property — Government and secured creditor appealed — Appeal by government allowed in part; appeal by secured creditor allowed — Government did not have provable claim in bankruptcy as result of failure of debtor to provide reclamation security

— Debt or liability to creditor by reason of obligation incurred before date of bankruptcy, not merely obligation on bankrupt, was required to establish provable claim in bankruptcy — Requirement to post security did not create debt and it was not something government could have enforced by legal action — While Minister was entitled to require reclamation security from applicant for licence, Quartz Mining Act (Yuk.) did not contain any provisions by which licensee's obligation to provide reclamation security could be enforced by legal action — In concluding that it was not sufficiently certain government would incur remediation costs, chambers judge did not simply rely on fact that claim was speculative but considered all of evidence including prospect of sale of mine, and government had not established she erred — Chambers judge conflated test for contingent environmental claims in case law and priority charge created by s. 14.06(7) of BIA for environmental remediation costs — Claim under s. 14.06(7) did not need to be provable claim in bankruptcy — On plain reading of s. 14.06(7), charge was created for costs that had been incurred for environmental remediation not for anticipated future costs or contingent care costs — In extending government's security to debtor's mineral claims, judge erred in concluding that Parliament's intention was to ensure remediation costs would not become burden on taxpayer and did not consider wording of BIA to determine whether Parliament intended to distinguish between real property and interests in real property — Words "real property" in s. 14.06(7) did not include interest in land such as mineral claim Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 14.06(7).

Table of Authorities

Cases considered by *Tysoe J.A.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, *(*sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, *(*sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

Asian Concepts Franchising Corporation (Re) (2018), 2018 BCSC 1022, 2018 CarswellBC 1615, 62 C.B.R. (6th) 123 (B.C. S.C.) — referred to

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]) — distinguished

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, *(*sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161, 1996 CarswellOnt 316 (Ont. C.A.) — followed

Farm Credit Corp. v. Holowach (Trustee of) (1988), 86 A.R. 304, 59 Alta. L.R. (2d) 279, 51 D.L.R. (4th) 501, [1988] 5 W.W.R. 87, 68 C.B.R. (N.S.) 255, 1988 CarswellAlta 293, 1988 ABCA 216 (Alta. C.A.) — followed

Farm Credit Corp. v. Holowach (Trustee of) (1989), 100 A.R. 395 (note), 66 Alta. L.R. (2d) xlvii (note), [1989] 4 W.W.R. lxx (note), 73 C.B.R. (N.S.) xxvii (note), 60 D.L.R. (4th) vii (note), 102 N.R. 236 (note), [1989] 1 S.C.R. viii (S.C.C.) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, *(*sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, *(*sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — followed

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — followed

JICO Holdings Inc. v. Lynco Construction Ltd. (2016), 2016 SKCA 126, 2016 CarswellSask 618, 485 Sask. R. 237, 676 W.A.C. 237, 6 P.P.S.A.C. (4th) 162 (Sask. C.A.) — distinguished

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Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.) — considered

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

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.) — considered

> 1. Yukon's application for a declaration that it has a claim provable in the bankruptcy of Yukon Zinc Corporation ("YZC") is dismissed.
>
> 2. A claim by Yukon for costs of remedying any environmental condition or environmental damage affecting real property of YZC will be secured on the real property of YZC affected by the environmental condition or environmental damage and on any other real property of YZC that is contiguous with that real property and that is related to the activity that caused the environmental condition or environmental damage.

I would not allow the appeal as it relates to any of the Government's grounds of appeal.

(b) Mineral Claims (Appeal No. 20-YU867)

86 This appeal is also from the order entered pursuant to the Government Application Reasons. Welichem appeals the aspect of the order that, for the purposes of the Government's security pursuant to s. 14.06(7) of the BIA, the Debtor's real property includes the mineral claims it holds.

87 Under the *Mining Act*, every person who locates a mineral claim is required to record it with the mining recorder (s. 41(1)). The holder of a mineral claim is entitled to all minerals lying within the boundaries of the claim (and downward into the earth) (s. 50). Section 52 provides as follows:

> **Chattel interest for one year**
>
> **52** The interest of the holder of a mineral claim shall, prior to the issue of a lease, be deemed to be a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of this Part.

Under s. 74, the holder of a mineral claim is entitled to a lease of the claim if the holder obtains a certificate of improvements under s. 70 that it has done work on the claim of at least $500.

88 Under s. 56, the holder of a mineral claim is entitled to it for a period of one year and thence from year to year if the holder has done work on the claim of at least $100 per year unless the Minister has granted relief in respect of the annual representation work (s. 57) or the holder has paid $100 in respect of each claim to the mining recorder (s. 59). A mining claim expires at the end of the year in which the required work or payment is not done or made (s. 60). The holder pays annual royalties to the Government based on the value of the output of the mine (s. 102).

89 In the Government Application Reasons, the chambers judge accepted that, as a result of the wording of s. 52, mineral claims under the *Mining Act* are chattels real, with the result that they are an interest in land: see *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324, leave to appeal ref'd (2004), [2003] S.C.C.A. No. 375. She stated that the real question was whether the words "real property" in s. 14.06(7) includes an interest in land.

90 The judge articulated the modern rule of statutory interpretation; i.e., the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: Rizzo & Rizzo Shoes Ltd. (Re) [1998] 1 S.C.R. 27 at para. 21. The judge found the clear intention of Parliament in enacting s. 14.06(7) was to ensure that remediation costs would not become a burden to the taxpayer. She reasoned that, as mineral claims have value, they need to be included as part of the security under s. 14.06(7). She found her conclusion to be supported by the decisions of *Yukon Territory (Commissioner) v. Bedard*, [1987] Y.J. No. 48 (S.C.) [*Bedard*]; Yukon v. B.Y.G. Natural Resources Inc. 2017 YKSC 2 [B.Y.G.]; and Yukon (Government of) v. United Keno Hill Mines Limited 2004 YKSC 59 [Keno Hill].

91 In my view, the judge made two errors in her analysis. First, in finding the intention of Parliament, she overlooked the comments of Deschamps J. at paras. 32 and 33 of *Abitibi*, to which I referred above. At para. 32, Deschamps J. found that, in enacting the corresponding section in the *CCAA* (s. 11.8(8)), Parliament struck a balance between the public's interest in

enforcing environmental regulations and the interest of third-party creditors in being treated equally. At para. 33, she observed that, if Parliament had intended that the debtor would always satisfy all remediation costs, it would have created the security over all of the debtor's assets (and not just real property). Hence, it was incorrect for the judge to conclude that the intention of Parliament was to ensure that remediation costs would not become a burden to the taxpayer.

92 Second, the judge did not consider the wording of the *BIA* to determine whether Parliament intended to distinguish between real property and interests in real property (although, in fairness to the judge, it is not clear that the following wording from the *BIA* was brought to her attention). The words "real property" are not defined in the *BIA*, but the word "property" is defined in s. 2 as follows:

> ***property*** means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;
>
> [Emphasis added.]

The use of the words "as well as" (rather than words to the effect of "including") indicates that the words "real property" are not intended to include an interest in real property.

93 A similar distinction is made in s. 74(3) of the BIA:

> **Caveat may be filed**
>
> **(3)** If a bankrupt owns any real property or immovable or holds any charge registered in a land registry office or has or is believed to have any interest, estate or right in any of them, ... a caveat or caution may be filed with the official in charge of the land registry by the trustee, ...
>
> [Emphasis added.]

It is clear that the words "real property" in s. 74(3) do not include an interest in real property because, if they did, it would not have been necessary to add the reference to any interest in real property.

94 Perhaps most importantly, s. 14.06(4), which deals with non-liability of a trustee in bankruptcy for environmental remediation costs in certain circumstances, uses the phrase "any interest in any real property". The phrase "any interest in any real property" is also used in s. 14.06(6) in stating that environmental remediation costs are not to rank as costs of administration if the trustee had abandoned or renounced any interest in any real property. It is evident that, in enacting s. 14.06(7) at the same time, Parliament was aware of the distinction between "real property" and "an interest in real property", and did not intend that the security created by s. 14.06(7) would extend to an interest in real property such as mineral claims.

95 The Government submits that clause (b) of s. 14.06(7) supports its interpretation that s. 14.06(7) does create security against interests in land. For ease of reference, I set out clause (b) again:

> **(b)** ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Clause (b) is referring to the security created for environmental remediation costs, and the Government argues that the use of the word "property" in clause (b) includes interests in real property because they are included in the definition of "property" in s. 2 of the BIA. With respect, clause (b) is dealing with the priority of the security that is created earlier in the section and is simply referring back to the property over which the security is created (i.e., real property or immovables). Clause (b) does not expand the type of property over which the security is created.

TAB 16

2011 ONSC 3230
Ontario Superior Court of Justice

Komtech Inc., Re

2011 CarswellOnt 6577, 2011 ONSC 3230, 106 O.R. (3d) 654, 205 A.C.W.S. (3d) 24, 81 C.B.R. (5th) 256

In the Matter of the Proposal of Komtech Inc. pursuant to the Law of the Province of Ontario, with a Head Office in the City of Kanata, in the Province of Ontario

Paul Kane J.

Heard: April 27, 2011
Judgment: July 8, 2011
Docket: 33-1469781

Counsel: Keith A. MacLaren for Komtech Inc.
John O'Toole, André Ducasse for Business Development Bank of Canada
Karen Perron for Hubbell Canada LP

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Where no proposal — Company became insolvent — Company issued notice of intent to make proposal under Bankruptcy and Insolvency Act — Company sought auction for sale of assets — Company brought motion for approval of sale — Motion granted — Trustee and primary lenders of company approved of sale process — Proposed process was likely to see higher price than forced sale of assets — Company made reasonable efforts in search of alternate financing, equity partnership or purchaser of business — Company cooperated with trustee to identify and engage prospective purchasers — Position of creditors would not improve if motion dismissed — Sale could still be authorized under s. 65.13 of Act despite fact that proposal had not been filed, as court had jurisdiction to do so.

Table of Authorities

Cases considered by *Paul Kane J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — considered

Hypnotic Clubs Inc., Re (2010), 68 C.B.R. (5th) 267, 2010 CarswellOnt 3463, 2010 ONSC 2987 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15(1)] — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — pursuant to

31 There were two Senate Committee meetings. At one of those, the Honourable Jerry Pickard, Parliamentary Secretary to the Minister of Industry, stated:

> It is widely accepted that inadequate provisions exist for workers whose employers becomes bankrupt. Previous attempts to bring about better protection for workers have failed, as the Minister of Labour has pointed out. ...
>
> Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to create greater fairness and efficiency.
>
> To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.
>
> (Emphasis added)

32 The resulting Senate Committee Report discusses how a sale of assets, at times, is necessary to effect a successful restructuring, resulting in added protection for both creditors and employees.

33 Although different legislation, the similarity of language of s. 65.13 of the *BIA* and s. 36 of the *CCAA*, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding: (a) the filing of an NOI, or (b) an order under the *CCAA*, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors, is not a condition to this Court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the *BIA*.

Interim Charges

34 The Stalking Horse Bidders Charge as security for the breakup fee and expense reimbursement under the APA, the Director's and Officer's charge to indemnify against statutory liability and the administration charge related to the fees of the Proposal Trustee and the debtor as presented, are authorized under s. 64.1 and s. 64.2 of the *BIA*. They are appropriate priorities and charges in this case subject to ss. 14.06(7); 81.4(4); and 81.6(2) of the *BIA*.

35 For the above reasons, the relief sought in this motion is granted.

Motion granted.

TAB 17

2019 ONCA 947
Ontario Court of Appeal

1732427 Ontario Inc. v. 1787930 Ontario Inc.

2019 CarswellOnt 20100, 2019 ONCA 947, 313 A.C.W.S. (3d) 242, 74 C.B.R. (6th) 273

In the Matter of Notices of Intention to make a proposal of 1732427 Ontario Inc. and 1787930 Ontario Inc. both of the City of St. Thomas, in the Province of Ontario

Paul Rouleau, L.B. Roberts, A. Harvison Young JJ.A.

Heard: November 15, 2019
Judgment: December 3, 2019
Docket: CA C66803, C66871

Proceedings: reversing in part *1787930 Ontario Inc. v. Transit Petroleum* (2019), 2019 CarswellOnt 1120, 2019 ONSC 716, R. Raikes J. (Ont. S.C.J.)

Counsel: Sherry Kettle, for Appellant, Transit Petroleum Inc.
Paul Neil Feldman, Oscar Strawczynski, for Respondent, 1787930 Ontario Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.6 Effect of proposal
VI.6.b As binding on creditors
Headnote
Bankruptcy and insolvency --- Proposal — Effect of proposal — As binding on creditors
Parties entered into negotiations to conclude agreement governing payment of past and future fuel purchases — Motion judge allowed in part debtor's motion to recover monies paid to creditor after it had filed notice of intention to file proposal in bankruptcy ("NOI") — Motion judge found that pre-authorized debit payment of $83,734.05 ("PAD") made to creditor post-NOI, under payment plan concluded pre-NOI, related to pre-NOI debts — Motion judge found that, contrary to s. 69(1)(a) of Bankruptcy and Insolvency Act ("BIA"), PAD represented prohibited remedy — Motion judge concluded that creditor should return PAD to debtor, net of $48,434.30 owing to creditor for post-NOI fuel purchases — Creditor appealed — Appeal allowed; matter remitted for rehearing on all issues except for creditor's entitlement to payment of $43,434.30, which was not disputed on appeal — Motion judge erred by failing to consider whether parties entered into legitimate agreement to pay past debts in order to secure future supply of fuel — In determining whether PAD was remedy, motion judge was required to consider all relevant surrounding circumstances — Submission that parties could not enter into agreement for payment of past debts in order to secure future fuel supplies was not accepted — To accept this submission would undermine first stage of BIA process that served to encourage debtor's successful reorganization as going concern — Determination of issue of PAD and alleged agreement could affect motion judge's characterization of PAD as prohibited remedy under s. 69(1) of BIA.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 69 — considered

s. 69(1) — considered

s. 69(1)(a) — considered

s. 95 — considered

s. 96 — considered

s. 97 — considered

s. 97(1) — considered

APPEAL by creditor from judgment reported at *1787930 Ontario Inc. v. Transit Petroleum* (2019), 2019 ONSC 716, 2019 CarswellOnt 1120, 74 C.B.R. (6th) 258 (Ont. S.C.J.), allowing in part motion by debtor to recover monies paid to creditor after filing notice of intention to file proposal in bankruptcy.

***Per curiam*:**

1 The appellant appeals from the motion judge's order requiring it to pay to the respondent the sum of $35,299.75, plus pre-judgment interest, and costs in the sum of $31,767.52.

2 The motion judge allowed in part the respondent's motion to recover monies paid to the appellant after it had filed a notice of intention to file a proposal in bankruptcy ("NOI") on July 2, 2018. The motion judge found that the pre-authorized debit payment in the amount of $83,734.05 ("the PAD") made to the appellant post-NOI, under a payment plan concluded pre-NOI, related to pre-NOI debts. As a result, contrary to s. 69(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the PAD represented a prohibited "remedy against the insolvent person or the insolvent person's property". The motion judge concluded that the appellant should return the PAD to the respondent, net of the $48,434.30 owing to the appellant for post-NOI fuel purchases. The appellant's entitlement to the latter is not disputed on appeal.

3 The appellant submits that the motion judge erred in characterizing the payment as the prohibited exercise of a creditor's remedy when it represented a *bona fide* agreement concluded on July 5, 2018 to satisfy past debts in order to continue a vital fuel supply to assist in the respondent's restructuring.

4 The respondent argues that the motion judge correctly determined that the July 5th PAD was a prohibited self-help creditor's remedy because it was payment for past fuel purchases. Moreover, once he determined that the PAD was a prohibited remedy, the motion judge was not required to consider any alleged agreements because the parties could not ratify what was otherwise prohibited. In any event, the respondent maintains that the appellant did not raise an alleged July 5th agreement before the motion judge but confined its argument to the impact of a pre-NOI agreement.

5 In our view, the motion judge erred by failing to consider whether the parties had entered into a legitimate agreement to pay past debts in order to secure the future supply of fuel. As a result, the matter should be remitted to him for a new hearing.

6 In determining whether the July 5th PAD was a remedy, the motion judge was required to consider all the relevant surrounding circumstances in which it occurred. Accordingly, it is useful to set out a brief synopsis of the relevant context leading up to and concerning the July 5th PAD and the alleged agreement between the parties.

7 Up until July 11, 2018, the appellant supplied fuel to the respondent, a trucking company. The respondent was experiencing serious financial difficulties and had fallen into arrears in payments to the appellant for fuel supplied. In June 2018, the parties entered into negotiations to conclude an agreement governing payment of past and future fuel purchases.

8 While the motion judge declined to determine whether the parties had reached an agreement prior to the filing of the NOI on July 2nd, the appellant submits that pursuant to the agreement that it says was reached on June 28th, on notice to and without objection from the respondent, it submitted the PAD for payment on July 3rd, which was processed and paid to the appellant on July 5th.

9 The appellant did not learn of the NOI until its meeting with the respondent on July 5, 2018. As noted at para. 21 of the motion judge's reasons, at that meeting, the respondent's owner, Louise Vonk, accompanied by its general manager, Blaine Skirtschak, informed the appellant's representatives, Monique Paul and Trevor Chambers, that the respondent "had filed a NOI on July 2, 2018 to restrict further action by CRA and to give [the respondent] some time to reorganize financially to carry on business".

10 In para. 22 of his reasons, the motion judge summarized the appellant's evidence concerning the respondent's representations which the appellant says formed the July 5th agreement between the parties:

> During the July 5 meeting, Vonk indicated that [the respondent] needed [the appellant's] support to keep operating and she was willing to do whatever was necessary to keep [the appellant] as its fuel supplier. She did not request return of the monies received by [the appellant] from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a 'vital vendor' necessary for [the respondent] to remain in business.

11 The appellant insists that the issue of a July 5th agreement was raised before the motion judge. Paragraph 30 of the motion judge's reasons provide some support for the appellant's submission that it had advanced the argument that it was a key supplier who, subsequent to the NOI, was permitted to keep the July 5 PAD for past debts in furtherance of an agreement to maintain supply to the respondent as it restructured its business. Similarly, the appellant points to para. 31 of the affidavit of Trevor Chambers in which he deposes that:

> Transit specifically relied on the representations of [the respondent], including Louise, Blaine and Nathan, that all purchases would be paid for by [the respondent] and that the Agreed Payment had been allowed to go through so that [the respondent] could continue in business. Transit continued to supply fuel to [the respondent] post-NOI at [the respondent's] request and continued to do business with [the respondent] in good faith and based on [the respondent's] representations.

12 To be fair to the motion judge, it is not entirely clear to what extent in argument on the motion the appellant characterized the July 5th exchanges as constituting an agreement. However, it seems common ground that the motion judge did not squarely consider whether, in context, that exchange represented a *bona fide* agreement with a key supplier to pay past debts in order to secure a vital future supply of fuel for the respondent's continued operations.

13 We do not agree with the respondent's submissions that the parties could not enter into an agreement for the payment of past debts in order to secure future fuel supplies. This would undermine the first stage of the *BIA* process that serves to encourage a debtor's successful reorganization as a going concern. Creditors and debtors alike benefit from the latter's continued operation. The goal of the stay and preference provisions under ss. 69, 95, 96 and 97 of the *BIA* is to give the debtor some breathing room to reorganize. Legitimate agreements with key suppliers also form a vital part of that process.

14 Apposite is the commentary of E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161 who writes:

> There is, however, no specific prohibition in the *BIA* on the debtor effecting payment of claims provable in the proposal proceedings. Instead, the BIA provides the trustee in the proposal (or the bankruptcy trustee in the event the proposal fails) with remedies against any creditor who receives such a payment on the basis that the payment is a preference. Payments to critical suppliers in the context of proposal proceedings are best analyzed on the basis that they are a preference. ... In the context of proposals, section 97 [of the BIA][1] arguably clarifies that payments to suppliers made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid.
>
> [Emphasis added.]

15 It is our view whether the parties concluded a *bona fide* agreement on July 5th for the payment of past fuel supplies in consideration for continued fuel supply was a key issue to be determined on the respondent's motion. The determination of the issue of the July 5th PAD and alleged agreement could affect the motion judge's characterization of the PAD as a prohibited remedy under s. 69(1) of the *BIA*. As the motion judge made no factual findings respecting this issue, it is not possible nor

desirable for this court to come to any determination. Given our reasons, the fairest route, as the parties agree, is to remit the matter to the motion judge for a new hearing.

16 We leave to the motion judge's discretion how best to manage the re-adjudication of this matter. With respect to the pre-NOI agreement, the motion judge concluded that, if he were inclined to do so, conflicts in the evidentiary record precluded him from making any findings concerning that agreement and he would order that the issue proceed to trial. It may be that is the case in relation to the alleged July 5th agreement. It will be up to the motion judge to decide whether he can make the necessary findings on the motion or whether the resolution of all these issues requires a trial.

17 Accordingly, we set aside the motion judge's order and remit the matter to the motion judge for a new hearing on all issues except for the appellant's entitlement to the payment of $48,434.30 for post-NOI fuel purchases.

18 The appellant is entitled to its partial indemnity costs of the appeal in the agreed upon amount of $15,000, inclusive of disbursements and applicable taxes. The disposition of the costs of the motion below is reserved to the motion judge.

Appeal allowed; matter remitted for rehearing.

Footnotes

1 Section 97(1) of the *BIA* provides as follows: No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankruptcy to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

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