Court File No. CV-18-00611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI and DONALD ROSS

Defendants

BOOK OF AUTHORITIES OF THE ESL PARTIES

March 8, 2019

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Ontario Superior Court of Justice

Apotex Inc. v. Laboratoires Fournier S.A.

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Apotex Inc. (Plaintiff / Respondent) v. Laboratoires Fournier S.A., Fournier Pharma Inc., Solvay S.A. and Solvay Pharma Inc. (Defendants / Moving Parties)

Belobaba J.

Heard:
Judgment: November 10, 2006
Docket: 06-CV-314931PD3

Counsel: David E. Leonard, Cecilia V. Hoover for Defendants / Moving Parties, Solvay S.A. and Solvay Pharma Inc.
Nando De Luca, Ben Hackett for Plaintiff / Responding Party

Subject: Criminal; Intellectual Property; Corporate and Commercial; Torts; Civil Practice and Procedure

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III Specific matters of corporate organization
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Plaintiff was generic drug manufacturer A and defendants F and S were originator drug manufacturers — F and S had co-promotion agreement covering relevant period and S acquired F in 2005 — A sought to market generic version of particular drug and F brought two unsuccessful prohibition proceedings in 2002 and 2004 under s. 6 of Patented Medicines (Notice of Compliance) Regulations — A brought action for remedies as result of marketing delay allegedly caused by prohibition proceedings and filed statement of claim for damages under s. 8 of Regulations and asserted other causes of action including oppression under Ontario Business Corporations Act, civil conspiracy at common law and under Competition Act, misrepresentation under Competition Act and sought to join S as necessary party pursuant to R. 503 of Rules of Civil Procedure — S brought motion to strike paragraphs of statement of claim as against S related to causes of action on basis that impugned paragraphs failed to disclose reasonable cause of action under R. 21.01(1)(b) of Rules — Motion to strike paragraphs related to oppression, misrepresentation and joinder granted — Oppression pleading had no chance of success and warranted striking in entirety — A's status as potential creditor did not predate alleged oppression but was created by very conduct complained of — S. 248 of Ontario Business Corporations Act clearly required actual or potential creditor at time of oppressive actions and A pleaded no facts to support status as creditor of S when prohibition proceedings were instituted.

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Plaintiff was generic drug manufacturer A and defendants F and S were originator drug manufacturers — F and S had co-promotion agreement covering relevant period and S acquired F in 2005 — A sought to market generic version of particular drug and F brought two unsuccessful prohibition proceedings in 2002 and 2004 under s. 6 of Patented Medicines (Notice of Compliance) Regulations — A brought action for remedies as result of marketing delay allegedly caused by prohibition proceedings and filed statement of claim for damages under s. 8 of Regulations and asserted other causes of action including oppression under Ontario Business Corporations Act, civil conspiracy at common law and under Competition Act, misrepresentation under Competition Act and sought to join S as necessary party pursuant to R. 503 of Rules of Civil Procedure — S brought motion to strike paragraphs of statement of claim as against S related

to causes of action on basis that impugned paragraphs failed to disclose reasonable cause of action under R. 21.01(1)(b) of Rules — Motion to strike paragraphs related to oppression, misrepresentation and joinder granted — Conspiracy action as pleaded both at common law and under s. 45 of Competition Act was supported by sufficient required facts — Pleadings alleged conspiracy at common law amongst S and F based on co-promotion agreement, and improper purpose and actions by institution of two prohibition proceedings — Conspiracy pleading on basis of common law tort provided sufficient level of detail to allow S to reasonably draft, serve and file statement of defence — Pleadings based on ss. 36, 45 of Competition Act also had sufficient level of factual disclosure to allow S to prepare statement of defence.

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Plaintiff was generic drug manufacturer A and defendants F and S were originator drug manufacturers — F and S had co-promotion agreement covering relevant period and S acquired F in 2005 — A sought to market generic version of particular drug and F brought two unsuccessful prohibition proceedings in 2002 and 2004 under s. 6 of Patented Medicines (Notice of Compliance) Regulations — A brought action for remedies as result of marketing delay allegedly caused by prohibition proceedings and filed statement of claim for damages under s. 8 of Regulations and asserted other causes of action including oppression under Ontario Business Corporations Act, civil conspiracy at common law and under Competition Act, misrepresentation under Competition Act and sought to join S as necessary party pursuant to R. 503 of Rules of Civil Procedure — S brought motion to strike paragraphs of statement of claim as against S related to causes of action on basis that impugned paragraphs failed to disclose reasonable cause of action under R. 21.01(1)(b) of Rules — Motion to strike paragraphs related to oppression, misrepresentation and joinder granted — Conspiracy action as pleaded both at common law and under s. 45 of Competition Act was supported by sufficient required facts — Pleadings alleged conspiracy at common law amongst S and F based on co-promotion agreement, and improper purpose and actions by institution of two prohibition proceedings — Conspiracy pleading on basis of common law tort provided sufficient level of detail to allow S to reasonably draft, serve and file statement of defence — Pleadings based on ss. 36, 45 of Competition Act also had sufficient level of factual disclosure to allow S to prepare statement of defence.

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Plaintiff was generic drug manufacturer A and defendants F and S were originator drug manufacturers — F and S had co-promotion agreement covering relevant period and S acquired F in 2005 — A sought to market generic version of particular drug and F brought two unsuccessful prohibition proceedings in 2002 and 2004 under s. 6 of Patented Medicines (Notice of Compliance) Regulations — A brought action for remedies as result of marketing delay allegedly caused by prohibition proceedings and filed statement of claim for damages under s. 8 of Regulations and asserted other causes of action including oppression under Ontario Business Corporations Act, civil conspiracy at common law and under Competition Act, misrepresentation under Competition Act and sought to join S as necessary party pursuant to R. 503 of Rules of Civil Procedure — S brought motion to strike paragraphs of statement of claim as against S related to causes of action on basis that impugned paragraphs failed to disclose reasonable cause of action under R. 21.01(1)(b) of Rules — Motion to strike paragraphs related to oppression, misrepresentation and joinder granted — Pleading that S was necessary party pursuant to R. 5.03 of Rules warranted striking — R. 5.03 of Rules required justification for joinder as defendant and no such justification was provided.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General principles

Plaintiff was generic drug manufacturer A and defendants F and S were originator drug manufacturers — F and S had co-promotion agreement covering relevant period and S acquired F in 2005 — A sought to market generic version of particular drug and F brought two unsuccessful prohibition proceedings in 2002 and 2004 under s. 6 of Patented Medicines (Notice of Compliance) Regulations — A brought action for remedies as result of marketing delay allegedly caused by prohibition proceedings and filed statement of claim for damages under s. 8 of Regulations and asserted other causes of action including oppression under Ontario Business Corporations Act, civil conspiracy at common law and under Competition Act, misrepresentation under Competition Act and sought to join S as necessary party pursuant to R. 503 of Rules of Civil Procedure — S brought motion to strike paragraphs of statement of claim as against S related to causes of action on basis that impugned paragraphs failed to disclose reasonable cause of action under R. 21.01(1)(b) of Rules — Motion to strike paragraphs related to oppression, misrepresentation and joinder granted — Pleading

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MOTION by defendants to strike portions of claim as against defendants in intellectual property action.

***Belobaba J.*:**

Motion to Strike Pleadings

1 This motion is brought by the two Solvay defendants to strike ten paragraphs in the statement of claim on the ground that the impugned paragraphs do not disclose a reasonable cause of action under rule 21.01(1)(b) or a minimum level of material fact as required under rule 25.06.

2 The plaintiff, Apotex, is a generic drug manufacturer. The Fournier and Solvay defendants are originator drug manufacturers. Fournier Pharma is a wholly-owned Canadian subsidiary of Laboratoires Fournier. Solvay Pharma is a wholly-owned Canadian subsidiary of Solvay S.A.

3 In this action Apotex seeks damages arising out of the delay in marketing a generic version of the drug fenofibrate. Apotex alleges that the delay was caused by the two unsuccessful prohibition proceedings brought by Fournier Pharma in 2002 and 2004 under s. 6 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the "PMNOC

Regulations"). The Fournier defendants have delivered a statement of defence and are not challenging the statement of claim as it relates to them.

4 Although the Solvay defendants were not parties to the prohibition proceedings, Apotex is suing them on the basis of a "co-promotion agreement" between Fournier Pharma and Solvay Pharma that covered the period January 1, 2001 to December 31, 2002, and on the basis that Fournier was acquired by Solvay in 2005.

5 The Solvay defendants argue that the impugned paragraphs and the causes of action contained therein should be struck as against the Solvay defendants under rules 21.01(1)(b) and 25.06. The following causes of action are being challenged:

1. Damages under s. 8 of the *PMNOC Regulations* (paras. 58 to 60 and 62);

2. Oppression under the federal and provincial business corporations legislation (para. 65);

3. Civil conspiracy, at common law (paras. 41, 52 and 55), and under ss. 36 and 45 of the *Competition Act* (para. 62);

4. Misrepresentation under ss. 36 and 52 of the *Competition Act* (para. 64);

5. Adding the Solvay defendants as necessary parties (para. 63).

Applicable Law

6 The law that applies on this motion is not in dispute. It is common ground that the test for striking a statement of claim at the pleadings stage is a stringent one and places a heavy burden on the defendants. The allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven. The moving party must show "that it is plain, obvious, and beyond doubt that the plaintiff could not succeed". Moreover, the claim "must be read generously with allowance for inadequacies due to drafting deficiencies" and should "not be dismissed simply because it is novel": *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980, and *Eliopoulos v. Ontario (Minister of Health & Long Term Care)* [2004 CarswellOnt 4378 (Ont. Div. Ct.)] (November 3, 2006) per Sharpe J.A., at para. 8.

7 Rule 25.06, however, requires a minimum disclosure of material fact or the deficient paragraphs will be struck: *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.), at 754; *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (Ont. S.C.J.) at para. 11.

8 I now turn to the causes of action that the Solvay defendants say should be struck.

Analysis

(1) Damages under s. 8 of the PMNOC Regulations

9 The PMNOC Regulations were enacted in 1993 as part of a federal pharmaceutical reform that abolished the compulsory licensing system for patented medicines. The new regulatory scheme has been described by the Supreme Court of Canada as follows:

> The general scheme of the *NOC Regulations* is to create a Patent Registry within the Department of Health in which an innovator drug company ... may have patents listed relevant to its various drug submissions for regulatory approval (s. 4). A generic manufacturer that is not prepared to await the expiry of what are alleged to be the relevant patents must challenge their validity or applicability to its proposed product (s. 5). The challenge is to be embodied in a notice of allegation, which will generally trigger an application in the Federal Court by the patent owner to prohibit the issuance of a NOC based on (in its view) the relevance, validity and applicability of the listed patents (s. 7). The unusual feature of the *NOC Regulations* is that mere initiation by the patent owner of its application

for prohibition freezes ministerial action for 24 months unless the prohibition proceedings are earlier disposed of, which seems to be rare (s. 7(1)(e).

See: *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49 (S.C.C.) (November 3, 2006) at para. 17.

10 The automatic two-year freeze has been called "draconian" because it allows a patent holder to delay the entry of competitors into the market without having to establish even a *prima facie* case of patent infringement: *Merck Frosst Canada Inc. v. Canada (Minister of National Health & Welfare)*, [1998] 2 S.C.R. 193 (S.C.C.) at para. 33.

11 To address this concern, s. 8 of the PMNOC Regulations provides a right of action to an aggrieved generic for "any losses suffered" if it turns out that the prohibition proceeding commenced by the originator is withdrawn, discontinued or dismissed.

12 The PMNOC Regulations use the language of "first person" and "second person." The original patent holder or "first person" is defined as "a person who files or has filed a submission for, or has been issued a notice of compliance in respect of a drug that contains a medicine." The generic manufacturer that seeks its own NOC on the basis that the originator's patent is invalid, has expired or would not be infringed is the "second person."

13 In this action, the "second person," Apotex, is claiming damages against the Fournier defendants under s. 8 of the PMNOC Regulations and is also pleading that the s. 8 claim extends to the Solvay defendants.

14 Solvay submits that there is absolutely no possibility that either of the Solvay defendants could be a "first person" under s. 8. The PMNOC Regulations are a "complete code for the recovery of damages by a second person against a first person": *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.* (2005), [2006] 3 F.C.R. 318 (F.C.A.) at para. 9. It is obvious, says Solvay, that Fournier Pharma is the "first person." It was Fournier Pharma that had its patents for fenobibrate listed on the Patent Register. It was Fournier Pharma that commenced, prosecuted and subsequently discontinued the two prohibition proceedings against Apotex. Not Solvay. Accordingly, says Solvay, there is no cause of action against the Solvay defendants under s. 8 of the PMNOC Regulations.

15 Counsel for Solvay, however, acknowledges that the Federal Court of Appeal has recently allowed a pleading alleging that the U.S. parent of a Canadian subsidiary could be a "first person" under s. 8: see *Apotex Inc. v. Eli Lilly & Co.* (2004), [2005] 2 F.C.R. 290 (F.C.A.). But the inclusion of the US parent as a possible "first person" was permitted, says Solvay, for two reasons: one, because the parent company, Eli Lilly US, had been joined as a party in the prohibition proceeding brought by its Canadian sub, Eli Lilly Canada, and, two, the generic had specifically pleaded that the Canadian sub was under "the complete control" of its US parent, a level of control that the court said went beyond the kind of relationship "that inevitably exists between a corporation and its sole shareholder": *Apotex Inc. v. Eli Lilly & Co.* , *supra*, at paras. 3, 9 and 12.

16 In the present case, says Solvay, neither of the Solvay defendants were parties to the two prohibition proceedings and there is no pleading that at the time of the prohibition proceedings, or indeed at any time thereafter, the Fournier defendants were under "the complete control" of Solvay or that such control was used to compel Fournier to commence or continue the unsuccessful prohibition proceedings.

17 In response, Apotex makes a number of points. First, it says, these are still early days in the adjudication of the PMNOC Regulations and in particular s. 8. No s. 8 claim has yet gone to trial. The reach of the definition of "first person" and the scope of the court's powers under s. 8 have not been determined. It therefore makes more sense, says Apotex, that these matters be determined at trial and not on an interlocutory motion. As the Federal Court of Appeal itself noted in *Eli Lilly*, "these and the other difficult questions involving the interpretation of s. 8 can only be satisfactorily resolved in the context of a trial" (at paras. 15 and 16).

18 Secondly, counsel for Apotex reminds the court that in *Eli Lilly* the same argument was made by the US parent on its motion to strike that is now being made by Solvay i.e. that it did not come within the definition of "first person", and yet

the Federal Court of Appeal refused to strike the pleading and accepted the possibility that the definition of "first person" could be interpreted to include Lilly US. Granted, the US parent was joined by Lilly Canada as a party to the impugned prohibition proceeding, but this fact was not determinative because this feature does not figure in the s. 4 definition of "first person". The Federal Court of Appeal was more interested in the fact that it might emerge on discovery that the degree of control exercised by Lilly US over Lilly Canada was such as to make Lilly US a "first person" (at para. 12).

19 Thirdly, says Apotex, in *Eli Lilly* the court noted that under s. 8 the second person could elect to recover the first person's profits, rather than its own lost profits. If so, then this would support the view that the corporation controlling or directing the impugned actions (i.e. the institution of the prohibition proceedings) could also be found liable under s. 8 or "the statutory purpose will have been thwarted...because it is conceivable that inter-corporate arrangements may have ensured that profits from the sale of the drug in Canada show up on the books of the parent company, not its Canadian subsidiary" (at para. 15).

20 Apotex argues that although expressed in the language of parent and sub, it is clear from the reasons in *Eli Lilly* that the court's primary concern was that the "second person's" recovery of lost profits could be frustrated by subsequent inter-corporate arrangements. Solvay's takeover of Fournier and the resulting assumption of control over Fournier's profits from the improperly instituted prohibition proceedings, says Apotex, is an arrangement that could well have the effect of thwarting the intent of s. 8 of the PMNOC Regulations. Given the reasoning of the Federal Court of Appeal in *Eli Lilly*, it is not "plain and obvious" that the s. 8 claim against the Solvay defendants has no chance of success.

21 I tend to agree. Although, in my view, a strict reading of the reasons for decision in *Eli Lilly* provides more support for Solvay's submissions than for those of Apotex, the points noted above by Apotex cannot be overlooked. The court in *Eli Lilly* did not strike the pleading, as it could have, by simply noting that the US parent did not fit within the precise definition of "first person". The court's concern about inter-corporate accounting arrangements thwarting the generic's right to recover lost profits under s. 8 was clearly a factor in its decision to let the pleading stand. Another factor was its preference that the dispute be fully litigated because the scope and content of s. 8 that was at issue therein was "a sufficiently difficult legal question to require a trial" (at para. 14).

22 Given the embryonic state of the law in this area, and given the court's reasoning in *Eli Lilly*, I cannot fairly conclude that the Apotex pleading to include the Solvay defendants in the s. 8 damages claim has no chance of success and is certain to fail.

23 I hasten to add that, in any event, Apotex offers a second reason why the Solvay defendants are caught by s. 8 — their liability as joint tortfeasors. This submission begins with the basic tort principle that where one person instigates or counsels another to commit an actionable wrong, whether common law or statutory, both will be held jointly liable: *Clark & Lindsell on Torts*, (2006, 19th ed.) at 235-37; *Standard Chartered Bank v. Pakistan National Shipping Corp. (No. 2)* (1999), [2000] 1 Lloyd's Rep. 218 (Eng. C.A.).

24 Apotex has alleged in paras. 41, 55 and 62 of the statement of claim that Solvay was a participant in the decision to institute and continue the prohibition proceedings in the Federal Court.

25 The actionable wrong is abuse of process. The constituent elements of this tort are (1) a collateral and improper purpose in bringing legal proceedings, and (2) a definitive act or threat in furtherance of the collateral purpose: *R. Cholkan & Co. v. Brinker* (1990), 71 O.R. (2d) 381 (Ont. H.C.) at 382. The first element, improper purpose, is pleaded in paras. 39 and 53 of the statement of claim (i.e. to delay Apotex's market entry); the second element is pleaded in paras. 40 and 54 where Fournier's actions in furtherance of this improper purpose are set out. Solvay's involvement in Fournier's actions is described in paras. 41 and 55 of the statement of claim.

26 In *Unilever plc v. Gillette U.K. Ltd.*, [1989] R.P.C. 583 (Eng. C.A.) there is a discussion of joint liability as it applies to two parties, A and B, who have allegedly infringed a patent. The English Court of Appeal concludes that even though A's actions alone infringed the patent, B could be held jointly liable "by virtue of a common design with

A" (at 603). The court acknowledged that this was "a bold step" because "it applies a common law doctrine to statutory interpretation" (at 603).

27 Similarly, says Apotex, if the facts as pleaded are assumed to be true, Solvay's common agreement or common design with Fournier that the latter should improperly (i.e. in an abuse of process) institute the prohibition proceedings in order to delay the issuance of an NOC to Apotex makes Solvay jointly liable under s. 8 of the PMNOC Regulations.

28 Thus, says Apotex, even if the Solvay defendants are not caught by s. 8 directly because they are found not to be "first persons", they can still be found liable under s. 8 as joint tortfeasors.

29 There are several arguments in response that counsel for Solvay will no doubt make at trial, but none were offered at the hearing of this motion. In any event, my obligation on this motion is not to adjudicate the merits of the claims but to determine whether a challenged pleading has no chance of success and is certain to fail. Given the analysis in *Unilever plc v. Gillette U.K. Ltd.*, *supra*, it is not plain and obvious that the "joint liability under s. 8" cause of action has no chance of success.

30 For these reasons, I conclude that the pleadings relating to the s. 8 claim as against the Solvay defendants are not certain to fail and should not be struck.

(2) Oppression

31 In paragraph 65 of the statement of claim, Apotex pleads that it "relies upon section 241 of the *Canada Business Corporations Act*...section 248 of the *Ontario Business Corporations Act*...and to the extent applicable, corresponding provisions in other business corporation statutes in Canada."

32 During the hearing of the motion, counsel for Apotex accepted the court's suggestion that at a minimum the references to the federal and provincial statutes other than the legislation in Ontario should be struck. The claim for an oppression remedy under the federal legislation is a purely statutory cause of action. It is available only to "complainants" against "corporations" that are incorporated or continued under the *CBCA*.

33 Solvay S.A. is a Belgian corporation; Solvay Pharma is an Ontario corporation, and, indeed, this is how Apotex described them in its pleading. It was not suggested that either of the companies was incorporated or continued under the *CBCA*. The reference to the federal statute should therefore be struck.

34 The reference to the "other business corporation statutes in Canada" should also be struck. No facts are pleaded to support even a possible application of these other non-Ontario provincial statutes.

35 The real issue with regard to the oppression remedy as pleaded in paragraph 65 of the statement of claim is whether Apotex has a reasonable cause of action under s. 248 the *OBCA* against either or both of the Solvay defendants.

36 The oppression remedy in s. 248 of the *OBCA* provides a wide-ranging judicial discretion to rectify matters where the court is satisfied by the complainant that the corporation has acted in a manner that is "oppressive...or unfairly disregards the interests of any security holder, creditor, director or officer of the corporation." The oppression remedy is available to "complainants" as defined in s. 245. Solvay is right that Apotex has not specifically pleaded why it has standing as a "complainant." However, I am satisfied that counsel for Solvay quickly understood that the only possible category of "complainant" into which Apotex could fit was under s. 245 (c) as a "creditor".

37 Solvay makes two submissions. First, that Apotex is at most a contingent or future creditor. Whatever damages may be awarded in this action have not been determined. No judgment has yet been rendered. As a potential creditor with an unliquidated claim, Apotex has no standing under the oppression remedy. Secondly, Solvay submits that even conceding its status as a contingent creditor, Apotex was not such a creditor at the time of the oppressive actions that are being complained about — namely the institution of the two prohibition proceedings.

38 I do not accept Solvay's first submission. I agree with Apotex that the case law has not limited "creditor" to "judgment creditor." Courts, in their discretion, have allowed non-judgment creditors standing under ss. 245 and 248 of the *OBCA*: *Tavares v. Deskin Inc.*, [1993] O.J. No. 195 (Ont. Gen. Div.); *Levy-Russell Ltd. v. Shieldings Inc.*, [2004] O.J. No. 4291 (Ont. S.C.J. [Commercial List]) at paras. 72, 160 and 161. If this was a case where Apotex was alleging oppression in its capacity as a *pre-existing* creditor, I would have to allow the pleading. Given the decisions in *Tavares* and *Levy-Russell*, *supra*, I could not conclude that this cause of action had no chance of success. But this is not the case that is before the court.

39 I accept unequivocally Solvay's second submission — that Apotex must be a creditor, whether actual or potential, *at the time of the oppressive actions that are being complained about.* The oppressive actions being complained about are the commencement of the two prohibition proceedings by Fournier, both with Solvay's alleged participation. The prohibition proceedings delayed Apotex's market entry and caused the losses that are now being claimed under s. 8 of the PMNOC Regulations. However, no facts are pleaded, and in my view, none exist, to show that Apotex was already an actual or potential creditor of any of the defendants when the oppression occurred, i.e. when the prohibition proceedings were instituted.

40 The law is clear that the creditor-complainant has to be a creditor at the time of the alleged oppression: *Trillium Computer Resources Inc. v. Taiwan Connection Inc.* (1992), 10 O.R. (3d) 249 (Ont. Gen. Div.), at 253; *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp.* (2003), 35 B.L.R. (3d) 193 (Ont. S.C.J.) at para. 14, aff'd. (2003), 179 O.A.C. 290 (Ont. C.A.)

41 It is not enough that the complainant became a creditor as a result of the allegedly oppressive conduct, as was the case here. If this were the law, then it would be "unsatisfactorily circular." Justice Spence made this point in *Awad v. Dover Investments Ltd.* (2004), 47 B.L.R. (3d) 55 (Ont. S.C.J.) at paras. 46 and 48:

> ... section 248 of the *OBCA* requires that the prospective complainant must be a creditor at the time that status as a complainant is sought. There would be something unsatisfactorily circular in an approach to the creditor status question that would involve deciding the question by determining whether there has been oppression that would warrant a remedy for a proper complainant and thereby create a creditor relationship...A person must be a creditor at the time of the alleged oppressive conduct so that the person can be determined to be oppressed in respect of the interests that pertain to that status. So it would not be sufficient if the person can establish that he is a creditor only by first showing that he has been oppressed and is therefore in a position to claim a remedy that would give rise to the status of creditor. The remedy is, after all, a discretionary one.

42 If the oppressive conduct alone was enough to create the status of a creditor-complainant for the purposes of the oppression remedy, then the oppression remedy could be used by any plaintiff in any case where a corporation has caused damage through an otherwise conventional breach of contract or through tortious conduct. This is obviously not the object or purpose of the oppression remedy. Nor is it the law in Ontario.

43 In my view, because Apotex's status as a potential creditor did not pre-date the alleged oppression but was created by the very conduct being complained about, the oppression pleading has no chance of success and must be struck in its entirety.

44 The only possibility that could save the oppression pleading, if it is amended, is the possibility that Apotex was oppressed by the institution of the second prohibition proceeding at which time, arguably, it was a future or potential creditor because of the improper institution of the first prohibition proceeding. This narrower view of the oppression remedy was neither pleaded nor argued. However, in striking the oppression action, I am prepared to give Apotex leave to amend in accordance with the analysis suggested in this paragraph, if it is so inclined.

(3) Civil Conspiracy

45 Solvay relies on rule 25.06 and submits that Apotex has failed to plead the required facts to support the allegation of conspiracy, both at common law and under ss. 36 and 45 of the *Competition Act.*

46 Both sides agree that in pleading conspiracy Apotex must identify the alleged conspirators, the agreement to conspire, the improper purpose, the actions taken and the damage that resulted: *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), at 104.

47 Solvay says that the statement of claim fails with regard to each of these requirements. Furthermore, says Solvay, the pleading of conspiracy on the basis of ss. 36 and 45 of the *Competition Act* must also be struck because the relevant s. 45 subsection is not identified, the specific actions of the two Solvay defendants as to "who did what when" are not particularized, and s. 45(8) makes clear that statutory conspiracy under the *Competition Act* does not apply to conduct or agreements between affiliates.

48 In my view, none of these objections are valid. I agree with Apotex. The statement of claim, on balance, satisfies the requirements set out in *Normart Management, supra.* It is discernable from the pleadings that Apotex is alleging a conspiracy at common law amongst the four defendants (paras. 5-6, 8-10, 40-41 and 53-55), based, in part, on the co-promotion agreement (paras. 12-13) and, in part, on the agreements relating to Solvay's acquisition of Fournier (paras. 14-16). The improper purpose and actions taken were the institution of the two prohibition proceedings to delay the market-entry of Apotex's generic version of the drug fenofibrate (paras. 39, 41, and 52-55). The damages being claimed under s. 8 of the PMNOC relate to the three-year delay caused by the Solvay and Fournier defendants acting in concert (paras. 57-59).

49 In short, the pleadings disclose that Apotex alleged non-infringement of the Fournier patent. Fournier improperly initiated and continued prohibition proceedings in response to this allegation of non-infringement. The pleadings state that these actions were taken with Solvay's agreement. Apotex has pleaded that Solvay Canada was a wholly-owned subsidiary of Solvay S.A. Because the two defendants are related parties, it can be inferred that the agreement of one Solvay defendant included the agreement of the other Solvay defendant: *Canadian Community Reading Plan Inc. v. Quality Service Programs Inc.*, [2001] O.J. No. 205 (Ont. C.A.) at paras. 27 and 29.

50 Solvay argues that more factual detail is required, particularly in a conspiracy pleading, about which defendant did what when. In my view, the pleading requirements do not oblige a plaintiff to provide such a detailed level of specificity at this stage of the proceeding. As this court noted in *North York Branson Hospital v. Praxair Canada Inc.* (1998), 84 C.P.R. (3d) 12 (Ont. Gen. Div.), at para. 22, leave to appeal refused, (Ont. Div. Ct.), "the very nature of a claim of conspiracy is that the tort resists detailed particularization at early stages...such details would not usually be available to a plaintiff until discoveries. These considerations...militate against holding pleadings in civil conspiracy to an extraordinary standard."

51 In any event, in my opinion, the conspiracy pleading, at least on the basis of the common law tort, provides a sufficient level of detail to allow the defendants to reasonably draft, serve and file a statement of defence and then, if needed, to move for further particulars in the normal course.

52 As for the pleading based on ss. 36 and 45 of the *Competition Act*, here as well, in my view, there is a sufficient level of factual disclosure to allow Solvay to prepare their statement of defence. I do not agree that the failure to plead a specific subsection of the s. 45 conspiracy provision is fatal. The various sub-sections of s. 45 are not so distinct as to alter the nature of the allegation. Indeed, in *Eli Lilly & Co. v. Apotex Inc.*, [2005] F.C.J. No. 1818 (F.C.A.), the Federal Court of Appeal, on a motion to strike, dealt with s. 45 as a whole throughout their reasons for judgment.

53 Nor do I agree that the "affiliate" exception as set out in s. 45(8) of the *Competition Act* bars the conspiracy claim under s. 45 herein. Fournier and Solvay may well be "affiliates" today, but it is not plain and obvious that they were "affiliates" when the impugned actions to initiate the two prohibition proceedings were taken. Indeed, on the facts as pleaded, Fournier was acquired by Solvay in 2005.

54 I therefore conclude that the conspiracy action as pleaded, both at common law and under s. 45 of the *Competition Act*, should not be struck.

(4) Misrepresentation under s. 52 of the Competition Act

55 During the hearing of the motion, counsel for Apotex did not resist the court's suggestion that there was no basis for this claim. Nowhere in the statement of claim does Apotex plead that the Solvay defendants made a representation to the public or that any such representation was misleading in a material respect — both being prerequisites for the application of s. 52. I also note that Apotex made no submissions in its factum in support of this claim. This cause of action and, in particular, paragraph 64 of the statement of claim, is struck.

(5) Adding the Solvay defendants as necessary parties

56 In paragraph 63 of the statement of claim, Apotex pleads that "Solvay Belgium and Solvay Canada are necessary parties to this action pursuant to rule 5.03."

57 I agree with Solvay that the purpose of rule 5.03 is to govern joinder, not pleadings, and as such, it is incumbent upon Apotex to specifically plead a justification for joining the Solvay defendants: *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.)at para. 93.

58 No such justification is provided. I indicated to counsel for Apotex that I was inclined to strike this paragraph and he acknowledged that paragraph 63 could be struck without doing damage to the overall claim. Paragraph 63 is struck as an improper pleading.

Disposition

59 In sum, and for the reasons given above, the following causes of action are struck from the statement of claim as against the two Solvay defendants:

- oppression (para. 65), with leave to amend as indicated above;
- misrepresentation under ss. 36 and 52 of the *Competition Act* (para. 64); and
- the joinder of the Solvay defendants as necessary parties under rule 5.03 (para. 63).

60 The following causes of action, as challenged by the Solvay defendants, are not struck from the statement of claim: damages under s. 8 of the PMNOC Regulations (paras. 58 to 60 and 62); and conspiracy (paras. 41, 52, 55 and 62).

61 Given that the success on the motion was almost evenly divided, no costs are awarded. I am grateful to counsel for their assistance.

Motion granted in part.

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2007 CarswellOnt 3704
Ontario Superior Court of Justice

Cohen v. Cambridge Mercantile Corp.

2007 CarswellOnt 3704, [2007] O.J. No. 2305, 33 B.L.R. (4th) 248

Cohen v. Cambridge Mercantile Corp. et al.

D. Brown J.

Heard: May 29, 2007
Judgment: June 11, 2007
Docket: 05-CV-298591PD3

Counsel: Amanda Hunter for Defendants / Moving Parties
James Olchowy for Plaintiff / Responding Party

Subject: Civil Practice and Procedure; Restitution; Torts; Corporate and Commercial
Related Abridgment Classifications
Business associations
IV Powers, rights and liabilities
IV.8 Corporate borrowing
IV.8.c Rights and obligations of security holders
IV.8.c.iv Remedies on default
IV.8.c.iv.E Miscellaneous
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.ii Plain and obvious
Remedies
I Damages
I.15 Practice and procedure
I.15.i Miscellaneous
Restitution and unjust enrichment
I General principles
I.1 When remedy available
Torts
XVI Negligence
XVI.14 Practice and procedure
XVI.14.b Pleadings
XVI.14.b.i Amendment
XVI.14.b.i.A Adding or striking out claim
Headnote
Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Plain and obvious
C Corp. terminated employment of employee who commenced action claiming damages against it and certain individuals, and after court ordered employee to provide particulars he added further claims including claims for unjust enrichment, negligence and breach of fiduciary duty — Employee alleged that C Corp. agreed to pay him commission of

10 per cent on business generated from client and later reduced this to 5 per cent and also deprived him of commissions by losing client — C Corp. and other defendants brought motion to strike out amended statement of claim — Motion was granted in part, employee was required to provide certain particulars, and deadlines were imposed for further pre-trial steps in action — Plaintiff was given one last chance to provide particulars of oral contract required by previous order for particulars — Claim for unjust enrichment was ordered struck since it failed to link particular material facts pleaded with respect to claim asserted — Employee had pleaded special relationship in his claims for negligence and breach of fiduciary duty which shared same source in alleged oral agreement and these were not struck since it was not plain and obvious that they would fail at trial — Oppression claim was not struck since employee met requirement of pleading that he was potential creditor of C Corp. with expectation of receiving 5 per cent of unpaid commissions despite his failure to plead that C Corp.'s oppressive conduct jeopardized his claim — Claim for aggravated damages was struck since aggravating circumstances were not identified but claim for punitive damages was not struck since they were not necessarily independently actionable in tort and breach of fiduciary duty claims — Claims against individuals for punitive, aggravated, and exemplary damages were struck since no facts specific to them were pleaded.

Restitution and unjust enrichment --- General principles — When remedy available

Striking out unjust enrichment claim — C Corp. terminated employment of employee who commenced action claiming damages against it and certain individuals, and after court ordered employee to provide particulars he added further claims including claims for unjust enrichment, negligence and breach of fiduciary duty — Employee alleged that C Corp. agreed to pay him commission of 10 per cent on business generated from client and later reduced this to 5 per cent and also deprived him of commissions by losing client — C Corp. and other defendants brought motion to strike out amended statement of claim — Motion was granted in part, employee was required to provide certain particulars, and deadlines were imposed for further pre-trial steps in action — Claim for unjust enrichment was ordered struck since it failed to link particular material facts pleaded with respect to claim asserted.

Torts --- Negligence — Practice and procedure — Pleadings — Amendment — Adding or striking out claim

C Corp. terminated employment of employee who commenced action claiming damages against it and certain individuals, and after court ordered employee to provide particulars he added further claims including claims for unjust enrichment, negligence and breach of fiduciary duty — Employee alleged that C Corp. agreed to pay him commission of 10 per cent on business generated from client and later reduced this to 5 per cent and also deprived him of commissions by losing client — C Corp. and other defendants brought motion to strike out amended statement of claim — Motion was granted in part, employee was required to provide certain particulars, and deadlines were imposed for further pre-trial steps in action — Plaintiff was given one last chance to provide particulars of oral contract required by previous order for particulars — Employee had pleaded special relationship in his claims for negligence and breach of fiduciary duty which shared same source in alleged oral agreement and these were not struck since it was not plain and obvious that they would fail at trial.

Business associations --- Powers, rights and liabilities — Corporate borrowing — Rights and obligations of security holders — Remedies on default — Miscellaneous issues

Striking out oppression claim — C Corp. terminated employment of employee who commenced action claiming damages against it and certain individuals, and after court ordered employee to provide particulars he added further claims including claims for unjust enrichment, negligence and breach of fiduciary duty — Employee alleged that C Corp. agreed to pay him commission of 10 per cent on business generated from client and later reduced this to 5 per cent and also deprived him of commissions by losing client — C Corp. and other defendants brought motion to strike out amended statement of claim — Motion was granted in part, employee was required to provide certain particulars, and deadlines were imposed for further pre-trial steps in action — Oppression claim under ss. 245 and 248 of Business Corporations Act was not struck since employee met requirement of pleading that he was potential creditor of C Corp. with expectation of receiving 5 per cent of unpaid commissions — That employee might not succeed was not plain and obvious despite his failure to plead that C Corp.'s oppressive conduct jeopardized his claim as potential creditor.

Remedies --- Damages — Exemplary, punitive and aggravated damages — Practice

C Corp. terminated employment of employee who commenced action claiming damages against it and certain individuals, and after court ordered employee to provide particulars he added further claims including claims for unjust enrichment, negligence and breach of fiduciary duty — Employee alleged that C Corp. agreed to pay him commission of

10 per cent on business generated from client and later reduced this to 5 per cent and also deprived him of commissions by losing client — C Corp. and other defendants brought motion to strike out amended statement of claim — Motion was granted in part, employee was required to provide certain particulars, and deadlines were imposed for further pre-trial steps in action — Claim for aggravated damages was struck since aggravating circumstances were not identified but claim for punitive damages was not struck since they were not necessarily independently actionable in tort and breach of fiduciary duty claims — Claims against individuals for punitive, aggravated, and exemplary damages were struck since no facts specific to them were pleaded.

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Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only), (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109 (S.C.C.) — considered

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Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 129 D.L.R. (4th) 711, 9 C.C.L.S. 97, 23 B.L.R. (2d) 165, 87 O.A.C. 129, 1995 CarswellOnt 1203, (sub nom. *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*) 26 O.R. (3d) 481 (Ont. C.A.) — referred to

Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 17 C.P.C. (4th) 170, 113 O.A.C. 375, 1998 CarswellOnt 251, 155 D.L.R. (4th) 627, 37 O.R. (3d) 97, 41 C.C.L.T. (2d) 282 (Ont. C.A.) — referred to

Royal Trust Corp. of Canada v. Hordo (1993), 1993 CarswellOnt 147, 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]) — considered

Waiser v. Deahy Medical Assessments Inc. (2006), 2006 CarswellOnt 295, 14 B.L.R. (4th) 317 (Ont. S.C.J.) — referred to

Whiten v. Pilot Insurance Co. (2002), 156 O.A.C. 201, 35 C.C.L.I. (3d) 1, [2002] 1 S.C.R. 595, 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, 283 N.R. 1, 20 B.L.R. (3d) 165, [2002] I.L.R. I-4048, 209 D.L.R. (4th) 257 (S.C.C.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

s. 245 — referred to

s. 245(c) — referred to

s. 248 — considered

s. 248(2) — referred to

Rules considered:

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

R. 21.01(1)(b) — considered

R. 21.01(2)(b) — referred to

R. 25.06(1) — considered

MOTION granted in part.

***D. Brown J.*:**

I. Introduction

1 Cambridge Mercantile Corp. ("Cambridge") moved for the second time to strike out the Statement of Claim of the plaintiff, Ira Cohen, as disclosing no reasonable cause of action. Mr. Cohen worked for Cambridge from June, 2001 until

his termination effective August 31, 2005. Mr. Cohen issued his Statement of Claim (the "Original Claim") on October 17, 2005.

2 On the defendants' first motion to strike, C. Campbell J. made an endorsement dated June 22, 2006 the effect of which was to permit the plaintiff to provide particulars, in the absence of which the claim could be struck.

3 The defendants subsequently sought and received some particulars. Before the defendants could file their defence, the plaintiff served and filed a completely revamped and expanded Amended Statement of Claim dated January 17, 2007 (the "Amended Claim").

4 The defendants moved before me to strike out the Amended Claim (i) as disclosing no reasonable cause of action, and (ii) as an abuse of the process of the court.

5 I grant the motion in part, strike out certain claims, require the plaintiff to provide certain particulars by June 25, 2007, and impose deadlines for further pre-trial steps in this action.

II. Order of Campbell J.

6 As a preliminary matter I would observe that a reading of the Amended Claim makes clear the plaintiff's complaints against Cambridge. First, Mr. Cohen alleged that in addition to the terms of his written employment agreement with Cambridge, the company had agreed to pay him a commission of 10% on all business generated from a prospective client, Abria. Mr. Cohen stated that Abria became a client of Cambridge, at which time Cambridge started paying him the commission. Then, over a year later, Cambridge reduced his commission on Abria business from 10% to 5%. Mr. Cohen alleged that this constituted a breach of his separate, oral commission contract with Cambridge, and he sought damages for commissions allegedly owing. Second, Mr. Cohen alleged that Cambridge conducted its affairs with Abria in such a way as to lose Abria as a client, thereby depriving him of commissions for the last five months of his employment and the potential to do business with Abria following his termination. The Amended Claim is prolix and loosely drafted, but nonetheless these two claims are readily apparent on the face of the pleading.

7 The starting point for assessing the issues raised on this motion must be the order made by C. Campbell J. on June 22, 2006. In his endorsement C. Campbell J. wrote:

> I agree that as it stands the Statement of Claim is deficient in making clear the nature of the relief sought. The plaintiff in essence claims that he is entitled to commissions from a client for a period during which he was paid by the defendant Cambridge at a reduced rate. The plaintiff's claim is based on the assertion that the reduction was over his 'objections'. I am not satisfied that this claim could not give rise to a cause of action but in order to stand the plaintiff should provide particulars of the basis on which his entitlement arises whether in contract, trust or otherwise. In absence of particulars the claim will be struck. The claim for interference with economic relations is in this context unique as the plaintiff was not in contract or in direct economic relationship with the client who terminated its business. As a novel cause of action, if it is to stand it should be pleaded with specificity of duty, breach, foreseeability, and damage. In the absence of particulars the claim will be struck. A novel cause of action is deserving of more precise notice to a defendant that an established one...
>
> The effect of this endorsement permits the plaintiff to provide particulars, only in the absence of which will the claim in its various heads be struck.

8 In light of this endorsement, I intend to proceed by first determining whether the plaintiff has provided particulars of his original claims, either in its Response to Particulars or Amended Claim. If he has not done so in respect of a particular claim, I must consider whether that claim should be struck as failing to comply with the order of C. Campbell J. If particulars were provided, then the pleading of that claim should stand. Any new causes of action asserted by the plaintiff in his Amended Claim will be assessed in light of the requirements of Rule 21.01(1)(b).

II. Providing Particulars — The Contract Claim

9 In paragraph 6 of his Original Claim the plaintiff pleaded that during the course of his employment he "entered into a further oral agreement wherein, inter alia, Cambridge would pay the plaintiff 10% commission on all business generated by a certain client known as Abria, which 10% commission commenced in May, 2002." He proceeded in paragraph 7 to assert that in October, 2003 Cambridge arbitrarily, without the consent of the Plaintiff, reduced the commission payable to 5%.

10 The particulars provided by the plaintiff in respect of this claim were: "The plaintiff is entitled to commissions as a result of a breach of an oral contract to pay ten percent commission for Abria. After the commission was reduced, the plaintiff objected and continually complained to the principals of the plaintiff, in house legal counsel and the vice-president".

11 The only addition to this oral contract claim made by the plaintiff in his Amended Claim was the pleading that it was an implied term of the oral agreement that he could trust and rely upon Cambridge to act in his best interests when cultivating its profitable business relationship with Abria.

12 The defendants argued that since the Amended Claim did not specifically plead the consideration for the separate, oral commission contract alleged by Mr. Cohen, his claim for damages for breach of that contract must fail. Given that Mr. Cohen alleged that Cambridge actually performed the agreement by initially paying him commissions of 10%, I do not accept the defendants' contention that consideration should have been pleaded — the plea of performance was sufficient.

13 However, in my view Mr. Cohen has not provided the particulars of the oral contract required by the order of C. Campbell J. Specifically, Mr. Cohen has not pleaded when the alleged oral contract was entered into, where it was made, nor has he identified the representative of Cambridge with whom he allegedly made the contract. This information is required in order to enable the defendants to plead over in an intelligent fashion.

14 C. Campbell J. was quite clear that particulars were required. Mr. Cohen has had two opportunities to provide them — through his Reply to Particulars and his Amended Claim. Notwithstanding those two opportunities, Mr. Cohen's contractual claim possesses no more specificity now than it did when considered by C. Campbell J. At the same time, I am reluctant to impose the drastic sanction of striking the claim when it discloses a substantively adequate complaint, but lacks in some particulars. I will give the plaintiff one last chance to correct his pleading of the contractual claim. I order the plaintiff to provide the defendant by June 25, 2007 with the following particulars: (i) the date upon which the oral contract was formed; (ii) the place where it was formed; and (iii) the identity of the representative of Cambridge with whom the oral contract was made. If Mr. Cohen fails to provide such particulars, the defendants may apply to strike the contractual claim. I will take into account Mr. Cohen's failure to have complied with the order of C. Campbell J. in assessing the costs of this motion.

III. Governing Test for a Rule 21.01(1)(b) Motion

15 The remaining claims which the defendants sought to strike were not found in the Original Claim, but appeared for the first time in the Amended Claim. The principles governing a motion under Rule 21.01(1)(b) to strike a claim are well settled. As put by the Court of Appeal in *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.), at page 6, on a motion to strike out a claim as disclosing no reasonable cause of action:

> the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies: *Toronto-Dominion Bank v. Deloitte Haskins & Sells* (1991), 5 O.R. (3d) 417 at p. 419 (Gen. Div.).

16 As to the purpose of a motion under Rule 21.01(1)(b), when a defendant moves to strike a claim, it is contending that the claim fails to disclose a wrong that is recognized as a violation of the plaintiff's rights, with the result that a court would be unable to grant a remedy even if the plaintiff proved all the facts alleged. The only question on such a motion is the substantive adequacy of the plaintiff's claim: whether a plaintiff will have established a cause of action entitling it to some form of relief assuming it can prove the allegations pleaded in the claim or, put another way, whether the plaintiff has sought relief for acts proscribed at law: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at paras. 8 and 9.

17 Since what is at issue on a Rule 21.01(1)(b) motion is the substantive adequacy of a pleading, the court hearing the motion cannot consider any evidence: Rule 21.01(2)(b). Instead, the court must consider whether the material facts pleaded in accordance with Rule 25.06(1) disclose a claim in respect of which relief may be granted. To ascertain what material facts must be pleaded in support of a particular cause of action, one can refer to texts such as Bullen & Leake & Jacobs, *Precedents of Pleadings (14th ed.)* (London: Sweet & Maxwell, 2001), Williston and Rolls *Court Forms (Second Edition)* (Toronto: Butterworths, 2007 update), especially Chapter 8, and Klar, Linden, Cherniak and Kryworuk, *Remedies in Tort* (Toronto: Carwsell, 2007 update). Where the level of material facts pleaded fails to meet the level required to disclose a cause of action — i.e. if any fact material to the establishment of a cause of action is omitted — the remedy is a motion to strike the pleading, not a motion for particulars: *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (Ont. S.C.J.), at para. 29; *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (Ont. Master).

18 While it usually is a simple matter in routine cases to ascertain whether a claim discloses the material facts necessary to support a cause of action, more difficult are those cases that bring into play extensions of existing principles of law or novel principles of law. The jurisprudence under Rule 21.01(1)(b) makes allowance for the dual realities of the common law of certainty and change. The openness of Canadian law to the consideration (as distinct from the acceptance) of novel points of law, or new applications of existing principles of law was emphasized by the Supreme Court of Canada in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.). In that case the Court noted that: (i) the novelty of the cause of action or the novelty of the application of a recognized cause of action should not prevent a plaintiff from proceeding with its case; (ii) whether there is good reason to extend a tort to a new context is the kind of question for a trial judge to consider in light of all the evidence; and (iii) the fact that a pleading reveals an arguable, difficult or important point of law may well make it critical that the action be allowed to proceed: *Hunt*, *supra*., at paras. 33, 34, 49 and 52. Our Court of Appeal echoed this approach in *Falloncrest Financial Corp. v. Ontario*, where at page 6 it stated:

> ...the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence: *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778, at p. 782 (C.A.).
>
> With respect to issue (1), the law relating to breach of statutory duty, negligent performance of a statutory duty or power, and negligent investigation is not so clear that we are prepared to say that these actions must fail. Even the Crown conceded that the law in this area is "muddy". Accordingly, the motions court judge erred in holding that "it is plain, obvious and beyond doubt" that these actions cannot succeed.

19 Or, as put by the Divisional Court in *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. Div. Ct.), at page 229, as long as a pleading discloses a cause of action founded in law, then the novelty of the cause is of no concern. What I take this to mean is that as long as a claim pleads material facts setting out the constituent elements of a cause of action — e.g. duty of care, breach of standard of care, and resulting damages — then the fact that the pleading may call for the application of a cause of action in new circumstances does not render the pleading defective in the sense that it fails to disclose a reasonable cause of action.

20 I will consider each argument submitted by the defendants about the substantive adequacy of the Amended Claim in light of this jurisprudence.

A. Claim for unjust enrichment

21 In paragraph 1(A)(b) of his prayer for relief in the Amended Claim Mr. Cohen asserted a claim for unjust enrichment, a claim not advanced in the Original Claim. The Amended Claim did not contain any further reference to the unjust enrichment claim apart from that set out in the prayer for relief.

22 Rule 25.06(1) requires a pleading to contain a concise statement of the material facts on which the party relies for his claim. To satisfy this rule a plaintiff must make some effort to link particular material facts pleaded with a particular claim asserted. It is not sufficient to say to a defendant, "Here is my claim; you can find the relevant material facts pleaded somewhere in the rest of my pleading; go find them". In order to know the case it must meet, a defendant is entitled to an identification of the material facts upon which a plaintiff relies in support of each specific claim.

23 In this case Mr. Cohen has failed to link any specific material fact to his claim for unjust enrichment. As a result, paragraph 1(A)(b) should be struck out since, as drafted, it is simply a claim "hanging in the air", unconnected to any material facts.

B. Claims sounding in negligence and breach of fiduciary duty

24 In paragraph 1A(e) of his Amended Claim Mr. Cohen sought "further damages" of $100,000 as compensation for the loss of the opportunity to earn commissions for the period after Abria had ceased to be a customer of Cambridge. Mr. Cohen rested this claim on four grounds: (i) breach of contract, (ii) negligence, (iii) breach of fiduciary duty and (iv) oppressive conduct by Cambridge. I have dealt already with Mr. Cohen's contractual claim; I will now deal with his claims sounding in negligence and breach of fiduciary duty.

25 Mr. Cohen's claims in negligence and breach of fiduciary duty were not asserted in his Original Claim. As I read the Amended Claim, the negligence and breach of fiduciary claims depend upon, and are inextricably linked with, Mr. Cohen's claim for breach of the oral agreement. This can be seen from the following paragraphs of the pleading:

> 8. It was an implied term of the Oral Agreement that the Plaintiff could trust and rely upon Cambridge to act in his best interest when cultivating its profitable business relationship with Abria, and that Cambridge would not act negligently or unprofessionally, or dishonestly, in its dealings with Abria, as it was reasonably foreseeable that such conduct would adversely affect the economic interests of the Plaintiff, which were contingent upon the relationship between Abria and Cambridge succeeding.
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> . . . . .
>
> 15. The Plaintiff also states that, because of the significant monetary value to the Plaintiff of the Oral Agreement with Cambridge concerning business generated by Abria, Cambridge's relationship with the Plaintiff was special and fiduciary in nature. Because of the real economic expectations created by the Oral Agreement — expectations independent of the employer-employee relationship between the parties — the relationship between the Plaintiff and Cambridge was premised on a higher degree of trust than that which is normally found in a typical employer-employee relationship.
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> . . . . .
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> 17. Because the Oral Agreement created a special relationship between the Plaintiff and Cambridge, the Plaintiff states that Cambridge in fact had a duty of care and/or fiduciary duty to the Plaintiff, which duty or duties required Cambridge carefully to consider the reasonable expectations and best interests of the Plaintiff whenever Cambridge was dealing with Abria or handling the Abria account.
>
> 18. Because the parties understood that the success and maintenance of Abria's ongoing relationship with Cambridge was of significant monetary value to the Plaintiff, Cambridge's duty of care and/or fiduciary duty to the Plaintiff minimally entailed not only acting professionally and competently in its dealings with Abria, but also taking all reasonable and necessary steps to maximize the business generated through the Abria account.
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> . . . . .

> 21. The Plaintiff further states that Cambridge breached its duty of care and/or fiduciary duty to the Plaintiff by breaching the Oral Agreement, and further breached its duties to the Plaintiff by failing to give primary and sufficient consideration, in respect of maintaining its business relationship with Abria, to the best interests of the Plaintiff. As such, when Abria terminated that business relationship as a result of improper conduct by Cambridge, the Plaintiff suffered economic losses because of Cambridge's improper conduct.
>
> 22. The Plaintiff further pleads that, even if Cambridge did not have a fiduciary duty to the Plaintiff that was breached, Cambridge nonetheless held a duty of care to the Plaintiff, which duty resulted from the special relationship created between Cambridge and the Plaintiff as a result of the Oral Agreement.
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> . . . . .
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> 36. The Plaintiff states that, through Cambridge's negligent and unprofessional handling of its business relationship with Abria, Cambridge simultaneously breached its duty of care and/or fiduciary duty to the Plaintiff, which duty or duties had arisen as a result of the Oral Agreement.

Mr. Cohen's claims for breach of contract, negligence and breach of fiduciary duty all share the same source — the alleged oral agreement.

26 Although the employer-employee relationship is not *per se* fiduciary and is based on contract, it is well recognized that in some circumstances employees may owe fiduciary duties to employers and there is nothing in principle that precludes the relationship existing in reverse: *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Ont. Gen. Div.), at p. 763, aff'd (1997), 32 O.R. (3d) 102 (Ont. C.A.). That is to say, the existence of a contractual relationship between the parties does not foreclose a finding that one party owed a fiduciary duty to the other. Whether an employer owes an employee a fiduciary duty turns on the question of whether it was within the reasonable expectation of the parties that the employer would forsake its own interests and oblige itself to act solely in the interests of the employee in relation to a matter: *Confederation Life*, *supra*., at p. 764. To answer that question a court must engage in a fact-driven analysis and consider the facts of the specific circumstances of the relationship: *Confederation Life*, *supra*., at p. 764-767.

27 In his Amended Claim Mr. Cohen has pleaded that the expectations created by the oral agreement were independent of the employer/employee relationship and gave rise to a special relationship between the parties (para. 15) under which Mr. Cohen was particularly vulnerable (para. 16) and in respect of which Cambridge possessed a discretion that it could exercise unilaterally to the detriment of Mr. Cohen (paras. 10, 12, 17, 18, 23, 26 and 27). All of these are necessary elements of a claim for a breach of fiduciary duty: *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 (S.C.C.), at p. 99.

28 However, at the heart of the plaintiff's claim lies the pleading that Cambridge breached its fiduciary duty by breaching the oral agreement: Amended Claim, para. 21. At this point, the claim for breach of fiduciary duty collapses in upon the claim for breach of contract and it is impossible to distinguish the one from the other. Notwithstanding the language of special relationship, vulnerability, etc., when stripped to its core the alleged breach of fiduciary duty is co-terminous with the alleged breach of contract.

29 Mr. Cohen's claim for negligence is structured in a similar way. In his Amended Claim he pleaded that the oral agreement created a special relationship between the parties that gave rise to a duty of care (paras. 17 and 22) possessed of a particular standard of care (para. 20) which Cambridge breached (para. 21) thereby causing economic losses to the plaintiff (para. 21). While these portions of his claim set out the constituent elements for a claim in negligence, the event Mr. Cohen alleged triggered the breach of the duty of care was the breach of the oral agreement. Certainly the relationship between two persons can give rise to concurrent liability in contract and tort: *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at para. 49. But in the *Rafuse* case the Supreme Court of Canada placed some limits on the 'mingling' of liability. At paragraph 50 LeDain J. stated:

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability

> must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract...A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intentions which should preclude reliance on a concurrent or alternative liability in tort.

30 In paragraph 8 of his Amended Claim Mr. Cohen carefully pleaded that Cambridge's obligations to act in a certain way towards Abria formed an implied, not an express, term of the oral agreement he entered into with Cambridge for commissions. By pleading an implied term Mr. Cohen brought himself within the principle of concurrent liability recognized in the *Rafuse* case.

31 Although I have reservations about the ability of a plaintiff to rely on the breach of an oral contract as the very basis for asserting a breach of a duty of care or fiduciary duty allegedly owed to him, and while to my eye all roads in Mr. Cohen's Amended Claim seem to lead back to his claim for breach of an oral agreement, I cannot say, at this stage of the litigation, that it is plain and obvious that his claims in negligence and breach of fiduciary duty must fail at trial. Findings of the existence of a fiduciary duty are very fact-specific, and the law in the area of concurrent liability in tort and contract is not settled and continues to evolve. Whether Mr. Cohen proves, on a balance of probabilities, that Cambridge owed him a duty of care and fiduciary duty in the particular circumstances of his case is a matter of evidence for trial.

C. Oppression claim

32 Mr. Cohen also sought relief under sections 245 and 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA"), specifically a declaration that the affairs of Cambridge were conducted in a manner oppressive to his interests and damages of $100,000 as compensation for the plaintiff's loss of an opportunity to gain additional monetary benefits relating to business from Abria after March, 2005.

33 In his Amended Claim Mr. Cohen alleged that he was a creditor of Cambridge while Abria was still a client of that company because Cambridge allegedly owed him the difference between the 10% commission due under the oral agreement and the 5% actually paid to him after October, 2003. He used this as the basis for his pleading of an oppression claim:

> 41. ...when Cambridge lost Abria as a client, Cambridge's conduct, as described herein, was sufficiently oppressive, unfairly prejudicial, and unfairly disregarding of the interests of the Plaintiff to make the Plaintiff a 'proper person' to seek relief under the OBCA's oppression remedy.
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> . . . . .
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> 44. In the circumstances, the Plaintiff, as a creditor of Cambridge, entertained a reasonable expectation that Cambridge would conduct itself fairly and professionally, and would not exhibit the kind of conduct that resulted in its loss of Abria as a client. Contrary to the expectations of the Plaintiff, which Cambridge was fully cognizant of, Cambridge's actions in respect of Abria were oppressive and unfairly prejudicial to, and unfairly disregarding of, the interests of the Plaintiff as a creditor of Cambridge.
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> . . . . .
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> 52. The Plaintiff has suffered significant monetary losses as a result of Cambridge's breach and/or repudiation of the Oral Agreement; as a result of Cambridge's breach of its duty of care and/or fiduciary duty to Plaintiff; and as a result of Cambridge's conduct, which has been oppressive and unfairly prejudicial to the economic interests of the Plaintiff as a creditor.

(i) Creditor as complainant

34 Under section 248 of the *OBCA* a 'complainant' may seek relief from the court where a corporation has acted in a manner that is "oppressive...or unfairly disregards the interests of any security holder, creditor, director or officer of the

corporation". Courts have recognized creditors — both actual and potential — as "complainants" under section 245(c) of the *OBCA*: *Apotex Inc. v. Laboratoires Fournier S.A.* (Ont. S.C.J.), at para. 38. Such recognition usually is given in circumstances of a corporation that is insolvent or nearing insolvency: *Millgate Financial Corp. v. BCED Holdings Ltd.* (Ont. S.C.J. [Commercial List]), at para. 89; aff'd (Ont. C.A.); *Waiser v. Deahy Medical Assessments Inc.* (Ont. S.C.J.). While Mr. Cohen has not yet been adjudged a creditor of Cambridge, his claim in this action makes him a potential one: *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2006] O.J. No. 812 (Ont. S.C.J.), at paras. 67 and 75.

(ii) Creditor at time oppressive conduct allegedly took place

35 To have status to pursue an oppression claim under section 248, a creditor-complainant must be a creditor, whether actual or potential, at the time of the oppressive actions about which complaint is made: *Apotex*, *supra*., at paras. 39 and 40; *Awad v. Dover Investments Ltd.* (2004), 47 B.L.R. (3d) 55 (Ont. S.C.J.), at paras. 46 and 48. I am satisfied that Mr. Cohen has pleaded his claim in a way that meets that requirement. He alleged that he was a creditor of the company by virtue of the 5% commissions not paid to him between October, 2003 and March, 2005, and it was the company's oppressive conduct leading to the loss of Abria as a client in March, 2005 which had the effect of depriving him of the opportunity to earn further commissions in respect of Abria's business.

(iii) Conduct disregards interests of a creditor

36 A creditor-complainant must plead what were its reasonable expectations as a creditor with respect to a defendant corporation and how the defendant's conduct effected a result that oppressed, or violated, those expectations: see the discussion of Cummings J. on the elements of proof at trial in *J.S.M. Corp.*, *supra*., at paras. 67 to 75. In the present case Mr. Cohen pleaded that his reasonable expectations, in effect, were that he would continue to receive commissions at 10% and that Cambridge would ensure that Abria remained its customer as long as he was an employee (Amended Claim, para. 44). Cambridge violated those expectations, he contended, by acting in a way that resulted in losing Abria as a client.

37 To date, however, the cases have interpreted section 248(2) of the *OBCA* as requiring proof of a wrong to the interests of a creditor *qua* creditor. Where, for example, the reorganization of a group of companies had the effect of depriving a judgment creditor of one of those companies of the ability to recover on his judgment, an oppression remedy was granted against the company's directors: *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.), at paras. 60 to 63; see also, *Litz v. Litz*, [1995] M.J. No. 65 (Man. Q.B.) at paras. 15 to 18. In *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]) Farley J. sounded a note of caution against a too expansive application of the oppression remedy when he stated, at p. 92:

> It does not seem to me that debt actions should be routinely turned into oppression actions...I do not think that the court's discretion should be used to give 'complainant' status to a creditor where the creditor's interest in the affairs of the corporation is too remote or where the complaints of the creditor have nothing to do with the circumstances giving rise to the debt or if the creditor is not proceeding in good faith. Status as a complainant should also be refused where the creditor is not in a position analogous to that of a minority shareholder and has no 'particular legitimate interest in the manner in which the affairs of the company are managed'.

38 There was no suggestion in Mr. Cohen's pleading that Cambridge's conduct jeopardized, in some way, his ability to recover judgment against the company in the event he were to succeed at trial. The allegedly oppressive conduct of Cambridge in managing its affairs so as to lose Abria as a customer may have the effect of increasing the company's indebtedness to Mr. Cohen should he succeed in his claims, but his pleading failed to allege any conduct as a result of which his claim against the company as a potential creditor might be impaired or jeopardized. This has not been the typical circumstance in which courts have granted a remedy under section 248 of the OBCA to a creditor-complainant. However, Cumming J. recently observed in *J.S.M. Corp.*, *supra*., at paragraph 83 "that judges should have a broad discretion in determining when creditors should be compensated through the oppression remedy." In light of that broad

remedial discretion, I cannot say that it is plain and obvious that the plaintiff must not succeed at trial with his oppression claim.

D. Claims for Aggravated and Punitive Damages against Cambridge

39 Cambridge sought to strike out the plaintiff's claims for aggravated and punitive damages.

40 As to the claim for aggravated damages, in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 (S.C.C.), the Supreme Court of Canada clarified that aggravated damages may arise out of aggravating circumstances and in such a case their award rests on a separate cause of action. While an 'independent actionable wrong' is not required to recover damages for mental distress in a breach of contract action, such a wrong is required to recover aggravated damages in other circumstances: *Fidler*, paras. 51 to 55.

41 The Amended Claim simply contained a bald assertion that the conduct of Cambridge merited an award of aggravated damages, without identifying the aggravating circumstances upon which that claim was based. The absence of a pleading of the specific material facts giving rise to a claim for aggravated damages means that the Amended Claim does not disclose a reasonable cause of action for aggravated damages. As a result, I strike out the references to aggravated damages in paragraphs 1B(g), 55 and 56 of the Amended Claim.

42 Although in a breach of contract case, a claim for punitive damages must be independently actionable (see, *Fidler*, *supra*, at para. 63), the same does not necessarily hold true in tort and breach of fiduciary claims. I concur with the defendants' submission that a court should resort to punitive damages "only in exceptional cases, and with restraint": *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.), at paras. 36 and 43; and *Fidler*, *supra*., at para. 62. However, whether to award punitive damages is a matter best left to the trier of fact upon consideration of all the evidence, and I therefore am not prepared to strike out that part of the claim at this point of time.

E. Claims against the individual defendants personally

43 The only relief sought by Mr. Cohen against the two individual defendants was for punitive, aggravated, and/or exemplary damages in the amount of $100,000. In the pleading both individuals were described as the principals and directing minds of Cambridge. In paragraph 42 the plaintiff pleaded that the conduct of Cambridge "and its principals, as a result of which Abria was lost as a client, constituted a breach of the underlying expectation of the Plaintiff arising from the Plaintiff's Oral Agreement with Cambridge". No material facts were pleaded as to what specific conduct by the individual defendants constituted a breach of the plaintiff's underlying expectation. The pleading was simply silent on this point.

44 At the end of his pleading the plaintiff referred to a letter dated September 26, 2005 from the individual defendants to Mr. Cohen several months after the termination of his employment: Amended Claim, para. 58. As reproduced in the Amended Claim, the letter contended that Cambridge had been misled by Mr. Cohen and would be seeking reimbursement from him of monies paid as a finder's fee. The Amended Claim then continued:

> 60. The Plaintiff pleading states that the above-mentioned letter, including the passages from it cited immediately above, demonstrates Cambridge's bad-faith and oppressive pattern of conduct towards the Plaintiff and, more particularly, Cambridge's intent to intimidate and discourage the Plaintiff from legitimately pursuing his legal rights as against Cambridge and the other defendants. The letter underscores both the arrogant attitude of Cambridge, and the Plaintiff's vulnerability to Cambridge.

The pleading contained no allegation against the individual defendants in respect of the letter save for the statement that they were its authors.

45 In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), Iacobucci J. stated, at pp. 407-408: "There is no general rule in Canada to the effect that an employee acting in the course of his or her employment

and performing the 'very essence' of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it 'independent' or otherwise, to the employer's customer..." Since that decision the Ontario Court of Appeal has considered, on several occasions, the sustainability of pleadings that advance claims against both a corporation and its directors, officers or employees. Several principles emerge from those cases:

(i) whether an employee or director of a corporation will be found personally liable for actions ostensibly carried out under a corporate name are fact-specific: *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 129 D.L.R. (4th) 711 (Ont. C.A.), at p. 720;

(ii) facts giving rise to personal liability must be specifically pleaded: *Montreal Trust*, *supra*., at p. 720; *Alper Development Inc. v. Harrowston Corp.* (1998), 38 O.R. (3d) 785 (Ont. C.A.); *Immocreek Corp. v. Pretiosa Enterprises Ltd.* (2000), 186 D.L.R. (4th) 36 (Ont. C.A.) at para. 27;

(iii) absent allegations of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they will be protected from personal liability unless it can be shown that their actions (i) are themselves tortious, or (ii) exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own: *Montreal Trust*, *supra*., at p. 720; cited with approval in *Alper Development Inc.*, *supra*.; *Immocreek Corp. v. Pretiosa Enterprises Ltd.* (1998), 155 D.L.R. (4th) 627 (Ont. C.A.); *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.); and,

(iv) liability does not attach to individual employees or officers merely by virtue of the fact that they might stand to gain from the completion of an impugned transaction as a result of their financial positions within a corporation: *Normart Management, supra.*, at paragraph 18.

46 In the present case, Mr. Cohen has not pleaded any facts specific to the individual defendants except that they authored a letter. No material facts were pleaded that the individual defendants engaged in conduct that was tortious or that exhibited a separate identity or interest from that of the company so as to make the act or conduct complained of their own. As a result, I conclude that the Amended Claim discloses no reasonable cause of action against Bernard Heitner and Jacques Feldman, and the claim is struck out as against them.

IV. Summary of order on pleadings motion

47 By way of summary, I make the following orders in respect of the defendants' motion to strike the Amended Claim:

(i) With respect to the pleading of an oral contract in paragraph 7 of his Amended Claim, Mr. Cohen must provide the following particulars to the defendant by June 25, 2007: (i) the date the oral agreement was formed; (ii) the place where it was made; and (iii) the identity of the representative of Cambridge with whom Mr. Cohen concluded the oral agreement;

(ii) Paragraph 1(A)(b) of the Amended Claim containing the unjust enrichment claim is struck out without leave to amend;

(iii) The claims for aggravated damages against Cambridge set out in paragraphs 1B(g), 55 and 56 of the Amended Claim are struck out without leave to amend;

(iv) The claims against the individual defendants, Bernard Heitner and Jacques Feldman, are struck out without leave to amend; and,

(v) In all other respects, the motion is dismissed.

I am permitting Mr. Cohen to provide further particulars of his oral contract claim because as drafted it discloses the basics of a cause of action, but fairness dictates that the defendants should be given some further particulars. I am not granting Mr. Cohen leave to amend the claims that I have struck out because they were pleaded in a substantively

inadequate manner. Having responded to the order of C. Campbell J. by asserting several new claims against the defendants, in my view the plaintiff should have ensured that those new claims were pleaded precisely and correctly. Some of them were not, so I see no reason to permit the plaintiff a further opportunity to correct his pleading of those new claims.

V. Further Steps in this Action

48 This action was started on October 17, 2005. Over a year and one half later the parties are no further down the road to trial than contesting the adequacy of the Statement of Claim. At this pace a trial date lies years in the future. At the hearing I canvassed with counsel a timetable for further steps in this action. As a result, I order the parties to proceed in accordance with the following timetable:

(i) Mr. Cohen is to provide the particulars required by paragraph 47(i) of this endorsement by June 25, 2007;

(ii) Cambridge is to serve and file its Statement of Defence by July 31, 2007. At the hearing Cambridge's counsel stated that Cambridge would not likely assert a counterclaim against Mr. Cohen. If it decides to do so, the Statement of Defence and Counterclaim must be served and filed by July 31, 2007 and Mr. Cohen's Statement of Defence to the Counterclaim must be served and filed by August 31, 2007; and,

(iii) Both parties are to complete their examinations for discovery by the end of October, 2007.

VI. Costs

49 I would encourage the parties to try to settle the costs of this motion. If they cannot, the defendants may serve and file written cost submissions, together with a Costs Outline, by June 18, 2007. The plaintiff may serve and file written cost submissions, together with a Costs Outline, by June 25, 2007. The written cost submissions, excluding the Costs Outline, should not exceed three pages in length.

Order accordingly.

2002 CarswellOnt 1571
Ontario Superior Court of Justice

Genereux v. Carlstrom

2002 CarswellOnt 1571, [2002] O.J. No. 1841, [2002] O.T.C. 314, 113 A.C.W.S. (3d) 997

William J. Genereux, Applicant and Richard Theodor Carlstrom and Frances Kathleen Carlstrom, Respondents

Cameron J.

Heard: April 23, 2002
Judgment: May 7, 2002
Docket: 02-CV-227200CM2

Counsel: *Anthony Moustacalis*, for Applicant
Mr. and Mrs Carlstrom for themselves

Related Abridgment Classifications
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.d "Badges of fraud"

Headnote
Fraud and misrepresentation --- Fraudulent conveyances — Fraudulent intent — "Badges of fraud"
Client engineer contacted solicitor in June 1994 for legal opinion regarding possible defamation action — Solicitor wrote demand letter for apology but recommended against bringing action — On March 2, 1995 client realized he was practicing without professional errors and omissions liability insurance — On March 6, 1995 client had solicitor convey his home, recreational condominium and vacant property owned by himself and his wife as joint tenants to his wife for $2 and natural love and affection — At time of transfer, client's only creditor was Revenue Canada for $25,193, client's practice produced billings exceeding $600,000, and client's and wife's employment income were $87,250 and $26,600 respectively — Client personally commenced defamation action in May 1996 and solicitor became solicitor of record in September 1997 — Client paid solicitor $23,000 in fees by March 1999 and $8,014 by October 1999 — Defamation action was dismissed and client failed to pay $20,000 costs order — Solicitor obtained judgment against client for $53,447.31 for outstanding fees — Solicitor applied to set aside conveyances under s. 2 of Fraudulent Conveyances Act conveyances — Application dismissed — At time of settlement, client did not have required intent under s. 2 of Act — At time of settlement client had income and prospects of future income sufficient to meet his current and anticipated liabilities, and he discharged his liabilities existing at time of transfer — Client did not commence action until 14 months after transfer and he paid his legal fees as they came due until four years after settlement — At time of transfers, solicitor was satisfied that client was not acting with improper intent and only changed his mind when his accounts for services rendered more than 4 1/2 years later remained unpaid — Fraudulent Conveyances Act, R.S.O. 1990, c. F.29, s. 2.

Table of Authorities

Cases considered by *Cameron J.*:

Bank of Montreal v. Bray, 1997 CarswellOnt 3903, 36 O.R. (3d) 99, 153 D.L.R. (4th) 490, 50 C.B.R. (3d) 1, 104 O.A.C. 351, 33 R.F.L. (4th) 335, 14 R.P.R. (3d) 139 (Ont. C.A.) — referred to
Bater v. Bater (1950), [1951] P. 35, [1950] 2 All E.R. 458 (Eng. C.A.) — considered
Beltos v. Tarala (May 14, 1999), Doc. 98-CV-147299 (Ont. S.C.J.) — considered
Beynon v. Beynon, 2001 CarswellOnt 3252, 21 R.F.L. (5th) 255 (Ont. S.C.J.) — referred to
Buckland v. Rose, 7 Gr. 440, 1859 CarswellOnt 64, [1859] Ch. 440 (U.C. Ch.) — considered

Continental Insurance Co. v. Dalton Cartage Ltd., 25 C.P.C. 72, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559, *(*sub nom. *Dalton Cartage Ltd. v. Continental Insurance Co.)* 40 N.R. 135, [1982] I.L.R. 1-1487, 1982 CarswellOnt 372, 1982 CarswellOnt 719 (S.C.C.) — considered

Fleming v. Edwards (1896), 23 O.A.R. 718 (Ont. C.A.) — considered

Meeker Cedar Products Ltd. v. Edge, 12 C.B.R. (N.S.) 60 (note), 1 D.L.R. (3d) 240n, 1968 CarswellBC 7 (S.C.C.) — referred to

Meeker Cedar Products Ltd. v. Edge, 12 C.B.R. (N.S.) 49, 68 D.L.R. (2d) 294, 1968 CarswellBC 6 (B.C. C.A.) — referred to

Oliver v. McLaughlin (1893), 24 O.R. 41 (Ont. C.A.) — referred to

Optical Recording Laboratories Inc., Re, 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, *(*sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.)* 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) — considered

Ottawa Wine Vaults Co. v. McGuire (1912), 27 O.L.R. 319, 8 D.L.R. 229 (Ont. C.A.) — considered

Ottawa Wine Vaults Co. v. McGuire, 48 S.C.R. 44, 13 D.L.R. 81, 1913 CarswellOnt 727 (S.C.C.) — referred to

Petrone v. Jones, 33 C.B.R. (3d) 17, 1995 CarswellOnt 312 (Ont. Gen. Div.) — considered

Sun Life Assurance Co. v. Elliott, 31 S.C.R. 91, 1900 CarswellBC 17 (S.C.C.) — referred to

Whetstone, Re, 47 O.R. (2d) 719, 52 C.B.R. (N.S.) 280, 12 D.L.R. (4th) 249, 1984 CarswellOnt 157 (Ont. Bktcy.) — referred to

Statutes considered:

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

Generally — referred to

s. 2 — considered

***Cameron J.*:**

Application

1 This is an application to set aside under s. 2 of the *Fraudulent Conveyances Act* three conveyances of real property ("Realty") by the Respondents, as joint tenants, to the Respondent Frances Kathleen Carlstrom ("Mrs. Carlstrom") on March 6, 1995. The Applicant also seeks a declaration that by reason of setting aside the transfers the Respondents are tenants in common of the Realty as to 50% each on the authority of *Bank of Montreal v. Bray* (1997), 36 O.R. (3d) 99 (Ont. C.A.) at p. 110.

Facts

2 The Respondent Richard Theodor Carlstrom ("Mr. Carlstrom") is a professional engineer. He was born in 1938. He carries on a practice as a consulting engineer in the area of forensic engineering through his company RTC Engineering Consultants Ltd. ("RTC"). He investigates, advises and testifies on the causes of accidents, and other mishaps. His office was and is in the basement of his home.

3 The Applicant William Genereux is a barrister and solicitor.

The Alleged Defamation

4 In June, 1994, Mr. Carlstrom received a copy of letter from a lawyer to the lawyer's client and several government departments. The letter asserted that Mr. Carlstrom's opinion respecting the design of the client's product contained in his earlier letter copied to the same addressees was irresponsible. Mr. Carlstrom felt the lawyer's letter was defamatory of his professional reputation and he ultimately consulted Mr. Genereux. On August 10, 1994 Mr. Genereux wrote to the lawyer and the recipients of a copy of the lawyer's letter complaining of defamation, seeking an apology and advising of a possible claim for damages ("Complaint Letter").

5 Notwithstanding the Complaint Letter, Mr. Genereux cautioned Mr. Carlstrom against the advisability of pressing an action and suggested Mr. Carlstrom take time to think about it. Mr. Carlstrom told Mr. Genereux that he accepted the advice but he was concerned with public safety issues and might seek a legal opinion about what he should do.

6 At the time, Mr. Carlstrom's engineering practice was prospering and supporting him and two other engineers.

The Transfers of Realty

7 On March 2, 1995, Mr. Carlstrom suddenly realized that he was practicing without professional errors and omissions liability insurance and that his family assets, including his home, recreational condominium and a vacant property, which constituted the Realty, could be seized for his personal liabilities arising out of his practice. This situation was permitted by the Association of Professional Engineers, provided he told his clients he was uninsured.

8 Mr. Carlstrom immediately called Mr. Genereux. Mr. Genereux said the call was "out of the blue", unrelated to anything else Mr. Genereux was doing for him, and asked if he could transfer his property to his wife for a dollar. Mr. Genereux said he could not do so if the intent was to defeat or defraud creditors. When asked what prompted the issue, Mr. Carlstrom told Mr. Genereux that he had received an odd telephone call, in which the caller had hung up without speaking, which got him thinking about exposure to unknown liabilities, particularly from people whose products he criticized as a risk to public safety. Mr. Carlstrom assured Mr. Genereux that he had no creditors who he was trying to defeat or hinder and that he was not intending to defeat, delay or defraud any creditor. Mr. Genereux believed him as he regarded Mr. Carlstrom as "a righteous and highly ethical individual who had professed concern about public safety issues and maintaining his good reputation as a professional engineer and member of the insurance adjusting community".

9 Mr. Genereux accepted Mr. Carlstrom's instructions to immediately transfer his interest in the three properties as a joint tenant with his wife to Mrs. Carlstrom alone for a nominal consideration. Mr. Genereux's memorandum to his real estate associate requesting preparation of the transfers of the Realty noted that Mr. Genereux seemed "stressed out" and wanted the conveyances done "ASAP".

10 Mr. and Mrs. Carlstrom attended at Mr. Genereux's office on Monday, March 6, 1995, to sign the transfers of the Realty from themselves jointly to Mrs. Carlstrom alone for "$2 and natural love and affection". The transfers were registered within the following week.

11 Mr. Carlstrom continued to occupy, use and enjoy the home and vacation condo included in the Realty with his wife.

Mr. Carlstrom's Financial Position

12 In March, 1995, Mr. Carlstrom's only creditor was Revenue Canada (now Canada Customs and Revenue Agency) ("CCRA") for $25,193 in respect of the balance owing on his 1993 income tax. In May, 1995, he was assessed a further $28,000 in tax, interest and penalty in respect of his 1994 income, increasing his liability to CCRA to $53,334. By October 1995, Mr. Carlstrom's liability to CCRA had been reduced to $28,000. He did not advise CCRA of the transfers.

13 In the fiscal year ended May 31, 1994 RTC's billings exceeded $600,000 and it had retained earnings of $61,000. Mr. Carlstrom's employment income in 1994 was $84,000 and he had taxable capital gains of $54,750 in that year on the sale of a property.

14 In the fiscal year ended May 31, 1995 RTC's billings were $480,000 but it sustained a loss, after salaries and other expenses, of $48,000 and its retained earnings dropped to $13,800. Mr. Carlstrom's employment income and taxable income in 1995 were $87,250.

15 In 1994 and 1995 Mrs. Carlstrom's net income was $32,300 and $26,600, respectively.

16 At the time of the settlement RTC's assets included 3 middle-aged vehicles, cameras and computers and its liabilities were current. There is no evidence of the nature or value of Mr. Carlstrom's other assets or liabilities at the time of the transfers.

17 In November, 1995, Mr. Genereux rendered an accounting to Mr. Carlstrom of the funds received in March for the transfers of the Realty. The covering letter referred to an opinion Mr. Genereux was preparing respecting the alleged defamatory letter written in June 1994. He later advised against commencing an action.

18 In May, 1996, Mr. Carlstrom commenced an action on behalf of RTC and himself in respect of the allegedly defamatory letter. He firmly believed in the correctness of his professional opinion.

19 In September, 1997, Mr. Genereux agreed to become the solicitor of record for RTC and Mr. Carlstrom in the action after Mr. and Mrs. Carlstrom acknowledged the costs and risks of the litigation. By March 1999 Mr. Carlstrom had paid $23,000 in fees in respect of the action to Mr. Genereux.

20 In early April 1999 Mr. Carlstrom advised Mr. Genereux that he had no money to pay Mr. Genereux's account of March 31, 1999 for $5,147. However on November 4, 1999 Mr. Carlstrom paid Mr. Genereux another $8,014 on account of his fees in the defamation action and another matter, apparently following Mr. Carlstrom's request for an invoice on October 22, 1999.

21 In February 2000 Mr. Genereux agreed that Mr. Carlstrom could have $10,000 Mr. Genereux had received in Trust for Mr. Carlstrom as a judgment creditor in another action. The $15,000 was credited to Mr. Genereux's fees in the defamation action.

22 Mr. Carlstrom's income from employment in 1996 had dropped to $30,000 due to the loss of a client. Mrs. Carlstrom's income had dropped to $7,000.

23 Mr. Carlstrom's income from employment in 1997 was again $30,000 and Mrs. Carlstrom's income was $29,300.

Liabilities Arising After 1999

24 Following a 10-day trial in June 2000 the defamation action was dismissed on the basis that the statement made in the alleged defamatory letter was made on an occasion of qualified privilege. The judgment contained an order for costs against Mr. Carlstrom of $20,000. These costs remain unpaid.

25 Before the judgment was released Mr. Genereux rendered his account in respect of the defamation action. On September 8, 2000, Mr. Genereux commenced an action against Mr. Carlstrom for his outstanding fees. Following a trial, Mr. Genereux obtained judgment against Mr. Carlstrom on April 24, 2001, for $53,447.31. That judgment remains unpaid notwithstanding demand for payment and a judgment debtor examination. Mr. Carlstrom says he has no money or assets to pay the account.

26 Mr. Carlstrom acknowledges that by December, 1997, following assessments for 1995 and 1996 and partial payments, his liability to CCRA had been reduced to $24,000. However, by July 1998, that indebtedness had been reduced to $2,000 and by December 1999 it was down to $51.00. He now owes CCRA $14,000 and VISA $24,000.

Post 2000 Use of Realty

27 In September, 2001, Mrs. Carlstrom mortgaged the vacation condominium constituting part of the Realty for $50,000 to secure Mr. Carlstrom's obligations, as opposed to Mrs. Carlstrom's obligations, for legal fees to new counsel for an appeal of the defamation judgment. That appeal was dismissed in March 2002.

28 In 2000 and 2001 the Carlstrom's home, which was part of the Realty transferred to Mrs. Carlstrom in 1995, was rented to tenants. Mr. Carlstrom signed his income tax return, prepared by his accountant, which allocated 50% of the rent and related expenses to him. Mr. Carlstrom says his accountant had acted for him for many years and was not aware of the settlement. Mr. Carlstrom said he did not notice this allocation of rents when he signed the return.

Theories of the Case

29 Mr. Genereux believes that at the time of the conveyances in March 1995, notwithstanding Mr. Genereux's advice, Mr. Carlstrom intended to enter into the defamation litigation, and in light of Mr. Genereux's advice that it would probably be unsuccessful, effected the transfers to Mrs. Carlstrom to avoid the adverse consequences respecting costs and legal fees about which Mr. Genereux had warned him. Mr. Genereux says Mr. Carlstrom's intent to sue was informed by his firm belief in the correctness of his professional opinion as to the hazard to the public constituted by the impugned product.

30 Mr. Carlstrom denies he had any intent in March 1995 to proceed with the lawsuit or to defeat or deny any creditor. He says his instructions to Mr. Genereux to prepare transfers of the property were not prompted by any existing or contemplated specific liabilities but by a general intent to protect his family assets from any indeterminate future liability arising out of his engineering practice. He says that after the transfers in March 1995 he had sufficient assets and income to meet his liabilities and that he was able to pay all of his personal liabilities, including Mr. Genereux's fees, until 1999. He had paid off his liability for 1994 and 1995 income taxes by December 1999.

Law

The Legislation

31 The *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, section 2, provides as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Burden of Proof

32 In this case, the onus rests with the applicant to prove fraudulent intent. In *Continental Insurance Co. v. Dalton Cartage Ltd.* (1982), 131 D.L.R. (3d) 559 (S.C.C.), at pp. 563-4 Chief Justice Laskin summarized the standard in reference to Lord Denning's words in *Bater v. Bater*, [1950] 2 All E.R. 458 (Eng. C.A.):

> . . . . .
>
> It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond a reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

Laskin, C.J.C. then continued:

I do not regard such an approach as departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that proof on a balance of probabilities has been established.

Only Necessary to Show Intent of Transferor (Not Transferee)

33 It is only where a conveyance is made upon good consideration that it is necessary under the statute in order to set it aside to show the fraudulent intent of both parties to it. But where a conveyance is voluntary, it is only necessary to show the fraudulent intent of the maker of it: *Oliver v. McLaughlin* (1893), 24 O.R. 41 (Ont. C.A.), at p. 51.

Lawyers' Recommendations Not Relevant

34 Even if a transferor's lawyer has recommended the transfer as a matter of estate planning or general business advice, it is the intent of the transferor, and not the intent of the lawyer, which is relevant: *Whetstone, Re* (1984), 47 O.R. (2d) 719 (Ont. Bktcy.), per Sutherland J. at pp. 721, 730-1.

Interpretation of the Legislation

35 In *Optical Recording Laboratories Inc., re* (1990), 1 O.R. (3d) 131 (Ont. C.A.) at p. 139, the Court of Appeal quoted with approval the following passage from Dunlop, *Creditor-Debtor Law in Canada* (Toronto: Carswell, 1981), at p. 513:

> ... Lord Mansfield concluded that the Common Law had always been strongly against fraud in every shape and that the Statute of Elizabeth [13 Elizabeth c.5, the predecessor of the *Fraudulent Conveyances Act*] — "*cannot receive too liberal a construction, or be too much extended in suppression of fraud*". [Emphasis in original]

Drawing Inferences from the Circumstances

36 Intent is essentially a matter of fact to be proved in the circumstances of each particular case. Proof of intent to defeat or delay creditors usually involves drawing inferences from the circumstances surrounding the particular transaction: *Beynon v. Beynon*, [2001] O.J. No. 3653 (Ont. S.C.J.), Court File No. C39540/97, Kruzick J., at para. 76.

37 In the absence of any direct proof of intent, if a person owing a debt makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid then, it is the necessary consequence of the settlement that some creditors must remain unpaid, it is the duty of the judge to direct a jury that they must infer the intent of the settlor to have been to defeat or delay his creditors: *Sun Life Assurance Co. v. Elliott* (1900), 31 S.C.R. 91 (S.C.C.).

38 In *Fleming v. Edwards* (1896), 23 O.A.R. 718 (Ont. C.A.) at p. 727, Burton J.A. stated:

> The principle of *Mackay v. Douglas*, L.R. 14 Eq. 106, and that class of cases, appears to me to be this, that when a man is going into business, I will not say a hazardous business, and immediately before doing so settles the bulk of his property voluntarily and becomes unable to pay his debts within a short time afterwards, it will be presumed that his object was to place his property out of the reach of his future creditors, and, if such a settlement be made, it seems in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed.

Intention to Defeat Potential Future Creditors

39 Per Spragge V.C. in *Buckland v. Rose*, [1859] Ch. 440 (U.C. Ch.) at p. 442:

> ... [A] settlement may be fraudulent even if there be no indebtedness at the time, if made with the intention of defeating those to whom the settlor intends to become indebted. Upon this last point the language of Lord Hardwicke in *Stileman v. Ashdown*, [2 Atk. 477] is explicit. "It is not necessary that a man should be actually indebted

> at the time he enters into a voluntary settlement, to make it fraudulent, for if a man does it, with a view to being indebted at a future time, it is equally fraudulent and ought to be set aside;" ...

40 In *Ottawa Wine Vaults Co. v. McGuire* (1912), 27 O.L.R. 319 (Ont. C.A.), affirmed (1913), 13 D.L.R. 81 (S.C.C.), the settlor, 3 months after entering into a hotel business which he recognized as hazardous, settled a valuable piece of realty on his wife with a view to protecting it from future creditors of the business. Within 14 months he was bankrupt. There is no suggestion that any creditor at the time of settlement was not paid in full. Shortly after the settlement the defendant told a creditor of the new hotel business that he was receiving rents from the property. The Court of Appeal found that the settlement contravened the *Fraudulent Conveyances Act*.

41 In the Court of Appeal, Meredith J.A., concurring in the result of the rest of the court but in separate reasons, stated at p. 324:

> ... [A]n intention to defeat, hinder, or delay future creditors is within the law affecting transactions in fraud of creditors quite as much as an intention to defeat, hinder, or delay present creditors, though transactions in fraud of future creditors are, of course, less frequent than those in fraud of existing creditors, and more difficult of proof.

42 Reviewing the facts the Supreme Court saw no grounds for upsetting the Court of Appeal.

43 In *Petrone v. Jones* (1995), 33 C.B.R. (3d) 17 (Ont. Gen. Div.) the payor under an outstanding promissory note payable in installments transferred property held jointly with his wife to his wife alone in contemplation of embarking on a new business venture. The payee of the note subsequently obtained judgment on the balance owing under the note but the payor resisted payment and denied that the transfer was made with the intent of defeating the existing creditor. The court, relying on *Optical Recording Laboratories Inc., Re* and the statement by Lord Mansfield, found the intent required by s. 2 of the Act.

44 In *Beltos v. Tarala*, [1999] O.J. No. 1743 (Ont. S.C.J.), Juriansz J. held that a settlement of the family home on a spouse, after 2 previous attempts to defeat creditors, could be set aside by an unpaid creditor who had threatened suit at the time of the settlement.

Analysis

45 At the time of the settlement Mr. Carlstrom had an income and prospects of future income sufficient to meet his current and anticipated liabilities. He discharged his liabilities existing at the time of the transfer. There is no evidence that at the time of the settlement he knew that his income would likely decline. He did not commence the lawsuit until May, 1996, 14 months after the settlement of the property on his wife. He acted for himself until September 1997. He paid his liabilities for legal fees in connection with that action as they came due until four years after the settlement and made a further payment on account in November 1999.

46 In the authorities cited to me, I see nothing to prevent a person from reordering his affairs to isolate his personal assets from future, as opposed to present, liabilities to creditors generally provided it is not established that the settlor had reason to believe at the time of the settlement that his creditors at the time or within the near to intermediate future in respect of a specific risk or risky enterprise would cease to be able to look to the settled assets.

47 At the time of the transfers Mr. Genereux was satisfied that Mr. Carlstrom was not acting with an improper intent. He only changed his mind when his accounts for services rendered more than 4 $^{1}/_{2}$ years later remained unpaid.

48 Notwithstanding the affirmations by Mr. and Mrs. Carlstrom that Mr. Genereux's legal bills would be paid, Mr. Genereux knew of Mr. Carlstrom's inability to pay in April 1998. Mr. Genereux continued to provide legal services to Mr. Carlstrom with the knowledge that he might not be paid. He was paid a further $8,014 in November 1999. At no time did he or any other creditor of Mr. Carlstrom grant credit in reliance on Mr. Carlstrom's continued ownership of the Realty settled on his wife in 1995.

49 Had Mr. Carlstrom truly intended to avoid his creditors by transferring the Realty he would have ceased paying CCRA before he did. I recognize that if he wanted to succeed in the defamation action he had to try and keep Mr. Genereux happy, and he did.

50 The badges of fraud in this case consist of:

(1) settlement of the Realty on his wife when the possibility of commencing an action was still on his mind;

(2) he continued to enjoy the use of the Realty and his wife mortgaged it to pay the legal costs of an appeal in 2001;

(3) he signed an income tax return in which he said one-half of the rental income belonged to him.

51 The existence of badges of fraud are only of evidential value on the issue of intent; they are not conclusive evidence of fraud: *Meeker Cedar Products Ltd. v. Edge* (1968), 12 C.B.R. (N.S.) 49 (B.C. C.A.); affirmed (1968), 12 C.B.R. (N.S.) 60 (note) (S.C.C.) .

52 Notwithstanding the badges of fraud, I am not satisfied on the balance of probabilities appropriate to the occasion that at the time of the settlement Mr. Carlstrom had the intent required under s. 2 of the *Fraudulent Conveyances Act*.

53 I dismiss the application.

54 Costs may be addressed in writing to me within 30 days.

Application dismissed.

1986 CarswellOnt 438
Supreme Court of Ontario, High Court of Justice

Hong Kong (Official Receiver) v. Wing

1986 CarswellOnt 438, [1986] O.J. No. 1104, 12 C.P.C. (2d) 217, 2 A.C.W.S. (3d) 7, 57 O.R. (2d) 216

OFFICIAL RECEIVER OF HONG KONG v. WING a.k.a Ma et al.

Steele J.

Heard: October 17, 1986
Judgment: October 31, 1986
Docket: No. RE1959/86

Counsel: *H.D. Pitch*, for respondent Shiu Fai Building Enterprises Limited.
S. Dewart, for applicant.

Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.c Time of production

Headnote
Practice --- Discovery — Discovery of documents — Time of production
Discovery — Discovery of documents — Time of production — Production of documents prior to close of pleadings — Ontario r. 30.04(5) giving Judge discretion to order production of documents in another party's possession, control or power if referred to in originating process, pleadings or affidavit of other party in the action — Principle that production prior to close of pleadings only ordered if documents essential to enable party to plead continuing to apply under new Rule.
The respondent M was adjudged bankrupt in Hong Kong. A receiver was appointed in Ontario to take possession of certain assets and documents located in an Ontario condominium owned by the respondent company, which allegedly belonged to M. M was a director of the respondent company and was allegedly living in the condominium at the time of the order appointing the receiver. The respondent company was named as a party to the receiving order and in a subsequent related action brought by the receiver, was enjoined from dealing with its assets in Ontario alleged to be held beneficially for M. The respondent company had not yet delivered a statement of defence in the action when it brought a motion for production of documents taken by the receiver which were referred to in the receiver's affidavit on the motion.
Held:
The motion was dismissed.
Rule 30.04(5) gives the Court a discretion to order production and inspection of documents in the possession, control or power of another party prior to the close of pleadings in the action if the documents are referred to inter alia, in an affidavit of the other party served in the proceedings. Under the former Ontario Rules, it had been established that generally production would not be ordered prior to close of pleadings unless the Court was satisfied that the documents were essential to enable the party seeking

production to plead. This principle continues to apply under new r. 30.04(5). The company's affidavit in support of the motion did not allege that the documents sought were essential to pleading, nor, upon a review of them, can they be said to be essential.

Table of Authorities

Cases considered:

Durish v. Bent (1985), 4 C.P.C. (2d) 37 (Ont. Master)*applied*

Rules considered:

Ontario Rules of Civil Procedure —

r. 30.04(2)

r. 30.04(3)

r. 30.04(5)

r. 30.04(8)

r. 30.08

Ontario Rules of Practice —

R. 348

***Steele J.*:**

1 The only part of this motion by the respondent, Shiu Fai Building Enterprises Limited (the company), that was argued was for an order requiring the applicant and Joseph Sprackman & Associates Inc. (Sprackman), the receiver appointed by this Court to provide the company with an inventory of all documents and assets removed by the receiver from a condominium owned by the company and to provide copies of such documents. Michael Ma Wing (Mr. Ma) did not bring the motion and was not represented.

2 The applicant was appointed as receiver of the property of Mr. Ma by the Supreme Court of Hong Kong on April 1, 1985. Mr. Ma was further adjudged bankrupt by that Court on May 15, 1985. It is alleged that substantial assets of Mr. Ma cannot be located although some have been located in Ontario. On the application that resulted in the appointment of Sprackman it was alleged that Mr. Ma was a director of the company and that he resided in the condominium.

3 Under the authority of the order of this Court dated September 5, 1986, Sprackman entered the condominium and located documents that, according to Sprackman's affidavit, indicate that Mr. Ma enjoys the beneficial use of funds and assets in several jurisdictions including the United States, the United Kingdom, Switzerland, Liechtenstein, Italy, Panama and the Bahamas. The bulk of such assets appear to be in the form of securities and stocks, controlled in a Zurich account in the name of two nominee companies located in Panama and Liechtenstein.

4 I was advised that at the present time Mr. Ma has resigned as a director of the company. No affidavit material has been filed by the company setting out its relationship, if any, to Mr. Ma. The only affidavit in support of this motion is that of a solicitor for the company, which states that certain papers removed from the condominium were delivered to his firm but that the documents relating to the assets of Mr. Ma in the countries referred to in Sprackman's affidavit were not included.

5 This motion by the company is for production of the documents under r. 30.04(2), on the basis that they are in the possession of the applicant and are referred to in the affidavit of an officer of Sprackman. Counsel for the company does not represent Mr. Ma but argues that the company is a party and that the Rule is

wide enough to require the production of all documents relating to any party. The company is named as a party and, by order of this Court dated September 16, 1986, it is enjoined from dealing with any of its assets in Ontario that are beneficially held for Mr. Ma. The applicant has also commenced an action against the company for a declaration that it holds the condominium for the benefit of Mr. Ma.

6 The applicant does not deny that it has documents relating to Mr. Ma but it takes the position that, notwithstanding several interim motions, the company has filed no affidavit material to show its connection with or lack of connection with Mr. Ma, or that it is in any way prejudiced by the failure of the applicant to disclose the information, or that this motion is bona fide. Counsel for the applicant is concerned that any information given to the company will be disclosed to Mr. Ma and will be used by him to frustrate the attempts by the applicant to realize upon assets in other jurisdictions. An exhibit attached to the company solicitor's affidavit in support of the present motion indicates that the company had some information that relates to the applicant's proceedings against Mr. Ma in other jurisdictions. Counsel for the applicant undertook to the Court that, subject to the rights of the applicant under r. 30.04(8), it would deliver the documents to the company after it had been provided with an affidavit of response by the company. He was concerned that the defence of the company might be tailored if the documents were disclosed in advance.

7 The company relies on r. 30.04(2) that provides as follows:

> A request in inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

8 Subsection (3) unequivocally requires the other party to allow inspection of all such non-privileged documents. However, the effect of the failure to so do is set out in r. 30.08.

9 The power to order production is under r. 30.04(5). Under the Rule there is a discretion in the Court. This Rule is similar to the old R. 348 under the Judicature Act, R.S.O. 1980, c. 223. Under that Rule the principle was that production normally should not be ordered prior to pleading unless the Court was satisfied that the documents were essential to enable the party to plead. I agree with Master Donkin in *Durish v. Bent* (1985), 4 C.P.C. (2d) 37 (Ont. Master) that this principle applies to the new r. 30.04(5).

10 The affidavit in support of the motion does not allege that the documents are essential but only that they be obtained to determine what assistance they may provide to the company in the defence of the application. Based on this mild assertion and a review of the material, I am satisfied that the documents are not essential to the company for it to respond.

11 The motion is dismissed with costs to the applicant in the cause.

Motion dismissed.

2006 CarswellOnt 8092
Ontario Court of Appeal

Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital

2006 CarswellOnt 8092, 154 A.C.W.S. (3d) 324, 40 C.P.C. (6th) 6

JACOB MEUWISSEN, a minor by his Litigation Guardian DEBORAH MEUWISSEN and the said DEBORAH MEUWISSEN and MICAHEL MEUWISSEN (Respondents / Plaintiffs) and STRATHROY MIDDLESEX GENERAL HOSPITAL and GARY PERKIN (Appellant / Defendant)

R.J. Sharpe, R.A. Blair, J. MacFarland JJ.A.

Heard: December 18, 2006
Judgment: December 18, 2006
Docket: CA C44789, C44801

Proceedings: reversing *Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital* (2006), 2006 CarswellOnt 8371 (Ont. S.C.J.)

Counsel: Kirk F. Stevens, Dara M. Lambe for Gary Perkin
Hans Engell for Strathroy Middlesex General Hospital
Donald Leschied, Stephen Marentette for Jacob Meuwissen et al

Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.c Time of production
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.e Application for order for production
XII.2.e.ii Order
Civil practice and procedure
XIV Practice on interlocutory motions and applications
XIV.7 Evidence on motions and applications
XIV.7.c Miscellaneous
Health law
V Malpractice
V.4 Miscellaneous

Headnote
Civil practice and procedure --- Discovery — Discovery of documents — Application for order for production — Order

Proposed defendants appealed from order compelling production of documents in intended medical malpractice action — Appeal allowed — Rule 30.04(5) of Rules of Civil Procedure does not contemplate order for pre-action discovery — Rule 37.17 requires urgency — Rule 30.10 may only be invoked by "party" — In exceptional circumstances, production may be ordered after commencement of proceedings but before pleadings in order to enable party to plead — Although equitable remedy of bill of discovery exists and permits pre-action discovery, relief should have been sought by way of application for "Straka" order — Such order would not have been granted here though, because proposed plaintiffs had sufficient information to enable them to plead their case.

Health law --- Malpractice — Miscellaneous

Proposed defendants appealed from order compelling production of documents in intended medical malpractice action — Appeal allowed — In exceptional circumstances, production may be ordered after commencement of action and before pleadings in order to enable party to plead — Production should not have been ordered because action was not yet commenced and, in any event, proposed plaintiffs did not show exceptional circumstances — Relief could have been sought by way of application for "Straka" order but there was no basis for such order because proposed plaintiffs had ample information to formulate and plead their case — Proposed plaintiffs have already retained experts and there was no evidence that production was required in order for them to obtain opinion — Report of College Of Physicians and Surgeons disposing of complaint against physician was struck and removed from record because it should not have been filed in support of motion — Regulated Health Professions Act, 1991 precluded proposed plaintiffs from adducing it in evidence on motion.

Civil practice and procedure --- Discovery — Discovery of documents — Time of production

Proposed defendants appealed from order compelling production of documents in intended medical malpractice action — Appeal allowed — In exceptional circumstances, production may be ordered after commencement of action and before pleadings in order to enable party to plead — Production should not have been ordered because action was not yet commenced and, in any event, proposed plaintiffs did not show exceptional circumstances — Relief could have been sought by way of application for "Straka" order but there was no basis for such order because proposed plaintiffs had ample information to formulate and plead their case — Proposed plaintiffs have already retained experts and there was no evidence that production was required in order for them to obtain opinion.

Civil practice and procedure --- Practice on interlocutory motions and applications — Evidence on motions and applications — General principles

Proposed defendants appealed from order compelling production of documents in intended medical malpractice action — Appeal allowed — There were no grounds for ordering pre-action production — As well, evidence filed in support of proposed plaintiffs' motion that was report of College Of Physicians and Surgeons disposing of complaint against physician was ordered struck and removed from court record — Regulated Health Professions Act, 1991 precluded proposed plaintiffs from adducing it in evidence on motion.

Table of Authorities

Cases considered by *R.J. Sharpe J.A.*:

Hong Kong (Official Receiver) v. Wing (1986), 57 O.R. (2d) 216, 1986 CarswellOnt 438, 12 C.P.C. (2d) 217 (Ont. H.C.) — referred to

Straka v. Humber River Regional Hospital (2000), 2000 CarswellOnt 4114, 1 C.P.C. (5th) 195, 51 O.R. (3d) 1, 137 O.A.C. 316, 193 D.L.R. (4th) 680 (Ont. C.A.) — considered

TD Insurance Home & Auto v. Sivakumar (Litigation Guardian of) (2006), 38 C.C.L.I. (4th) 27, 268 D.L.R. (4th) 59, (sub nom. *TD Insurance Home & Auto c. Sivakumar (tuteur à l'instance de)*) 80 O.R. (3d) 680, 211 O.A.C. 316, 29 C.P.C. (6th) 359, 80 O.R. (3d) 671, 2006 CarswellOnt 3132 (Ont. C.A.) — referred to

Statutes considered:

Regulated Health Professions Act, 1991, S.O. 1991, c. 18

s. 36(3) — referred to

Rules considered:

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

R. 30.04(5) — considered

R. 30.10 — considered

R. 37.17 — referred to

***R.J. Sharpe J.A.* (orally):**

1 Dr. Gary Perkin and the Strathroy Middlesex General Hospital appeal from the order of Rogin J. requiring the production of certain documents relating to an intended medical malpractice action.

2 The motion for pre-action discovery was brought pursuant to rule 37.17. We are satisfied that the motion could not proceed under that rule as it is conceded that there was no urgency.

3 We agree with the appellants that rule 30.04(5) does not contemplate an order for pre-action discovery. That rule is available to a "party" and accordingly, only applies where a proceeding has been commenced. See *TD Insurance Home & Auto v. Sivakumar (Litigation Guardian of)* (2006), 80 O.R. (3d) 671 (Ont. C.A.). As the respondents had not commenced an action, they have no right to invoke rule 30.04(5).

4 Similarly, rule 30.10 which provides for discovery against a non-party may be invoked only by a "party" which means that an action must have been commenced. Moreover, any form of production against the non-party must relate to a material issue which can only be determined by reference to the pleadings.

5 English decisions according broader rights to pre-action discovery are based upon legislation and rules which find no equivalent in Ontario law.

6 Pre-pleading, post-commencement of action production may be ordered in exceptional circumstances to enable a party to plead: see *Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (Ont. H.C.) at p. 219. However, in this case no action had been commenced and in any event, the respondents have not made out a case for such an exceptional order. They already have retained experts and there is no evidence that production is required for them to obtain an opinion.

7 The motions judge did not find that pre-action production was required to enable the respondents to plead. Moreover, on this record, it would be impossible to make such a finding.

8 There is no authority for the proposition cited by the motion judge in paragraph 5 of his reasons, namely, that "the intended plaintiffs in this case should be entitled at this time to disclosure of anything to which they would eventually be entitled." In our view, this proposition cannot be supported in law.

9 The equitable remedy of a bill of discovery is preserved in Ontario law and does permit pre-action discovery in certain circumstances: see *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1 (Ont. C.A.). Properly conceived, the relief sought by the respondents should have been presented as an application for a *Straka* order. In any event, we are satisfied that with the information that the respondents have already obtained from the hospital and with the information obtained from the College of Physicians and Surgeons, they are in possession of ample information to formulate and plead their case and we see no basis for a *Straka* order. The order appealed from represents a significant departure from the ordinary procedure laid down by the rules of court relating to pleadings and discovery that is not required in the circumstances of this case.

10 We agree with the appellants that the respondents were precluded by the *Regulated Health Professions Act 1991*, R.S.O. 1991 c. 18 s. 36(3) from adducing in evidence on the motion the report of the College of Physicians and Surgeons disposing of the complaint against Dr. Perkin and that accordingly, that portion of the evidence should be struck and removed from the court record.

11 In view of our disposition of these issues, it is unnecessary for us to deal with the other issues raised by the appellants relating to privilege.

12 For these reasons, the appeal is allowed and the order of motion judge is set aside. Costs to Dr. Perkin fixed at $10,000 and to the Strathroy Middlesex General Hospital fixed at $5,000, both figures inclusive of disbursement and GST.

Appeal allowed.

2013 ONSC 6635
Ontario Superior Court of Justice [Commercial List]

Montor Business Corp. (Trustee of) v. Goldfinger

2013 CarswellOnt 14983, 2013 ONSC 6635, [2013] O.J. No. 4871, [2014] W.D.F.L. 940, [2014] W.D.F.L. 941, 237 A.C.W.S. (3d) 296, 8 C.B.R. (6th) 200

A. Farber & Partners Inc., the trustee of the bankruptcy estates of Montor Business Corporation, Annopol Holdings Limited and Summit Glen Brantford Holdings Inc. Applicant and Morris Goldfinger, Goldfinger Jazrawy Diagnostic Services Ltd., Summit Glen Bridge Street Inc., Mahvash Lechcier-Kimel, Annopol Holdings Limited and Summit Glen Brantford Inc. Respondents

In the Matter of the Bankruptcy of Summit Glen Waterloo/2000 Developments Inc.

D.M. Brown J.

Heard: October 10, 11, 2012; December 3-5, 2012; February 12-13, 2013; June 20, 2013
Judgment: October 28, 2013
Docket: 10-8629-00CL, 31-OR-207640-T

Proceedings: additional reasons at *Montor Business Corp. (Trustee of) v. Goldfinger* (2014), 2014 CarswellOnt 1169, 2014 ONSC 756 (Ont. S.C.J. [Commercial List])

Counsel: P. Shea, F. Lamie for A. Farber & Partners Inc., Trustee of the bankruptcy estates of Montor Business Corporation, Annopol Holdings Limited, Summit Glen Brantford Holdings Inc. and Summit Glen Waterloo/2000 Developments Inc.
M. Davis, B. Hughes for Morris Goldfinger, 1830994 Ontario Limited and Goldfinger Jazrawy Diagnostic Services Ltd.
F. Tayar for Mahvash Lechcier-Kimel
M. McQuade for Morris Goldfinger, 1830994 Ontario Limited and Goldfinger Jazrawy Diagnostic Services Ltd. on the charging order motion

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Public; Torts; Civil Practice and Procedure; Contracts; Restitution
Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.5 Trust property
VIII.5.e Miscellaneous
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.3 Settlements of property
XI.3.e Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.2 Trustees
XIV.2.j Duty to act fairly
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.C Oppressive conduct
III.3.e.ii.C.1 Improper payment by corporation
Professions and occupations
IX Barristers and solicitors
IX.8 Solicitor's lien
IX.8.b Statutory charging order
IX.8.b.ii Entitlement

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — Miscellaneous

MG invested money with JK, real estate developer who owned SG group of companies — Relationship soured, resulting in two settlement agreements — MG brought action alleging breach of first settlement agreement — Several of SG group companies were placed into bankruptcy — In bankruptcy of SGW Ltd., MG moved for determination of priority of several claims advanced against proceeds realized from sale of property — Motion really involved examination and determination of proofs of claim in SGW Ltd. bankruptcy under s. 135 of Bankruptcy and Insolvency Act, exercise which trustee in bankruptcy had not performed ("claims motion") — Second proceeding consisted of application by trustee asserting preference-like claims against MG in capacity as trustee in bankruptcy of companies MB Corp., A Ltd., and SGBH Inc. ("preferences application") — MG's trial lawyers moved for order granting them charging order over any proceeds MG obtained from these proceedings — Determination was made as to claims motion — Trustee provided sufficient evidence in support of claim that SGW Ltd., at time of its bankruptcy, was indebted to MB Corp. in amount of $500,000, such indebtedness being secured by MB Corp. $500,000 charge — SGW Ltd. was indebted to MB Corp. for further sum of $25,000, but as unsecured claim, as security was never given for that amount — Evidence supported finding that at date of SGW Ltd.'s bankruptcy it owed A Ltd. at least $100,000 and that indebtedness was secured by A Ltd. $100,000 charge — Claim of trustee for secured claim in respect of $750,000 charge was disallowed, as A Ltd. did not advance any funds to SGW Ltd. when latter granted charge — Determination was also made as to claim by MG's company, 183 Ltd., based on assignment of Community Trust Company (CTC) mortgages — Claim in respect of CTC $50,000 and $500,000 charges was allowed.

Bankruptcy and insolvency --- Property of bankrupt — Trust property — Miscellaneous

MG invested money with JK, real estate developer who owned SG group of companies — Relationship soured, resulting in two settlement agreements — MG brought action alleging breach of first settlement agreement — Several of SG group companies were placed into bankruptcy — In bankruptcy of SGW Ltd., MG moved for determination of priority of several claims advanced against proceeds realized from sale of property — Motion really involved examination and determination of proofs of claim in SGW Ltd. bankruptcy under s. 135 of Bankruptcy and Insolvency Act (BIA), exercise which trustee in bankruptcy had not performed ("claims motion") — Second proceeding consisted of application by trustee asserting preference-like claims against MG in capacity as trustee in bankruptcy of companies MB Corp., A Ltd., and SGBH Inc. ("preferences application") — MG's trial lawyers moved for order granting them charging order over any proceeds MG obtained from these proceedings — MG argued that since he made all of cash payments for acquisition of property by SGW Ltd., as well as payment against VTB mortgage, he was entitled to constructive trust claim against estate of SGW Ltd. for those amounts — Claim for constructive trust dismissed — MG did not comply with claims mechanisms specified in BIA, having failed to file proof of claim in respect of trust property claim or proof of claim in respect of related debt or liability claim — Claim also failed for substantive reasons — Evidence did not support claim for constructive trust in respect of monies MG advanced to SGW Ltd. to finance part of purchase price for property and to make payment against VTB — Second release precluded MG from asserting such claim at this point in time — There was no injustice requiring remedy by way of constructive trust.

Bankruptcy and insolvency --- Administration of estate — Trustees — Duty to act fairly

MG invested money with JK, real estate developer who owned SG group of companies — Relationship soured, resulting in two settlement agreements — MG brought action alleging breach of first settlement agreement — Several of SG group

companies were placed into bankruptcy — In bankruptcy of SGW Ltd., MG moved for determination of priority of several claims advanced against proceeds realized from sale of property — Motion really involved examination and determination of proofs of claim in SGW Ltd. bankruptcy under s. 135 of Bankruptcy and Insolvency Act, exercise which trustee in bankruptcy had not performed ("claims motion") — Second proceeding consisted of application by trustee asserting preference-like claims against MG in capacity as trustee in bankruptcy of companies MB Corp., A Ltd., and SGBH Inc. ("preferences application") — MG's trial lawyers moved for order granting them charging order over any proceeds MG obtained from these proceedings — MG made allegations of conflict of interest against trustee — Court expressed concern that trustee, by acting as trustee for both bankrupt and claimants, did not afford court full benefit of independent arguments in respect of claims on behalf of estate, on one hand, and claimants, on other — That said, trustee provided sufficiently fulsome record relating to claims advanced — Court was not persuaded that trustee's obvious conflict of interest in claims procedure caused inadequate record to be placed before court, although court required trustee to provide more sufficient information regard particular claim.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Miscellaneous

MG invested money with JK, real estate developer who owned SG group of companies — Relationship soured, resulting in two settlement agreements — MG brought action alleging breach of first settlement agreement — Several of SG group companies were placed into bankruptcy — In bankruptcy of SGW Ltd., MG moved for determination of priority of several claims advanced against proceeds realized from sale of property — Motion really involved examination and determination of proofs of claim in SGW Ltd. bankruptcy under s. 135 of Bankruptcy and Insolvency Act, exercise which trustee in bankruptcy had not performed ("claims motion") — Second proceeding consisted of application by trustee asserting preference-like claims against MG in capacity as trustee in bankruptcy of companies MB Corp., A Ltd., and SGBH Inc. ("preferences application") — MG's trial lawyers moved for order granting them charging order over any proceeds MG obtained from these proceedings — Determination was made as to preference application — Trustee's claim for declaration under s. 96(1) of Act to set aside payment of $2.5 million to MG was dismissed — Payment was not made by debtor with intent to defraud, defeat or delay creditor — Finding was same with respect to Assignments and Preferences Act and Fraudulent Conveyances Act claims.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Improper payment by corporation

MG invested money with JK, real estate developer who owned SG group of companies — Relationship soured, resulting in two settlement agreements — MG brought action alleging breach of first settlement agreement — Several of SG group companies were placed into bankruptcy — In bankruptcy of SGW Ltd., MG moved for determination of priority of several claims advanced against proceeds realized from sale of property — Motion really involved examination and determination of proofs of claim in SGW Ltd. bankruptcy under s. 135 of Bankruptcy and Insolvency Act (BIA), exercise which trustee in bankruptcy had not performed ("claims motion") — Second proceeding consisted of application by trustee asserting preference-like claims against MG in capacity as trustee in bankruptcy of companies MB Corp., A Ltd., and SGBH Inc. ("preferences application") — MG's trial lawyers moved for order granting them charging order over any proceeds MG obtained from these proceedings — Trustee challenged payment of $2.5 million to MG under oppression provisions in s. 248 of Business Corporations Act (BCA) — Claims under ss. 130(4) and 248 of BCA were dismissed; claims by trustee for return of $2.5 million paid by A Ltd. to MG were dismissed — It was found that at time of payments there was no intent to defeat, hinder, delay or defraud creditors — Same findings were relied upon to conclude that A Ltd.'s payment to MB did not violate reasonable expectations of its creditors — Claim against director of A Ltd. also failed — Payments to MB were not payments under ss. 30 or 38 of BCA — Trustee's claim under s. 96(1) of BIA was dismissed, and it followed that claim against director of A Ltd. under that section as privy was also dismissed.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Settlements of property — Miscellaneous

MG invested money with JK, real estate developer who owned SG group of companies — Relationship soured, resulting in two settlement agreements — MG brought action alleging breach of first settlement agreement — Several of SG group companies were placed into bankruptcy — In bankruptcy of SGW Ltd., MG moved for determination of priority of several claims advanced against proceeds realized from sale of property — Motion really involved examination and

determination of proofs of claim in SGW Ltd. bankruptcy under s. 135 of Bankruptcy and Insolvency Act (BIA), exercise which trustee in bankruptcy had not performed ("claims motion") — Second proceeding consisted of application by trustee asserting preference-like claims against MG in capacity as trustee in bankruptcy of companies MB Corp., A Ltd., and SGBH Inc. ("preferences application") — MG's trial lawyers moved for order granting them charging order over any proceeds MG obtained from these proceedings — Trustee sought to set aside certain charges — Trustee also sought to set aside payment of $471,000 to MG — Trustee's claim under s. 96(1) of BIA dismissed; relief in respect of $471,000 granted — At time of closing of first settlement, JK and his signatory companies did not intend to defraud, defeat or delay creditors — Payment of $471,000 to MG was to be declared void, and MG had to repay that amount to trustee — MG knew that payment of $471,000 to him would prefer his interests over those of MB Corp. — MG sought and obtained payment with intent to defeat, hinder, delay or defraud another creditor, MB Corp.

Professions and occupations --- Barristers and solicitors — Solicitor's lien — Statutory charging order — Entitlement

MG invested money with JK, real estate developer who owned SG group of companies — Relationship soured, resulting in two settlement agreements — MG brought action alleging breach of first settlement agreement — Several of SG group companies were placed into bankruptcy — In bankruptcy of SGW Ltd., MG moved for determination of priority of several claims advanced against proceeds realized from sale of property — Motion really involved examination and determination of proofs of claim in SGW Ltd. bankruptcy under s. 135 of Bankruptcy and Insolvency Act, exercise which trustee in bankruptcy had not performed ("claims motion") — Second proceeding consisted of application by trustee asserting preference-like claims against MG in capacity as trustee in bankruptcy of companies MB Corp., A Ltd., and SGBH Inc. ("preferences application") — MG's trial lawyers moved for order granting them charging order over any proceeds MG obtained from these proceedings — Motion for charging order granted, on terms — Fairness required that solicitor's lien be lifted to extent of requiring firm to deliver to MG those portions of its files dealing with documentation relating to certain issues — Requiring MG to pay $40,000 against unpaid amount, without prejudice to any right to assess firm's accounts, constituted reasonable and proportionate condition for lifting lien to extent to enable MG to deal with remaining issues — Normal course was to prevail, and any net funds attached by charging order were to be paid to firm.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Abou-Rached, Re (2002), 2002 BCSC 1022, 2002 CarswellBC 1642, 35 C.B.R. (4th) 165 (B.C. S.C.) — considered

Bank of Montreal v. Bonner (1988), 1988 CarswellBC 500, 38 B.L.R. 45 (B.C. S.C.) — referred to

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Statutes considered:

Assignments and Preferences Act, R.S.O. 1990, c. A.33

Generally — referred to

s. 4 — considered

s. 4(1) — considered

s. 4(2) — considered

s. 5(1) — considered

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

Generally — referred to

s. 2 "equity claim" — considered

s. 2 "insolvent person" — considered

s. 2 "property" — considered

s. 2 "transfer at undervalue" — considered

s. 4(2) — considered

s. 4(3) — considered

s. 4(4) — considered

s. 4(5) — referred to

s. 47 — considered

s. 81(1) — considered

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

s. 95 — considered

s. 95(1) — considered

s. 96 — considered

s. 96(1) — considered

s. 96(1)(a) — considered

s. 96(1)(a)(iii) — considered

s. 96(2) — considered

s. 124 — considered

s. 124(4) — considered

s. 135 — considered

s. 135(1) — considered

s. 140.1 [en. 2005, c. 47, s. 90] — considered

s. 144 — considered

s. 170 — considered

s. 244 — considered

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

s. 30 — considered

s. 30(2) — considered

s. 31 — considered

s. 32 — considered

s. 38 — considered

s. 38(3) — considered

s. 130 — considered

s. 130(2)(b) — considered

s. 130(2)(d) — considered

s. 130(2)(f) — considered

s. 130(4) — considered

s. 135(1) — referred to

s. 135(3) — referred to

s. 245 "complainant" (c) — referred to

s. 248 — considered

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

Generally — referred to

s. 2 — considered

s. 3 — considered

s. 4 — considered

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

Generally — referred to

Land Titles Act, R.S.O. 1990, c. L.5

s. 101(4) — referred to

Mortgages Act, R.S.O. 1990, c. M.40

s. 17 — referred to

Partnerships Act, R.S.O. 1990, c. P.5

s. 4 — considered

Planning Act, R.S.O. 1990, c. P.13

Generally — referred to

Real Property Limitations Act, R.S.O. 1990, c. L.15

Generally — referred to

Rules considered:

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

R. 15.03(5) — considered

DETERMINATION of issues with respect to claims motion, preferences application, and motion for charging order.

***D.M. Brown J.*:**

I. Overview of these two proceedings

1 Starting in about 1999, Dr. Morris Goldfinger invested approximately $6.5 with Jack Lechcier-Kimel ("Kimel"), a real estate developer who owned a group of companies known as the Summit Glen group of companies. In 2007 their relationship soured, which led Goldfinger and Kimel to enter into settlement agreements in 2008 and 2009. Goldfinger's allegation that Kimel had breached the first, 2008 settlement agreement led him to sue Kimel and several of his companies. At the end of the day, several of the Summit Glen companies were placed into bankruptcy, with A. Farber & Partners Inc. ("Farber") appointed as trustee in bankruptcy.

2 Two proceedings were heard together by way of a hybrid trial. First, in the bankruptcy of one of the Summit Glen companies, Summit Glen Waterloo/2000 Developments Inc. ("SGW"), Goldfinger moved for the determination of the priority of several claims advanced against the $3.8 million in proceeds realized from the sale of the 105 University Avenue, Waterloo property once owned by SGW. In actual fact, the motion really involved the examination and determination of proofs of claim in the SGW bankruptcy under section 135 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3, an exercise which Farber, as trustee of SGW, had not performed. I will call that proceeding the "Claims Motion".

3 The second proceeding consists of an application commenced by Farber in which it asserted a number of preference-like claims against Goldfinger in its capacity as trustee in bankruptcy of three companies: Montor Business Corporation, which was not related to Kimel, as well as Annopol Holdings Limited and Summit Glen Brantford Holdings Inc., which were related to Kimel. I will call that proceeding the "Preferences Application".

4 Both proceedings were supported by extensive documentary records, including the transcripts of several out-of-court cross-examinations. In view of certain credibility issues surrounding some of the evidence, I conducted a hybrid trial of both proceedings in which focused *viva voce* evidence was heard from Kimel and two lawyers who had acted for Goldfinger at the time of the first, 2008 settlement.

5 Following the conclusion of the trial, Goldfinger changed lawyers. His trial lawyers, the Davis Moldaver LLP firm, thereupon moved for an order granting them a charging order over any proceeds Goldfinger obtained from these proceedings. I reserved judgment on that motion until the release of these Reasons on the two main proceedings.

6 These Reasons will first deal with the Claims Motion regarding the proceeds from the sale of 105 University, then with the Preferences Application and, finally, with the Charging Order Motion. To put those issues into their proper context requires a general description of the history of the business relationship between Goldfinger and Kimel.

II. The history of the relationship between Jack Lechcier-Kimel and Dr. Morris Goldfinger

A. The business relationship

7 Jack Lechcier-Kimel was in the business of developing real estate. To that end, he incorporated a number of companies, together known as the Summit Glen group of companies.

8 Kimel was a good friend of a radiologist, Dr. Morris Goldfinger. In about 1999 or 2000, Goldfinger agreed to provide money to some of Kimel's Summit Glen group of companies to fund the development and operational expenses

of various properties. From February, 1999 until December, 2005, Goldfinger advanced about $6.5 million to Kimel's companies. [1]

9 In his November 4, 2008 affidavit Goldfinger described those advances as "interest free shareholder loans" and his arrangement with Kimel as a "joint venture" - "I had been a business partner, half-owner, and shareholder to the joint venture for more than seven years..." [2] In his September 6, 2011 affidavit Goldfinger deposed that under his arrangement with Kimel he would "have a 50% equity interest in each of the various properties", and Goldfinger was to receive 50% of the net profits realized from the sale of the properties in respect of which he was making loans - net, that is, of the repayment of his loans. As Kimel described the arrangement at trial:

> A. [Goldfinger] provided the capital, the equity with which to purchase properties and my function was to manage and redevelop the properties to a higher state where they could be sold for a profit that we would then share.
>
> Q. And do I understand that these moneys that Dr. Goldfinger advanced were loans to you or the companies and that he was to get no interest on the loans but he was to get 50% of the profits after they were resold?
>
> A. Yes, that's correct.
>
> Q. And, am I correct that there, this agreement was never reduced to writing?
>
> A. No, it wasn't. [3]

10 In one of his affidavits Goldfinger described the nature of his business relationship with Kimel as follows:

> ...we agreed upon the following terms:
>
> (a) Kimel suggested that I should participate as an equal business partner and 50% shareholder in the Summit Glen Companies (as defined herein). I would provide capital in the form of interest free shareholder loans, and in exchange, Kimel, acting as director and project operator, would provide ongoing property management at no fee or salary.
>
> (b) Both Kimel and I would retain a 50% interest in the joint venture, and a 50% ownership interest in each of the purchased properties. Kimel and I also agreed that I would become an equal business partner in the Raleigh Street Properties.
>
> (c) At all times, I retained the right to demand repayment of the shareholder loans, in addition to 50% of any growth or profit on the properties.
>
> (d) I was not obligated to provide financing to projects I did not agree to participate in. I was fully aware that Kimel had other ongoing business interests, and was not interested in providing financing to all of his projects. As such, we agreed that the projects I chose to fund would be kept separate from his other interests. Where I acted as financier, I would also act as guarantor for any first mortgage financing as would be reasonably required. [4]

11 In the Preferences Application Farber took the position that it was intended Goldfinger would be a 50% owner of the various SG group of companies into which he had invested his funds, [5] including Annopol.

B. The First Settlement: 2007/2008

12 In 2007 the business relationship between Goldfinger and Kimel broke down, and they began to negotiate its dissolution. The negotiations resulted in the "First Settlement" memorialized by a Memorandum of Agreement dated

December 11, 2007, but signed on May 20, 2008 and then amended on June 6, 2008. Under the First Settlement, Goldfinger would withdraw from the various projects by being repaid his shareholder loans of $6.5 million, as well as receiving an additional $5 million for what was thought at the time to be his equity in the properties by selling his shares in the various companies to Kimel.

13 As part of the negotiations of the First Settlement, Goldfinger was paid $2.5 million in December, 2007 and January, 2008. He described the payment as "consideration in contemplation of the settlement, without which I would not have proceeded to any kind of written settlement". [6] Kimel testified that the payments were "made in anticipation of the settlement". [7]

14 According to Kimel, the funds used to make that payment largely came from the sale in October, 2007 of a property owned by Summit Glen Fairway and the remortgaging of the Summit Glen Trayvan properties, with Kimel and his then wife, Mahvash Lechcier-Kimel, contributing about $200,000 of their personal funds. [8] (The actual details about the source of those payments will be discussed below.)

15 Farber, however, contended that the cheques issued in December, 2007 and January, 2008 to pay Goldfinger the $2.5 million came from Annopol, with those post-dated cheques describing the $2.5 million as payment for the "re-purchase shares". Farber also stated that the $2.5 million paid to Goldfinger came from (a) inter-company loans from related companies and (b) a loan by a third-party to Annopol. Farber asserted that Goldfinger was aware that Annopol was borrowing money to pay him. [9]

16 Although Goldfinger received that $2.5 million payment in late 2007, most of the transactions contemplated by the First Settlement did not close until June 8, 2008.

C. Kimel's breach of the First Settlement and Goldfinger's enforcement actions

17 Goldfinger contended that no sooner had Kimel entered into the 2008 First Settlement, than he breached it, in large part by dealing improperly with properties which formed part of the settlement — i.e. SG Trayvan gave a $4 million mortgage to Community Trust Company, and soon after Kimel sold the SG Fairway property.

18 In July, 2008, Goldfinger had made demands on SG Brantford and SG Bridge, as well as others, and delivered notices pursuant to s. 244 of the *Bankruptcy and Insolvency Act* to those companies.

19 On October 31, 2008, Goldfinger commenced an action seeking damages and the appointment of a receiver over a number of SG companies, including SG Brantford and SG Bridge (the "Goldfinger Action").

20 In November, 2008, Goldfinger moved in that action to appoint Zeifman & Partners Inc. ("Zeifman") as interim receiver of several SG companies, including Summit Glen Waterloo, SG Brantford and SG Bridge. By order made December 1, 2008 this Court appointed Zeifman & Partners as receiver of a number of the SG companies to which Goldfinger had made loans, including SGW, but not Annopol.

21 The appointment of a receiver caused some of the SG companies to default on loans made to them by third party lenders. That ultimately resulted in Montor, a company owned by Jack Perelmuter, an accountant who had provided accounting services to Kimel's companies, making an assignment in bankruptcy on February 6, 2009. Farber was appointed Montor's trustee. As such, Farber then issued a series of bankruptcy applications which resulted in its appointment as trustee in bankruptcy for Annopol, SGW and SG Brantford:

> (i) Kimel's wife, Mahvash Lechcier-Kimel, was the sole director of Annopol which was adjudged bankrupt on May 27, 2010; the date of the initial bankruptcy event was May 26, 2009. Farber was appointed the trustee;
>
> (ii) SGW owned an apartment development located at 105 University Avenue, Waterloo. SGW was adjudged bankrupt on June 28, 2010; the date of the initial bankruptcy event was April 3, 2009. Farber was appointed

trustee. As mentioned, in the SGW bankruptcy proceedings Farber sold that property and the proceeds of $3.8 million were paid into court;

(iii) Kimel owned all the shares of Summit Glen Group of Companies Inc. ("SGG") which was adjudged bankrupt and Farber was appointed its trustee in bankruptcy; and,

(iv) Kimel owned all the shares of SG Brantford, which was adjudged bankrupt on May 27, 2010; the date of the initial bankruptcy event was April 30, 2009. Again, Farber was appointed the trustee.

22 The appointment of the receiver also resulted in Goldfinger and Kimel defaulting on loans made to them by Community Trust Company which had been guaranteed by SGW.

23 A number of motions were brought in that receivership. Certain secured creditors successfully applied to remove properties out of the receiver's possession. Farber also moved to discharge the receiver over SG Brantford so that it could proceed with its bankruptcy application against that company, but the motion was never heard because Kimel and Goldfinger reached a new settlement of their dispute.

D. The Second Settlement: 2009

24 On December 16, 2009, Goldfinger and Kimel, Annopol and SGW settled the Goldfinger Action by entering into Minutes of Settlement (the "Second Settlement"). Goldfinger agreed to certain releases as part of that Second Settlement. Zeifman was discharged as receiver in May, 2010.

25 The key terms of the Second Settlement were as follows:

a) Goldfinger would receive a mortgage with a face value of $5 million on 40 Park Lane Circle, Toronto, a high-end property in the Bridle Path area, which Kimel earlier had bought in Mahvash's name for $9.5 million and upon which they were building a luxury house;

b) the mortgage granted to Goldfinger on SG Waterloo's property at 105 University as part of the First Settlement would be discharged and replaced with a $5 million mortgage;

c) the payments to Goldfinger would be capped at $5 million. This would include any money Goldfinger had collected after the First Settlement, but not the $2.5 million he was paid in December 2007 or the $471,000 from the SG Brantford re-financing;

d) the legal proceedings would be discontinued; and,

e) the parties would exchange full and final mutual releases.

26 Goldfinger deposed that the Second Settlement represented a serious compromise of his interests: he gave up his right to further debt repayment, and mortgages he held were significantly downgraded. In his September 27, 2010 affidavit, Goldfinger deposed:

I made significant compromises to my rights through the 2009 Settlement Agreement, as I was entitled to no further repayment of the debt that was owed to me.

I agreed to significantly change the terms of my remaining security interests against 105 University and 41-67 Valleyview Road by converting them into long-term mortgages. In addition, I took on a long-term mortgage against a property that may never have sufficient equity to pay the outstanding debt to me, being Mahvash's uncompleted residential property at 40 Park Lane Circle, Toronto.

The 2009 Settlement Agreement was precipitated by the fact that Jack was causing extensive costs to be incurred, and at the same time was likely to be adjudged bankrupt — which subsequently occurred when he made an assignment.

> This, together with the fact that little, if any, additional assets to which I had an entitlement appeared to be available — other than those already included in the Receivership — and the fact that the Receiver's requested information was not being forthcoming, were the factors that led to the 2009 Settlement Agreement. [10]

27 The Second Settlement was completed in January, 2010. Before that, Goldfinger waived registration of the $5 million mortgage on the SG Waterloo property. The $5 million mortgage on 40 Park Lane Circle was registered on January 29, 2010 in third position, behind HSBC's mortgage for $9.5 million and a judgment in favour of Community Trust Company for $4 million.

E. Post-Second Settlement Events

28 On March 19, 2010, Farber, in its capacity as trustee in bankruptcy for SGW, Annopol and SG Brantford, commenced the Preferences Application.

29 In August and September, 2010, Goldfinger acquired the shares of SGW through transactions with Kimel and his wife, Mahvash. That couple had separated in January, 2009 and divorced in November, 2010. Mahvash married Goldfinger shortly thereafter, on November 18, 2010.

30 I will deal in greater detail with some of these events at the appropriate points later in these Reasons. Let me turn, first, to the issues in the Claims Motion.

III. The Claims Motion: the Summit Glen Waterloo Property

A. The property and its realization

31 Summit Glen Waterloo/2000 Developments Inc., an *OBCA* corporation incorporated on April 11, 2000, owned property located at 105 University Avenue, Waterloo (the "Property"). SGW had purchased 105 University pursuant to an agreement of purchase and sale with Bolliger Holdings Corporation dated January 12, 2000, for $950,000.

32 On April 3, 2009, Farber, acting as trustee of Montor, applied for a bankruptcy order against SGW. A bankruptcy order was made against SGW over a year later, on June 28, 2010. Farber was appointed trustee. Pursuant to a consent order made November 22, 2010, Farber sold 105 University for $3,807,504.68. Those funds were paid into court; the trial of the Claims Motion concerned the entitlement of certain claimants to those proceeds.

B. The claims and the issues

33 At trial, several claims were advanced against the proceeds of the sale of 105 University, Waterloo:

> (i) *Montor Business Corporation*. Farber acts as Montor's trustee in bankruptcy and it advanced a secured claim of $500,000 in respect of a loan made to SGW in December, 2005 and extended twice. The loan was secured by a charge on title to the Property. There is no dispute that at the direction of SGW, Montor paid the proceeds of the loan to Annopol. 183 and Goldfinger took the position that by paying the loan proceeds to Annopol, Montor enjoyed no claim, secured or otherwise, against the SGW sale proceeds or, as put by Goldfinger in his December 16, 2010 affidavit: "[T]here is no credible evidence that... Montor advanced any funds to SG Waterloo in support of the secured interest that is registered in [its] favour". Montor also advanced a secured claim in the amount of $25,000.00.
>
> (ii) *Annopol Holdings Limited*. Farber acts as Annopol's trustee in bankruptcy and asserted a claim against SGW based on inter-company loans with Annopol. SGW signed a $100,000 promissory note in favour of Annopol. As well, SGW granted Annopol a $100,000 charge against the Property and a $750,000 charge against the Property. 183 and Goldfinger opposed Annopol's claim on the basis that Annopol was merely a "conduit"

for money loaned to the Summit Glen group of companies and therefore no indebtedness had arisen between Annopol and SGW.

(iii) *The Summit Glen Group of Companies Inc. ("SGG")*. Again, Farber acts as SGG's trustee in bankruptcy and asserted an unsecured claim against the sale proceeds in the amount of $565,998 based on inter-company loans and payments made by it for the benefit of SGW. 183 and Goldfinger opposed SGG's claim on the basis that the latter was merely a "conduit" for money loaned to Summit Glen companies and therefore no indebtedness had arisen between SGG and SGW.

(iv) *1830994 Ontario Limited*. The principal of 183 is Dr. Morris Goldfinger. 183 advanced claims against SGW based on an assignment to it from Community Trust Company of two mortgages granted to CTC by SGW in the amounts of $50,000 and $500,000; and,

(v) *Dr. Goldfinger*. As a lender of money to Kimel and his companies, Goldfinger asserted a constructive trust claim against the sales proceeds. Also, as the shareholder of SGW, Goldfinger asserted a claim to the sale proceeds. In his notice of motion initiating the Claims Motion, Goldfinger requested that following the determination of the priorities amongst 183, Montor and Annopol, the net surplus funds held in Court be paid out to him.

34 In terms of the registration of the various mortgages against the title to 105 University at the time of SGW's bankruptcy, there is no dispute that as a result of various postponements the CTC mortgages stood in first and second position, followed by the Montor mortgage and then the mortgages granted to Annopol.

35 As claimants, each of Montor, Annopol, SGG and 183 Ontario must prove their claims against SGW. I adopt, as a comprehensive summary of the principles which guide assessing any claim made by a creditor against the estate of a bankrupt the following passages from the decision of the Saskatchewan Court of Queen's Bench in *Mamczasz Electrical Ltd. v. South Beach Homes Ltd.*:

[35] To succeed, the [the creditor] must establish that it has a claim provable in bankruptcy on the day on which the bankrupt became bankrupt... Section 121 of the *BIA* is the governing section and it provides:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[36] The scope of 'debt' and 'liability', employed in that provision, has been succinctly summarized in text authorities:

A debt is a sum due by certain and express agreement, a specified sum of money owing to some person from another, including not only the obligation of a debtor to pay, but the right of a creditor to receive and enforce payment. To be a provable claim, a debt must be due, either at law or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process.

The meaning of the word "liability" is broader than that of the word "debt", including almost every character of hazard or responsibility and in particular, as provided in s. 121, includes all obligations to which the bankrupt is subject on the day on which he or she becomes bankrupt. [footnotes omitted] (Honsberger and DaRe, *Bankruptcy in Canada*, 4th ed, (Aurora: Canada Law Book, 2009) at p. 390)

[37] Failure to disclose a claim in its records or in its statement of affairs does not affect the validity of the claim and has been found to be an irrelevant consideration. *Flewitt v. Agravoice Productions Ltd. (Trustee of)* (1986), 61 C.B.R. (N.S) 280.

[38] Inasmuch as s. 121 deals with the substantive right to participate in estate assets, sections 121 and 135, read together, address the method and process employed to determine claims. These sections provide:

> 124. (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
>
> (2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.
>
> . . .
>
> (4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.
>
> . . .
>
> 135.(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> . . .
>
> (2) The trustee may disallow, in whole or in part,
>
> (a) any claim;
>
> (b) any right to a priority under the applicable order of priority set out in this Act; or
>
> (c) any security.

. . .

[39] It is undisputed that a creditor who wishes to participate and share in estate dividends must prove its claim. (s. 124(1) *BIA*) This process begins with filing a proof of claim in the prescribed form which shows and/or includes:

> ... the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated." (s.124(4) *BIA*)

[40] The underlined words in s. 124(4) clearly impose an evidentiary burden on creditors to file sufficient and adequate material to enable the trustee to "make an informed decision as to whether the claim has merit." (Roderick Wood, *Bankruptcy & Insolvency Law*, (Toronto: Irwin Law, 2009) at p. 243) Subsection 135(1) imposes a corresponding duty on trustees to examine every proof of claim and the grounds in support to determine validity (s. 135(1) *BIA*). This duty extends to proposals. (*Re Toronto Permanent Furniture Showrooms Co.* (1960), 1 C.B.R. (N.S.) 16).

[41] Where a trustee is unsatisfied with the material provided in support of a claim, the trustee has both a right and duty to demand further evidence from the creditor. In the exercise of this duty, the trustee may conduct examinations or obtain the production of documents. (see s. 163 *BIA*; Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. looseleaf, vol. 2, p. 5-181)

. . .

[44] Decided cases have framed the issue of onus or burden of proof in terms of creditors' duties and sufficiency of response. In *Re Norris* (1988), 67 C.B.R. (N.S.) 246 (Ont. Sup. Ct.) the trustee requested additional material from

the creditor (Canada Revenue Agency "CRA") in support of its claim. The CRA in reply provided a copy of the notice of assessment (*Income Tax Act*, R.S.C. 1985, c. 1 (5th supp.)) but nothing more. The trustee found this reply inadequate and disallowed the claim. Although ultimately overturned on appeal on the 'adequacy' issue ((1989), 75 C.B.R. (N.S.) 97 (Ont. C.A.)), the following comments are worth noting:

> In my opinion the proof of claim with a statement of account, vouchers and/or supporting evidence should be sufficient to enable the trustee to make an informed decision as to whether the claim represents a claim which has merit and should be allowed or whether it is a claim unsupported by particulars and supporting material being in the nature of a claim which the trustee should disallow.

[45] The British Columbia Court of Appeal in *Port Chevrole*, *supra*, considered the appeal from the perspective of creditor compliance with s. 124(4) of the *BIA*. Examined factually, the Court found the creditor had failed to specify the vouchers or provide any other probative evidence to support its claim, and in consequence had failed to meet the threshold of 'sufficiency' required by s. 124(4).

[46] Case authority is quite clear: the creditor bears the onus of establishing its claim. It does so by providing vouchers, statement of account or other evidence sufficient to substantiate it. Put another way, the creditor must provide sufficient evidence so as to enable the trustee to make an informed decision on the validity of the proposed claim. The test to be applied when examining proofs of claim has been described as follows:

> In deciding the validity of a claim, *certainty* is not the test. If the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted. *Re HDYC Holdings Ltd.* 1995 CanLII 488 (BC SC), (1995), 35 C.B.R. (3d) 294. [Houlden and Morawetz p. 5-181; emphasis added]

[47] If a creditor adduces relevant and probative evidence from which a valid claim can be reasonably inferred, the test has been met and the claim is provable. In the face of that, particularly where a trustee has suspicions, the obligation shifts to the trustee to investigate further. Disallowing a claim based on a hunch or suspicion is not enough.

> The trustee is entitled to have all claims investigated and if, necessary, litigated before he or she can be called to pay....The trustee "is entitled to go behind such forms to get at the truth....When the trustee is in doubt as to whether a claim should be allowed or disallowed, the trustee may apply to the court for directions.
>
> [*Bankruptcy In Canada*, p. 409] [11]

C. Some comments about the written record filed at trial

36 Farber reported that it had only been able to recover limited books and records for SGW and Annopol. At one point it had to resort to obtaining entry orders and search warrants to secure SGW records. That, no doubt, hampered Farber's ability to gain a clear picture of the financial history of both companies, however the determination of the various claims will have to be based on what documentation exists and was adduced at trial.

37 Much pre-trial skirmishing went on between counsel for Farber and counsel for Goldfinger over the production of documents in the possession of Farber, wearing its many trustee hats. [12] I wish to express my disappointment at the evident lack of co-operation between counsel, co-operation mandated by the "3Cs" principle of the Commercial List. That lack of cooperation resulted in an unnecessarily large and unfocussed evidentiary record, necessitating its lengthy review, and resulting in the delay in releasing these Reasons.

IV. Summit Glen Waterloo: Montor's claim

A. Evidence

38 Farber, as trustee of Montor, filed an April 29, 2011 proof of claim in the SGW bankruptcy proceeding for a secured claim of $583,486.06, plus interest and costs in accordance with the security. Although the proof of claim recorded the principal amount loaned as $525,000, Farber's January 11, 2011 Report stated that Montor was asserting a secured claim of $500,000, plus interest and costs.

39 Jack Perelmuter, an accountant, owned Montor which carried on business providing mortgage and other loans primarily to Kimel's companies, including SGW and Annopol. Through his accounting firm Perelmuter had provided accounting services to the Summit Glen group of companies, including Annopol, SGW and SGG.

40 On his September 19, 2012 out-of-court examination, Perelmuter stated he could not recall Montor's mortgage transaction with SGW because there had been so many transactions with Kimel. Consequently, his evidence was given at a very general level and Perelmuter, by and large, let the documents speak for themselves.

41 In December, 2005, Montor agreed to loan SGW $500,000 secured by a charge over 105 University. Montor and SGW engaged counsel to document the loan. Kimel, in a December 1, 2005 email to his counsel, Mike McCarter, stipulated that the mortgage to Montor would stand in third place, behind the CTC charges, but ahead of Annopol's and, in addition:

> We would also like all funds from this mortgage to be paid directly to Annopol Holdings Limited rather than the borrower company. Will you please prepare the necessary direction to this effect, for execution by the borrower.

42 Kimel, in a December 2, 2005 email to Perelmutter, which he signed on behalf of SGW, directed that Montor make the cheques for the $500,000 loan payable to Annopol, not SGW, and continued:

> Notwithstanding this, we acknowledge that we [SGW] are solely responsible for the repayment of all and any monies advanced by you under this loan, and all interest that pertains, as it falls due and until maturity of the loan, whether monies were actually advanced to Annopol Holdings or to ourselves.

43 Montor did so. As a result, Montor wrote two December 5, 2005 cheques to Annopol, one for $165,000 and the other for $35,000. The same day Montor wrote a cheque to its lawyers for $300,000 in respect of the "2nd mortgage". Kimel signed a direction authorizing Montor's lawyers to pay the proceeds of the transactions to his own lawyers. That was done, and Kimel's lawyers wrote a cheque to Annopol. In the result, the $500,000 Montor loan was deposited into Annopol's account and, of that amount, about $413,000 was disbursed by Annopol to other SG companies. At trial Kimel did not dispute that Montor had disbursed the borrowed funds in accordance with his direction.

44 On December 12, 2005, Mahvash signed a director's resolution authorizing SGW to borrow $500,000 from Montor and to grant security for the loan.

45 SGW granted Montor a $500,000 charge on 105 University which was registered on December 15, 2005 (the "Montor $500K Charge"). As well, on December 5, 2005, Kimel, on behalf of SGW, executed a promissory note in the amount of $200,000 in favour of Montor. Although Farber could not locate a similar promissory note for the remaining $300,000 of Montor's $500,000 advance to SGW, Kimel testified that he had no doubt such a promissory note had existed. [13] In any event, a subsequent promissory note dated July 7, 2008, given on the extensions of the loan evidenced the $500,000 debt. As part of the December, 2005 transaction, Annopol postponed its two mortgages on the Property to that of Montor.

46 The terms of the loans were such that payments were interest only, and SGW provided Montor with post-dated cheques for the interest payments. [14] Farber adduced evidence that SGW made interest payments to Montor until the appointment of Zeifman as its receiver. Farber was not able to find any evidence that SGW had made payments against the principal amount of the loan.

47 Prior to trial, in an August 24, 2009 affidavit, Kimel had deposed that the funds borrowed from Montor were used for purposes related to SGW. [15] Over a year later, in a November 16, 2010 affidavit, Kimel did an about-face, contending that SGW had received no funds from that mortgage. [16] At trial he questioned the correctness of his initial evidence:

> Q. In paragraph six, you indicate that the proceeds from the loan were paid out for three purposes, to discharge a collateral debt owing to Community Trust by Summit Glen Waterloo, to pay costs related to two Ontario Municipal Board zoning proceedings relating to Summit Glen Waterloo, to pay for the operating and related expense of Summit Glen Waterloo, that statement correct?
>
> A. I'm not sure that is entirely correct, no. [17]

Kimel did admit that some of the money Montor had advanced to Annopol was used to pay SGW, but when at trial he was asked why he was changing his affidavit evidence about the use of the Montor loan, Kimel's answer revealed that little stock can be put parts of his evidence:

> Q. Mr. Davis took you to payments out from Annopol to Summit Glen Fairway. So, could Fairway have been using those fund to pay down Community Trust company?
>
> A. I don't remember that any of the Montor funds were used to pay anything to Community Trust Company.
>
> Q. Okay, then why would you swear they were?
>
> A. In, uh, previous years, prior to my own bankruptcy, and, uh, the collapse of my business, I was involved in many different aspects of litigation, and, um, sometimes in doing affidavits or in providing responses at that point in time, I was often attempting to cater responses to allow for what I thought might still be the protection and ultimate salvation of my business. And, because of the constraints that I felt I may have coloured things in a certain fashion which, uh, was not entirely correct.
>
> Q. So you lied.
>
> A. Yes. [18]

48 At SGW's request, Montor twice renewed the loan and the charge, and Montor loaned an additional $25,000 to SGW by way of cheque dated November 25, 2008. On November 20, 2008, SGW signed a promissory note in favour of Montor for the sum of $525,000, which was accompanied by a "commitment to replace note with mortgage security". No new mortgage security in favour of Montor was registered following that commitment. Perelmuter testified that he was not sure whether Kimel ever gave the commitment to his lawyers: [19]

> And we're renewing it for $500,000 plus 25 which makes 525,000. So basically I would expect that there is going to be 525,000 renewal by a mortgage. I'm not sure that was ever done by him. At this point, this is 2008, maybe at this point he start letting things go. [20]

49 Although Montor's February 6, 2009 statement of affairs in its bankruptcy proceeding listed the amount of the security it held against SGW at $525,000, Montor's bankruptcy application against SGW estimated the value of its security at $500,000, with the amount of the total indebtedness at $525,000. [21]

50 SGW included in its March 31, 2006 and March 31, 2007 financial statements, and showed in its accounting records, the $500,000 debt owing to Montor. [22] Kimel swore a statement of affairs in SGW's bankruptcy which confirmed that SGW owed Montor $500,000 and that Montor enjoyed security over 105 University for that loan.

51 At trial Kimel admitted that SGW was obliged to repay the Montor loan:

> Q. The money wasn't advanced to Annopol, it was paid to Annopol. The loan was to Summit Glen Waterloo, wasn't it?
>
> A. Yes.
>
> Q. And Summit Glen Waterloo was obliged to repay the funds, correct?
>
> A. Yes. [23]

52 Goldfinger and 183 took the position that Montor had failed to prove how much was owing to it on account of its security because it had not accounted for any monies realized from the various companies which had received the proceeds of the December, 2005 Montor loan. 183 and Goldfinger opposed Montor's claim on the ground that since SGW had directed Montor to pay Annopol the proceeds from the loan to SGW, the charge no longer had any effect as against the Property.

B. Analysis

53 There is no dispute that Montor lent $500,000 to SGW. As well, the evidence supports a finding that SGW gave promissory notes in that amount to Montor, both at the time the loan was advanced and on its extension, and I so find. The consideration necessary to support a promissory note includes not only a benefit conferred on the maker of the note, but also a benefit conferred on a third party at the request of the maker of the note. A party to a note may receive value for a note or consideration for a note even though it does not personally receive the proceeds of a loan pursuant to it. [24]

54 Farber submitted that Montor provided SGW with two kinds of consideration in support of the promissory notes — the advance of the $500,000 to the person directed by SGW and the extensions of the loans. Goldfinger contended that the extent of SGW's debt to Montor was limited to those borrowed funds which SGW used for its own corporate purposes. I accept the submission of Farber and reject the position advanced by Goldfinger. SGW, as debtor, directed that the funds it borrowed from Montor be paid to Annopol. Montor complied with the debtor's direction. How SGW, or its designated payee, Annopol, used the funds borrowed by SGW is not relevant to the question of whether SGW is indebted to Montor.

55 SGW granted the Montor $500K Charge to secure the debt evidenced by the promissory notes. 183 and Goldfinger did not question the validity of the charge.

56 Goldfinger argued that because Farber had never accounted for the monies received from the other Kimel Summit Glen companies which received the proceeds of the $500,000 Montor loan, Montor had not established the amount of the debt outstanding to it at the time of the bankruptcy of SGW. I disagree. The indebtedness was that of SGW to Montor. Certainly, if any monies had been re-paid to Montor on account of the $500,000 loan to SGW, either from SGW or from another Summit Glen company at SGW's direction, due account would have to be made for such amounts. However, notwithstanding the extensive documentary disclosure made in this proceeding about the affairs of Montor and SGW, no evidence of any such repayment was adduced. On the contrary, the evidence disclosed the following state of affairs:

> (i) The only repayments of the loan made by SGW or any other Summit Glen company prior to the appointment of Zeifman as receiver of SGW were the monthly payments of interest to Montor in accordance with the terms of the loan;
>
> (ii) Kimel, in his sworn statement of affairs regarding SGW, confirmed that SGW owed $500,000 to Montor; and,
>
> (iii) the financial statements of SGW for the years ended March 31, 2006 and 2007 recorded SGW's debt to Montor of $500,000 as part of its "mortgages payable" liabilities.

57 In light of that evidence, I conclude that Farber, in its capacity as trustee of Montor, has provided sufficient evidence in support of its claim that SGW, at the time of its bankruptcy, was indebted to Montor in the amount of $500,000.00, and that such indebtedness was secured by the Montor $500K Charge.

58 So, too, the evidence adduced by Farber, in its capacity as trustee of Montor, established that SGW was indebted to Montor for the further sum of $25,000 advanced on November 25, 2008. However, the evidence disclosed that SGW never gave security for that amount, so I allow that claim as an unsecured one.

59 Both claims are allowed with interest until the date of payment in accordance with the terms of the loans.

IV. Summit Glen Waterloo: Annopol's claim

A. The amounts claimed

60 Farber, in its capacity as the trustee in bankruptcy of Annopol, advanced claims in the SGW bankruptcy based on inter-company loans made over the years by Annopol to SGW in order to fund operating and development expenses for 105 University. As trustee of Annopol, Farber filed two proofs of claim dated February 28, 2011, in the SGW bankruptcy:

> (i) The First Proof of Claim made an unsecured claim of $420,000 and a secured claim of $100,000. In support of its claim, Farber attached two charts.[25] One recorded payments by Annopol to SGW from its TD Bank account between June 27, 2000 and March 24, 2005, totaling $152,600. The other recorded transactions between Annopol and SGW from an HSBC account showing net payments to SGW of $367,400 between September 13, 2005 and December 4, 2008. In a response to a refusal made on the cross-examination of Martin Cyr, one of the trustees, Farber stated that it arrived at the amount of the claim based upon a review of the banking records of Annopol and SGW to identify inter-company loan transactions;
>
> (ii) The Second Proof of Claim made a secured claim of $750,000. In support of the claim Annopol's trustee attached a SGW director resolution authorizing the borrowing and the Annopol $750,000 Charge. No other evidence to support advances under the charge was attached to the proof of claim. Although on a cross-examination Martin Cyr, the trustee, refused to explain why $750,000 was put in the proof of claim on the basis that the question went beyond the permitted scope of the examination,[26] in a subsequent response Farber stated that it used the $750,000 for Annopol's proof of claim because it "was the face amount of the charge/mortgage".

61 183 and Goldfinger took the position that SGW did not owe any money to Annopol because Annopol had not carried on any business, but merely had acted as a "conduit" for money loaned by third parties to SGW.

62 In his trial evidence Kimel acknowledged that Annopol did carry on some business with third parties, specifically the making of short term loans,[27] and did own some properties, usually for *Planning Act* purposes. On a Statement of Personal Net Worth dated August 29, 2006, long before the breakdown in his relationship with Goldfinger, Kimel went even further, describing Annopol as a "50% joint venture partner in a number of Commercial/Industrial properties located in Southwestern Ontario" with a value of $8 million.[28]

63 As mentioned, Farber also is the trustee in bankruptcy of Annopol. According to a March 19, 2012 Claims Register for that estate, secured claims of about $578,000 and unsecured claims of approximately $6.848 million have been filed, of which Montor filed an unsecured claim for $2.7 million and Goldfinger filed a contingent proof of claim for $2.956 million.

B. Evidence: the Annopol $750K Charge

64 SGW's acquisition of 105 University closed on April 14, 2000. A few days before, on April 11, 2000, Mahvash, as sole director of SGW, passed a resolution authorizing SGW to borrow $750,000 from Annopol upon the terms of a draft mortgage.

65 When SGW acquired the 105 University property on April 14, 2000, Kimel caused Annopol to register against title the Annopol $750K Charge. It was not disputed that at the time of registration Annopol did not advance any money to SGW. [29] Goldfinger deposed that he did not learn about this mortgage until 2007, when his relationship with Kimel soured. I accept his testimony on that point.

66 By its terms, the Annopol $750K Charge required the on-going payment of interest only and the mortgage was to mature two years later. The terms contained in the Schedule to the Charge spoke only about the "principal sum hereby secured", and the Schedule contained the standard "no obligation to advance" clause. Farber was not able to locate any evidence that as of the date of registration Annopol had advanced $750,000 to SGW or that SGW had made a promissory note in that amount to Annopol.

67 In its January 18, 2011 Report Farber stated:

> Farber acknowledges that it does not have much information with respect to the Annopol $750,000 Charge. [30] This is due to the lack of books and records for SG Waterloo and Annopol.
>
> Based on the evaluation of information, it appears that the Annopol $750,000 Charge may have been intended to be collateral security for loans advanced by Annopol to other companies to protect third parties lending money to Annopol.

Farber did produce a schedule summarizing transfers Annopol made to other Summit Glen companies. By the same token, Annopol had the benefit of a number of charges against properties owned by other Summit Glen companies.

68 As of the time of its January 18, 2011 Report, Farber stated that "further evidence is required with respect to the Annopol $750,000 Charge". In its June 25, 2012 Report, Farber stated:

> Aside from the documentary evidence referenced in connection with the Annopol $100K Charge, Farber has not located any documentary evidence to establish that cash advances beyond the advances identified above [i.e. $557,600] were made by Annopol to SG Waterloo.

69 As to advances made by Annopol to SGW subsequent to the granting of the Annopol $750K Charge, Kimel's evidence at trial was inconsistent. On the one hand, under examination by counsel for Farber, Kimel testified as follows:

> Q. Were there subsequent advances?
>
> A. By Annopol to Waterloo?
>
> Q. Yes.
>
> A. Yes.
>
> Q. Yes. So the mortgage would've secured those subsequent advances.
>
> A. I suppose so, yes.
>
> Q. That was what it was intended to do, to ensure that to the extent Annopol was advancing funds into Summit Glen Waterloo, those advances would be protected?
>
> A. Yes.

Q. Thank you. Did you tell Dr. Goldfinger that?

A. No. [31]

. . .

Q. And then in 2009 when you settled with Goldfinger, those mortgages remained on the properties, correct?

A. Yes.

Q. And they would secure any advances, or intended to secure, any advances that Annopol made to Summit Glen Waterloo over the period to develop the property, correct.

MR. DAVIS: Sorry, I missed that question.

Q. Sorry. The intention of the mortgages was to secure advances made by Annopol to Summit Glen Waterloo, correct?

A. Yes.

Q. Thank you. [32]

On the other hand, under examination by Goldfinger's counsel, Kimel contradicted that evidence. [33]

70 On June 22, 2000, Kimel wrote to his lawyer asking that the amount secured by the $750,000 mortgage be increased to $850,000. He had so written in response to his lawyer's letter of June 14, 2000 asking whether Kimel had "had any further thoughts about securing your family's injection of monies into projects with registered mortgages". [34] In the result, the amount of the $750,000 mortgage was not increased.

C. Evidence: The Annopol $100K Charge

71 An October 18, 2000 resolution of the director of SGW approving the Annopol $100K Charge indicated that the charge was to secure advances to be made by Annopol up to $100,000 and was "to better secure the present *and future indebtedness* of the Corporation to the Lender..." SGW executed a *five-year* promissory note dated October 18, 2000 for the lesser principal amount of: (a) $100,000 and (b) "the unpaid balance of all advances made by the Lender to the undersigned under the loan as recorded by the Lender on the grid on the reverse hereof." No amounts were recorded on the grid. On re-examination Kimel contended that he did not read the resolution or promissory note before they were signed.

72 By its terms, the Annopol $100K Charge registered on November 10, 2000, stated:

> This Charge is held by the Mortgagee as security for the payment of all indebtedness of the Company to the Mortgagee relating to loans to Summit Glen Waterloo/2000 Developments Inc. which indebtedness is referred to as the "Indebtedness".

73 It was not disputed that at the time of registration of the Annopol $100K Charge, Annopol did not advance any money to SGW. [35]

74 Kimel testified that there was no loan of money corresponding to the registration of each mortgage. Instead, the mortgages were placed on the property to secure the equity in the property in favour of a company controlled either by Kimel or his wife, Mahvash.

D. The state of the accounts between Annopol and SGW

75 Farber's Reports described three basic features of the financial relationship between Annopol and SGW:

> (i) Between 2000 and 2005 Annopol wrote cheques to SGW which were noted as shareholder loans. When the cheques written by Annopol were deposited into SGW's bank account, they were recorded as loans from Annopol. SGW wrote cheques to Annopol which were described as the repayment of loans;
>
> (ii) From 2005 to 2009 there were multiple transfers between the bank accounts of Annopol and SGW which were recorded as loans from Annopol to SGW and repayments by SGW to Annopol;
>
> (iii) Annopol borrowed funds from third parties which were deposited into its bank accounts, and in most cases the loans to Annopol from third parties did not parallel the transfers from Annopol to SGW in that the records did not disclose a deposit of third party funds into Annopol followed by an immediate payment out of Annopol's bank account to a SG group company;
>
> (iv) The accounting records of Annopol and SGW reflected an inter-company loan from Annopol to SGW, although the quantum of the loan reflected on the accounting records of Annopol and of SGW did not match each other, nor did the quantum match the amount of the inter-company loan determined by Farber based on the companies' banking records.

76 Farber, as trustee for Annopol, relied for its claim on the evidence concerning the intercompany transactions between Annopol and SGW. Farber reported that it had been able to reconstruct the inter-company account for Annopol and SGW for the period March, 2005 until May, 2010 from HSBC account records. In terms of the TD Bank records for the 2000 to 2005 period, Farber reported that they were not as extensive.

Bank account records

77 As mentioned, in support of its First Proof of Claim for an unsecured claim of $420,000 and a secured claim of $100,000 Farber attached two charts: [36]

> (i) One recorded payments by Annopol to SGW from its TD Bank account between June 27, 2000 and March 24, 2005, totaling $152,600;
>
> (ii) The other recorded transactions between Annopol and SGW from an HSBC account showing net payments to SGW of $367,400 between September 13, 2005 and December 4, 2008.

78 In its January 18, 2011 Report Farber stated that SGW owed Annopol no less than $519,600. It continued:

> Farber acknowledges that only $100,000, plus costs and interest, of the obligations owing by SG Waterloo to Annopol will be secured by the Annopol $100,000 Charge and the advances in excess of $100,000 will be an unsecured claim against SG Waterloo.

79 By the time of its June 25, 2012 Report, Farber was stating that between 2000 and 2008 Annopol "appears to have advanced no less than $557,600" to SGW. Farber explained the increase in this amount since the filing of the 2011 proofs of claim as the result of securing additional SGW records from the execution of entry orders and search warrants. Farber reported that based on its review of these additional records, it had determined that between January 27, 2000 and March 24, 2005, Annopol had advanced no less than $190,200 to SGW. [37] Virtually all of the cheques from Annopol, as well as many of the SGW bank deposit slips, contained the notation, "Loan Advance". Farber also adduced a few cheques from SGW to Annopol noted as "partial loan repmt".

Financial statements

80 The SGW unaudited, notice to reader financial statements for the years ended March 31, 2005, 2006 and 2008 did not show the Annopol charges as a liability of SGW. The company's unaudited financial statements for the year ended March 31, 2001 only showed a mortgage payable of $375,000 — i.e. the Bolliger VTB.

81 Annopol's unaudited balance sheet as at February 29, 2008, did record, as an asset, a loan to SGW in the amount of $200,460.00.

Other documents

82 Farber was not able to locate any loan agreements between Annopol and SGW. However, as noted, the October 18, 2000 SGW director's resolution did contemplate future indebtedness arising between SGW and Annopol.

83 In late 2005, when Kimel was trying to entice Perelmuter (of Montor) into lending money to his companies, he wrote a November 30, 2005 email in which he stated the only mortgages registered against 105 University were those held by Community Trust Company; he made no mention of Annopol's mortgages. But, a few days later, on December 1, 2005, in an email to his lawyer, Kimel did refer to an existing third mortgage in favour of Annopol which would have to be postponed to Montor's proposed $500,000 mortgage.

84 The June 28, 2010 statement of affairs for SGW signed by Kimel in the bankruptcy listed Annopol as an unsecured creditor for the amount of $600,000 on the basis that Annopol held security of $750,000, the estimated value of which was only $150,000.

85 Finally, it must be recalled that Farber issued an application for bankruptcy against SGW on April 30, 2009 and obtained a bankruptcy order on June 28, 2010. Farber did not adduce evidence of the net amount owing by SGW to Annopol, if any, on either of those dates.

86 On the cross-examination of Martin Cyr, the trustee at Farber who had ultimate carriage of the SGW bankruptcy file, counsel for Goldfinger sought to elicit information about efforts by Farber to ascertain the amounts owing by SGW to Annopol under each mortgage. Those efforts initially were met with refusals, as disclosed by the following exchanges on the transcript:

> Q. 40: What steps have you or anyone on behalf of Farber's taken to determine how much, if anything, was advanced under that $750,000.00 Annopol mortgage that was registered in April of 2000?
>
> A. What steps were taken as of is this just a general statement or as of the date of the affidavit?
>
> Q. 41: Let's start with as of the date of the affidavit, which is June 25, 2010.
>
> A. As I said, I don't have an answer to that.
>
> Q. 42: Can you undertake to find out and let me know, please?
>
> MR. SHEA: No. This is just going down a path. I would like you to focus on the issue of conflict, as per the order.
>
> Q. 43: And to this date can you tell me what steps, if any, Farber has taken to determine how much, if anything, was advanced pursuant to or in consideration of that mortgage security for $750,000.00?
>
> MR. SHEA: Don't answer the question.
>
> Q. 44 And can you undertake to tell me what steps Farber has taken to determine whether anything was advanced under the $100,000.00 Annopol mortgage?

MR. SHEA: Don't answer the question. [38]

87 By way of summary, the evidence about the state of accounts as between SGW and Annopol filed in support of Annopol's proofs of claim disclosed the following:

(i) Annopol did not advance any funds at the time SGW granted it the Annopol $750K Charge;

(ii) Annopol did not advance any funds at the time SGW granted it the Annopol $100K Charge;

(iii) SGW's financial statements for the years ended March 31, 2005, 2006 and 2008 did not record the Annopol charges as corporate liabilities;

(iv) Bank account records disclosed net payments from Annopol to SGW of: (i) $190,200 for the period June 27, 2000 through to March 24, 2005, and (ii) $367,400 between September 13, 2005 and December 4, 2008;

(v) Annopol's unaudited balance sheet as of February 29, 2008 recorded a loan to SGW in the amount of $200,460; and,

(vi) Notwithstanding that SGW and Annopol continued to operate until the dates of their bankruptcies (June 28, 2010 and May 27, 2010 respectively) - albeit SGW operated under receivership from December 1, 2008 until May, 2010 - Farber did not adduce evidence of the state of the inter-corporate indebtedness between SGW and Annopol as at the date of SGW's bankruptcy.

88 Before considering each of the proofs of claim filed by Annopol, it is necessary to deal with the main argument advanced by Goldfinger that no indebtedness arose during the course of dealings between SGW and Annopol.

E. The financial characterization of the dealings between SGW and Annopol

89 In its Reports Farber concluded that Annopol had acted as a kind of "bank" for the Summit Glen group of companies, including SGW, and had provided, in effect, an operating line of credit to SGW.

90 In response, Goldfinger submitted that the dealings between SGW and Annopol did not give rise to any indebtedness between the companies. Goldfinger advanced two main arguments: (i) a lack of documentation argument, and (ii) an "Annopol as mere conduit" argument.

The lack of documentation argument

91 Goldfinger submitted that Farber had refused his request to provide copies of all Annopol documents and, as a result, no Annopol bank records were placed into evidence save for one from December, 2005. This led Goldfinger to assert that Farber had not proved its "bald statements of loans from Annopol to SGW" and, therefore, Farber's claims with respect to the $850,000 of Annopol mortgages should be disallowed.

92 I have reviewed the extensive materials filed by the parties on the issue of documentary production. While it would be easy to conclude that both parties demonstrated unreasonableness in the various positions they took prior to the hearing about the scope and terms concerning the production of documents, I am satisfied that ultimately Farber provided appropriate access to all relevant documents to counsel for Goldfinger.

93 Moreover, this argument was undermined by evidence which Goldfinger, himself, filed in his Responding Motion Record, Tab 14 of which contained a copy of Annopol's balance sheet and trial balance as at February 29, 2008. It is not clear who at, or who on behalf of, Annopol prepared those documents, although Goldfinger, relying on hearsay from Kimel, deposed that the company's bookkeeper or accountant, Perelmuter, had prepared them. Significantly, and not surprisingly, the balance sheet and trial balance recorded as assets "loans" made by Annopol to many other Summit

Glen Companies, including SGW. Those internal Annopol documents strongly suggested that Annopol treated inter-company advances to SGW as creating loan assets.

The "Annopol as mere conduit" argument

94 Goldfinger also relied on evidence given by Kimel, both before and at trial, that Annopol had operated merely as a "conduit" for funds. As a conduit, he argued, no debtor/creditor relationship existed between SGW and Annopol in respect of any of the funds which flowed between the two companies.

95 At trial, in response to questions posed by counsel for Goldfinger, Kimel explained how Annopol had operated:

> Q. Now, we're going to talk about the fact that various moneys flowed through that company. What was the purpose behind using Annopol for your various business endeavours?
>
> A. Well, it became a conduit, a pass-through company. I was advised by the accountants that, uh, I was using at the time, that because I wasn't really certain of, uh, whether some of the entities that I was operating would have profits or losses, that it would be best to have a neutral entity through which I could register various advances or various writeoffs, then apply, where I felt, or they felt, it made sense from a tax perspective to then take losses or revenues into account.
>
> . . .
>
> Q. So you used Annopol as the vehicle, um, for flowing that money through so that at the end of the year, you or your accountants could determine which company to take the expense under, is that right?
>
> A. Absolutely correct, yes. [39]

96 Notwithstanding that Annopol had received money from third parties and then disbursed funds to various Kimel companies, including SGW, at trial Kimel took the position that none of the flows of money between Annopol and SGW constituted loans:

> Q. Okay. Now, I'm going to read you another sentence from paragraph fifteen where my friend says, "Annopol also carried on business providing what were akin to operating lines of credit for various of the S.G. companies (that's Summit Glen) including Summit Glen Waterloo." So, the suggestion is that Annopol also carried on business providing operating lines of credit or something akin to that, is there anything to that statement, were operating lines credit provided by Annopol to anybody, or anything like an operating line of credit?
>
> A. I don't believe that's, uh, that's a correct reflection of what Annopol was doing, no. Annopol had no revenues of it, of its own generated, no interest or administration, or brokerage fees of any kind, uh, it, uh, never took profits on anything. It, basically, raised money, or when I say raised, money was given to it from either other individuals or other companies to basically flow through it to some other entity. But, uh, a line of credit to me implies that it would've been charging interest or a fee for its services and none of that ever happened.
>
> . . .
>
> Q. And, similarly, money from other people that you raised in various arrangements, or money from financial institutions, were deposited to Annopol at you direction.
>
> A. Yes.
>
> Q. And that's so you could flow the money through Annopol to wherever you needed it.
>
> A. That's correct.

Q. And when you flowed the money from Annopol to these other companies, such as Summit Glen Waterloo, Summit Glen Brantford, Summit Glen Trayvan, or any of the other companies, you never expected any of these companies to pay any of the money back to Annopol, correct?

A. That is correct.

Q. So, when my friend comes along and he says that loans were made by Annopol to others, that is incorrect agreed?

A. I agree. [40]

97 Kimel concluded on this point by testifying:

Q. And, also, am I right that moneys may have flowed from one company to another, but none of those moneys were ever a repayment of a loan?

A. Yes, you're right.

Q. And is it fair to say that you never expected any moneys that were advanced by Annopol, or Summit Glen Group to be repaid.

A. That's correct.

. . .

Q. And, if there are promissory notes given by Annopol, that was done as a mere convenience to paper the transaction?

A. Yes. [41]

98 For several reasons I do not accept Kimel's assertion that Annopol generally operated as a mere conduit of funds in the sense that no inter-company liabilities arose between Annopol and other SG companies, including SGW, with the result that at the date of its bankruptcy SGW could not be indebted to Annopol. First, Kimel's evidence revealed that he lacked honesty in his financial dealings with others, a characteristic which diminished the overall credibility of his evidence. For example, Kimel admitted during his testimony that he had misled lenders in the past, such as misleading Community Trust Company when attempting to arrange the take-out financing for 105 University:

Q. Now, we've seen in the record, can't put my hands on it as we speak, a letter you wrote to Community Trust in advance of the loan suggesting that you put $400,000 into the property, remember that?

A. Vaguely.

Q. And, it's fair to say you never put the $400,000 in, that was a letter that you wrote just in an attempt to secure the financing?

A. Yes, that's correct. [42]

99 Kimel also admitted to providing false statements of net worth:

Q. And, the next thing I want to do is take you to tab 'H', and that's a statement of personal net worth dated August 29, 2006, did you prepare this?

A. Yes, I did.

> Q. And two-thirds of the way down where it says equity incorporation net of debt, you show Summit Glen Group of Companies, and you describe it as parent umbrella of various subsidiaries, that wasn't the true statement, was it?
>
> A. No, it was just something I put, uh, for matter of convenience.
>
> Q. And you put a value of thirty-two million dollars on the Summit Glen Group of Companies, that wasn't true, was it?
>
> A. No.
>
> Q. And, similarly, over on the next page, at item 'C', you have Annopol Holdings Limited and it says, "fifty per cent joint venture partner in a number of commercial industrial properties located in Southwestern Ontario that you values at eight million dollars, that was completely untrue, correct?
>
> A. Yes.
>
> Q. And, if you go down below, it says Annopol U.S Holdings Corporation also fifty per cent owner of various properties that you valued at fourteen million dollars, that was also untrue.
>
> A. It was untrue.
>
> Q. And, similarly, the family trust that you referred to, not true, correct?
>
> A. They were not true.
>
> Q. And you put together this statement for the purpose of getting financing from financial institutions and, basically, you misrepresented the state of the various assets, right?
>
> A. Yes. [43]

100 Second, Kimel denied the obvious by taking the position that notwithstanding the bank statements for his companies recorded certain transactions as loans from one Summit Glen company to another, those notations meant nothing:

> Q. And, where it says, just, I know we might be beating, flogging a horse but, where it says in the bank statement, loan to this company or that company, they weren't really loans to that company, you were just using Annopol as a conduit, so you get the five hundred thousand from Montor and you distribute it wherever you need it and you never expected any of those companies to pay it back, right?
>
> A. That's correct. [44]

Similarly, in respect of the records of SGG, Kimel testified:

> Q. Now, I then want to take you to my friend's document brief at tab number one, or volume number one, I should say, tab number six, and you'll see here there's a series of cheques all drawn on the Summit Glen Group of Companies' account at TD Bank, you see that?
>
> A. Yes, I do.
>
> Q. And, pretty well every one of them, I think every one of them, has a reference saying loan advance, can you tell the Court whether or not these really were loan advances?

> A. Well, they weren't loan advances, but the reason that I noted them as that were, was exactly what I, I think explained to you before, that all of these moneys were flowing through either Summit Glen Group or Annopol, and were being noted as, in this instance for example, loan advances, so that at some point in the future, they could be, they would have attribution against some other entity, uh, for purposes of writing them off or utilizing them. [45]

101 Third, Kimel acknowledged that the evidence he was giving at trial was inconsistent with the documentary record, but he was doing so in order to support Goldfinger's position at trial:

> Q. Can you tell the Court why you have since provided information, documentation, and assistance to my client?
>
> A. Previously I, um, thought that I had, uh, assets to protect, properties and family to protect and, uh, took steps that I thought were necessary to do that. And in the intervening period, I no longer have any properties or assets, I'm bankrupt, my business has been basically destroyed, my family life has been destroyed, and, uh, frankly I no longer have anything to lose. And, uh, at this point, I think it's only appropriate that I do what, uh, is correct to try to make amends, uh, and, um, assist in any way possible that I can to verify and, uh, point out what my intentions and what my thoughts were at the different points in time that you've asked me about in terms of, uh, documentation and such. [46]

102 Fourth, Kimel's favourable evidence in response to questions posed by Goldfinger's counsel describing Annopol as a mere conduit cannot be reconciled with answers he then gave at trial in response to questions posed by Farber's counsel. When questioned on the issue of funds advanced by individual third party investors to Annopol, Kimel took the position that *Annopol* owed those persons the monies advanced, hardly a position consistent with Goldfinger's theory of "Annopol as a mere conduit":

> Q. So, you don't know if Annopol, sorry, explain that to me. You don't know if Annopol borrowed money from them, but they advanced money to Annopol. I'm afraid that you're going to have to explain that to me. This is a list of debts, all sources?
>
> A. Yes.
>
> Q. So, who owed Mardarowicz [a third party investor] one point six million?
>
> A. The money was advanced to Annopol.
>
> Q. So, did Annopol owe him one point six million?
>
> A. Yes.
>
> Q. Annopol owed Jack Mardarowicz one point six million?
>
> A. Yes.
>
> Q. Fruma. Who owed Fruma the half a million dollars?
>
> A. Well, the moneys were advanced to Annopol but then they went through Annopol to other entities.
>
> Q. So when you say they went through Annopol to other entities, this is Mr. Davis's conduit argument.
>
> A. It's not an argument, it's, it's a fact.

Q. So, we'll get to that in a moment, but your position is, then, that the funds were advanced by Fruma Srubiski to Annopol, but Annopol didn't owe him, or her, any money back?

A. Well, they all understood that the money was going out of Annopol to other companies for other purposes.

Q. Who owed them the obligation to pay the money back?

A. They all asked for something from Annopol, which I gave them.

Q. So, Annopol owed them the money back then.

A. Yes.[47]

103 Fifth, Kimel testified that the inter-corporate accounting of funds passing between the various SG group companies usually recorded advances made by one company to another as loans:

Q. So, how did you keep track of all of that?

A. Well, internal bookkeeping.

Q. How would you record, did you record it as loans?

A. Yes, typically, again, based on accountant, uh, advice, every cheque I would write 'loan advance' or something of that nature because, uh, in that fashion at the time that we were doing statements we would determine where we could attribute. If a company had profits and needed write-offs, it allowed us to utilize them where we, we could best utilize them.

. . .

Q. So, the statements would show an interest, so the statements for who, let's start with the statements for who. So, let's say Annopol was providing funds to Summit Glen Waterloo, cash would go across to Summit Glen Waterloo marked as a loan on the cheque, correct?

A. Yes.

Q. And then when you prepared your statements you would show interest paid from Waterloo to Annopol?

A. No.

Q. Okay, so how would you do it then?

A. We would, uh show the advance on, uh, well whoever it came from or whatever it came from, so that, uh, even though Annopol was the company making the advance, if the money had come through, uh, Trayvan or it had come through Raleigh Street, or it had come through some other entity, then that was the entity that we attributed the expense against, or in favour of.

Q. An expense. So, you would show on Trayvan's financial statement an expense that Summit Glen Waterloo had incurred?

A. No, we would show an outstanding loan, or an outstanding debt.

Q. And I still don't understand how that allows you, how an outstanding debt allows you to sop up an expense, oh, sorry, sop up profit.

A. By writing if off as uncollectable.

Q. So, but you would collect it sometimes?

A. No. We never expected, I never expected that any of these were loans that would ever be repaid, uh, these were advances that, uh, were used to support various companies at different points in their existence but it was never expected or anticipated that the loans would be repaid. [48]

104 Sixth, Goldfinger's "Annopol as a mere conduit" position also was undermined by the way in which he treated his own advances to Kimel and his companies over the years. In a January 9, 2012 letter Goldfinger's accountant described how the advances made by Goldfinger were treated on the financial statements of his companies, Goldfinger Jazwary Diagnostic Services Inc. and 2048754 Ontario Inc.: the amount of $50 was shown as share capital in each of the companies, including Annopol, and the rest of the advances were recorded as shareholder loans, including shareholder *loans* of $2.057 million to Annopol.

105 In a similar vein, evidence was filed regarding communications from Annopol to individual investors which certainly would lead the investor to believe that Annopol had placed the funds in an investment of a fixed duration on his behalf, and Annopol provided the investors with monthly cheques on its account to pay interest to the investor. [49] Also, Annopol issued T-5s to some investors for interest paid on their loans during a year. Kimel, in a February 27, 2007 letter on Annopol letterhead to Perelmuter's accounting firm, enclosed a list of people to whom Annopol had paid interest over the course of the year. [50]

106 Indeed, Kimel's evidence, when taken as a whole, revealed that the SG companies to which third party investors had advanced funds, including Annopol, were liable to those investors for the repayment of the invested funds, with the ability of that company to repay its investors dependent upon the performance of real estate developments undertaken by other SG companies in which the third party funds were invested. The following testimony by Kimel at trial encapsulated the point:

Q. So, if the loans would never be repaid, how would, for example, let's use Annopol for the example since it's the company we're dealing with, *Annopol borrows money from Jack Mardarowicz, who you've agreed Annopol owed one point six million to, correct?*

A. *Yes.*

Q. So, Annopol takes Mr. Mardarowicz's money, we'll get to how some of that money was used in a moment, and transfers it to Summit Glen Waterloo reflected as a loan, correct?

A. Well, his money wouldn't have gone necessarily to Summit Glen Waterloo.

Q. Well let's just...

A. Assuming, yeah.

Q. Let's assume it did. Pick one of them. I'm just trying to do a hypothetical. So, the money goes to Summit Glen Waterloo. *Summit Glen Waterloo is never obliged to pay that money back, how would Annopol ever pay back Mr. Mardarowicz?*

A. *Through the development and sale of Summit Glen Waterloo.* [51]

107 Seventh, Annopol's HSBC bank statements recorded "loans" to SGW from Annopol. [52]

108 Finally, on his examination Perelmuter, Annopol's former accountant, was not prepared to agree that Annopol was a mere conduit: "What you're saying is conceivable but not necessarily this is the whole truth about Annopol because he may have been involved in other deals". [53]

109 Whether the financial dealings between two entities are intended to create a debtor/creditor relationship is a matter to be determined from the specific facts of a particular case. Counsel for Goldfinger drew my attention to the decision of Power J. in *Coast Operations of Canada Ltd. (Trustee of) v. Ottawa Credit Exchange Ltd.*, [54] in which the court concluded that a flow of funds between two companies did not create a debtor/creditor relationship. In that case the trial judge accepted such an explanation for "questionable book entries", and the Court of Appeal did not interfere with that finding of fact. Such were the facts in that case. In the present case, however, I conclude that the evidence overwhelmingly demonstrated that Kimel operated the Summit Glen group of companies, including Annopol and SGW, on the basis that funds provided by a third party investor to one company, such as Annopol, would give rise to a liability from Annopol to that investor. Annopol, in turn, would advance those third party funds to another Summit Glen company, such as SGW, to finance various real estate developments, and that advance would give rise to a liability from the recipient company, such as SGW, to Annopol.

110 In light of that finding, I need not deal with the claim based on unjust enrichment advanced by Farber in its Factum. [55]

F. Analysis

F.1 Annopol's First Proof of Claim: $100,000 Annopol Charge and unsecured claim

111 Annopol's First Proof of Claim asserted an unsecured claim of $420,000 and a secured claim of $100,000, for a total claim of $520,000.

112 As to the secured claim, although Annopol did not advance funds to SGW at the time of the granting and registration of the Annopol $100K Charge, by its terms that charge granted security in respect of future indebtedness — "security for the payment of all indebtedness of the Company to the Mortgagee relating to loans to Summit Glen Waterloo/2000 Developments Inc." The SGW director's resolution of October 18, 2000 also expressed an intention that the charge would secure "present and future indebtedness".

113 The question then becomes, at the date of SGW's bankruptcy, June 28, 2010, what amount was due and owing from SGW to Annopol? Or, put another way, has Farber, as trustee of Annopol, adduced relevant and probative evidence from which a valid claim can be reasonably inferred — i.e. that Annopol, as a creditor of SGW, had, at the date of bankruptcy, the right to receive and enforce payment of the amount claimed?

114 Farber, as trustee of Annopol, did not file in support of its claim a reconciliation of the accounts between SGW and Annopol as at the date of bankruptcy. Instead, Farber has asked this Court to draw the inference that because bank account records showed net payments from Annopol to SGW during two periods of time ($190,200 from June 27, 2000 until March 24, 2005, and $367,400 from September 13, 2005 until December 4, 2008), the amount due from SGW to Annopol at the date of bankruptcy was the aggregate of the two amounts, i.e. $557,600.

115 The method used by Farber to calculate Annopol's claim suffers from several obvious difficulties. First, a gap exists in the bank account analysis, with several months unaccounted for — March 25 through to September 12, 2005. Second, the analysis stopped at December 4, 2008, some year and one-half prior to the date of bankruptcy. Third, while the unaudited financial statements of Annopol suffered from the fact that they were based on information provided by Kimel, a person of very low credibility, the company's unaudited balance sheet as at February 29, 2008 recorded a liability due from SGW of only $200,460. Also, the unaudited financial statements of SGW placed into evidence did not record the Annopol charges as a liability, an unusual omission given the evidence that at the time of their creation Kimel

was attempting to preserve his family's "equity" in 105 University. If nothing else, Kimel was consistent in his drive to protect his own self-interest, so one would have expected some recognition of charges in favour of his related companies on SGW's financial statements had he thought the charges truly secured some amount of indebtedness. Finally, at least in respect of the unsecured portion of Annopol's claim, it relies on inter-company transactions which took place more than two years prior to the date of bankruptcy, raising questions about how much of the claim would not be sustainable because it was statute-barred at the date of bankruptcy. [56]

116 On the other side of the evidentiary ledger, one must recognize that Farber encountered significant difficulties in obtaining the books and records of Annopol and SGW. Further, although Farber's reconciliation of the amounts due from SGW to Annopol stopped a year and one-half prior to the date of SGW's bankruptcy, the evidence disclosed that the affairs of SGW did not improve after December 4, 2008, so it was most unlikely that SGW would have been in the position to reduce its indebtedness to Annopol between then and the date of its bankruptcy.

117 In light of these conflicting issues regarding the evidence adduced on behalf of Annopol's First Proof of Claim, I conclude that, when taken as a whole, the evidence supports a finding that at the date of SGW's bankruptcy it owed Annopol at least $100,000 and that indebtedness was secured by the Annopol $100K Charge. I allow that portion of the First Proof of Claim, with interest to the date of payment in accordance with the terms of the loan. [57]

118 As to the amount of any unsecured claim, the Court is hampered in this case by the absence of any analysis from a trustee in bankruptcy whose only interest lay with the estate against which the claim was made. Farber could not play that role because of the multiple hats it wore. In the ordinary course of the administration of an estate a trustee would consider whether all or part of any claim made against the estate was statute-barred. The analysis filed by Farber in support of this part of Annopol's claim disclosed that in the two years prior to the date of bankruptcy (June 28, 2008 - June 28, 2010), Annopol paid SGW a net amount of $44,600. Most of the unsecured claim, therefore, relates to payments made more than two years prior to the date of bankruptcy. At trial only cursory submissions were made regarding the limitations issue, but because the Court is acting in this case as a reviewer of first instance of these claims, I have concluded that the parties must make further submissions on the effect, if any, of any limitations period on this part of Annopol's claim. Accordingly, I require submissions from the parties on the issue of whether all or part of Annopol's unsecured claim is statute-barred:

> (i) Farber may serve and file brief written submissions, together with any authorities, no later than November 30, 2013;
>
> (ii) Goldfinger may serve and file brief responding written submissions, together with authorities, no later than January 15, 2014; and,
>
> (iii) Farber may file brief reply submissions no later than January 22, 2014.

F.2 Annopol's Second Proof of Claim: the Annopol $750K Charge

119 I find that at the time SGW granted the Annopol $750K Charge no funds were advanced by Annopol to SGW.

120 The language used in that charge, when read in the light of the language used in the contemporaneous authorizing SGW director's resolution, leads to the conclusion that the charge was intended to secure an advance of funds made at that time, not to secure any future indebtedness of SGW to Annopol. On this point, the language in the Annopol $750K Charge differed from that used in the Annopol $100K Charge and the May 6, 2005 Annopol Charge granted by SG Bridge, discussed later in these Reasons, which stipulated that the charges stood as security for both present and future indebtedness.

121 It follows that since Annopol did not advance any funds to SGW at the time the latter granted it the Annopol $750K Charge, the charge, as registered, does not secure any indebtedness of SGW to Annopol.

122 Farber pointed to a February 21/22, 2005 email exchange between Kimel and Eden Cheng at HSBC as evidence that Kimel understood that the Annopol $750K Charge secured subsequent advances made by Annopol to SGW. I do not accept that submission. Cheng, in his email to Kimel, wrote: "I was asking you to fax to me anything you have regarding the CAD750M mortgage receivable you expect to receive in end-March..." On their faces, neither email referred to 105 University or SGW; the authors were discussing 41 Valleyview, Henry Street and 27 Bridge Street. SG Bridge had granted Annopol a $750,000 charge. In light of the absence in the mails of any reference to 105 University, I cannot conclude that this email exchange had anything to do with that Property.

123 In its evidence filed in support of this Second Proof of Claim, Farber stated that it used the figure of $750,000 because it "was the face amount of the charge/mortgage". Absent proof that funds were advanced, the mere registration of the charge did not create an indebtedness from SGW to Annopol. As previously noted, the Schedule to the charge contained a standard "no obligation to advance" clause. In the event, Annopol made no advance secured by the Annopol $750K Charge. I therefore disallow this claim by Farber, as trustee of Annopol.

F.3 Summary of conclusion on Annopol's claims

124 By way of summary, I allow the claim of Farber, as trustee of Annopol, for a secured claim of $100,000 secured by the Annopol $100K Charge, with interest to the date of payment, and call for further submissions on the unsecured portion of Annopol's First Proof of Claim. I disallow the claim of Farber, as trustee of Annopol, for a secured claim in respect of the Annopol $750K Charge.

V. Summit Glen Waterloo: Claim by Farber as the trustee of Summit Glen Group of Companies Inc. ("SGG")

125 SGG was the management company for the entire Summit Glen group of companies, including Annopol and SGW. Starting in 2005, SGG had an operating line of credit with HSBC.

126 Farber, in its capacity as trustee of SGG, filed in the SGW bankruptcy a proof of claim "as of July 7, 2012" making an unsecured claim for $578,336. In support of its claim Farber simply appended extracts from its June 25, 2012 Report. Farber later filed a further proof of claim, for the same amount, dated July 9, 2012.

127 In its June 25, 2012 Report, Farber, as trustee of SGG, made its first reference to a possible *unsecured claim* against SGW on two bases: (i) a debt claim in the amount of $16,450 in respect of inter-company loans made by SGG to SGW to fund operating expenses for 105 University; and, (ii) a claim based on unjust enrichment in the amount of $565,998 for payments made by SGG for the benefit of SGW relating to costs concerning the re-development of 105 University.

128 183 and Goldfinger took the position that SGW did not owe any money to SGG because SGG had not carried on any business, but merely had acted as a "conduit" for money loaned by third parties to SGW.

A. SGG's Debt claim

129 Based on its review of cheques written by SGG, Farber stated that between May, 2003 and May, 2004, SGG had made direct advances to SGW totaling $16,450. Farber could not locate any loan agreements between SGG and SGW, nor did SGW grant SGG a charge over 105 University.

130 At trial Kimel admitted that SGG wrote cheques to SGW marked as loan advances. [58] He also agreed that in respect of the HSBC operating line obtained by SGG, if one of the SG group of companies sold a property, the proceeds would work their way back to HSBC through SGG. [59]

131 According to Farber's investigation, unlike Annopol, SGG did not receive significant advances from persons other than Goldfinger and Annopol. SGG did use an operating line of credit with HSBC under which it borrowed monies.

HSBC has filed a $885,375 unsecured claim against SGG for amounts owing under that operating line, but HSBC has not filed a claim against SGW.

132 Goldfinger took the position that SGG was used as a conduit in the same manner as Annopol and, therefore, no debtor/creditor relationship ever arose between SGW and SGG. I reject Goldfinger's conduit argument for the reasons given above in rejecting his similar claim regarding Annopol.

133 Although that was the only objection raised by Goldfinger, the Court once again is hampered in the case of this proof of claim by the absence of any analysis from a trustee in bankruptcy whose only interests relate to the estate against which the claim is made. As mentioned earlier, in the ordinary course of the administration of an estate a trustee would consider whether all or part of any claim made against the estate was statute-barred. Farber has remained silent on that point. This particular claim for $16,500 raises obvious questions about the limitations period. According to the claimant, those inter-company payments were made in 2003 and 2004. Farber did not adduce any evidence that repayment of those amounts was due at a time other than their advance. SGW became bankrupt in June, 2010. Given that chronology, one could ask whether claims dating back to the period 2003 and 2004 might be statute-barred. Farber adduced no evidence to support a late discoverability argument in respect of this part of SGG's claim. I do not think that a court, when asked to consider a proof of claim in the first instance, can avoid asking the basic question of whether the claim might be statute-barred. Accordingly, before finally determining Farber's claim, as trustee of SGG, for $16,500, I require submissions from the parties on the issue of whether all or part of that claim is statute-barred:

> (iv) Farber may serve and file brief written submissions, together with any authorities, no later than November 30, 2013;
>
> (v) Goldfinger may serve and file brief responding written submissions, together with authorities, no later than January 15, 2014; and,
>
> (vi) Farber may file brief reply submissions no later than January 22, 2014.

B. SGG's unjust enrichment claim

B.1 The positions of the parties and the applicable law

134 In its June 25, 2012 Report Farber stated that SGG made payments totaling $565,998 to third parties, such as architects, engineering firms and lawyers, who had provided services for the re-development of 105 University. Farber grounds its claim, as trustee of SGG, against SGW in unjust enrichment. [60]

135 The cause of action for unjust enrichment has three elements: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and, (iii) an absence of juristic reason for the enrichment. [61] The first element employs a "straightforward economic approach". An enrichment occurs when the plaintiff confers a tangible benefit on the defendant, such as the payment of money, or a negative benefit such as sparing the defendant an expense it would otherwise have incurred. [62] In addressing the third element — the absence of juristic reason for the enrichment — the Supreme Court of Canada, in *Garland v. Consumers' Gas Co.*, laid down the following analytical approach:

> [I]n my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery... The established categories that can constitute juristic reasons include a contract..., a disposition of law..., a donative intent..., and other valid common law, equitable or statutory obligations... If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the

> enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments. [63]

136 Again, as in the case of the claim for the $16,500 loan by SGG, Goldfinger's objection to this claim was brief. He contended that SGG was used as a conduit in the same manner as Annopol:

> Accordingly, it never intended, or was capable of forming a debtor/creditor relationship with SG Waterloo.
>
> For the same reasons set out with respect to Annopol's claim, the claim of SG Group should be denied. [64]

Goldfinger raised no other objection to this claim.

B.2 Analysis

137 Having reviewed the description of SGG's claim in Farber's June 25, 2012 Report, together with the supporting documents filed in Volume 1 of its Brief of Documents of the same date, I am not satisfied that Farber has filed sufficient particulars regarding parts of this claim. Specifically:

> (i) as to the monies SGG paid to an architect, Joe Somfay Architects, although Farber reported that that firm was retained for the purpose of developing 105 University, all Farber filed in evidence was a summary of invoices, credit notes and payments prepared by Somfay. That summary was entitled, "Summit Glen Developments", not, as one might expect, "Summit Glen Group" if the payor were SGG. No invoices were produced for examination to ensure they related to work on 105 University nor was adequate evidence adduced to establish who the payor of any invoice was. The invoices totaled $346,029.13 and dated from 2002 until May 30, 2007;
>
> (ii) in respect of Courtland Engineering ($1,588.95 invoice dated May 10, 2004) and GSP Group ($10,406.51 of invoices from March 19, 2004 through to September 10, 2008), Farber did not file adequate documentation to support those claims, specifically copies of the invoices and cheques. The same was true for MTE's invoices. It was incumbent on Farber, as trustee of SGG, to put together a claim which complied with *BIA* s. 124(4) containing not only a statement of account showing the particulars of the claim, but "the vouchers or other evidence, if any, by which it can be substantiated". Farber, as trustee of SGG, did not provide the latter information;
>
> (iii) in respect of the Stikeman Elliott law firm, the Trustee adduced invoices rendered by that firm between November 18, 2004 and May 28, 2007. The client to whom those invoices were sent was Summit Glen Developments Limited, not SGG. It also adduced cheques payable to that firm between October 4, 2002 and April 30, 2005. Of those cheques, most were made by SGG; one was made by Summit Glen Trayvan Holdings Inc. There was no evidence of payment of the three invoices rendered after May 19, 2005;
>
> (iv) Farber reported that the records of SGW disclosed that payments were made by SGG to Sze Straka who performed engineering services in respect of 105 University. The cheque stubs filed by the Trustee did not

identify on their face that SGG had paid invoices rendered to SGW or for work performed for SGW, nor were the relevant invoices filed; [65]

(v) invoices from Minden Gross to SGG from February 27, 2007 through to November 27, 2007 were filed. On their face they do not refer clearly to work performed for or in respect of SGW or for 105 University; they simply were headed, "Housing Initiative". No evidence was adduced to explain the work recorded on the invoices. Those invoices appear to have been subject to a May 1, 2009 Order for Assessment. In its Report Farber asserted that SGG paid those invoices, but no evidence to support that statement was filed; and,

(vi) Farber reported that SGW's HST records indicated that SGG had paid an additional $62,943 in operating and other day-to-day operating expenses on behalf of SGW between the period May 16, 2003 and December 31, 2008, with most pre-dating 2007. No documentation was filed by Farber to support those assertions.

138 In sum, I am not satisfied that Farber, as trustee of SGG, has filed sufficient information in support of its claim as required by *BIA* s. 124(4). However, as will be seen from my treatment below of 183's claim under the CTC $50,000 Charge, I plan to give 183 an opportunity to file further evidence in support of its claim pursuant to *BIA* s. 135(1). Fairness dictates that Farber be given a similar opportunity. I give both parties these further opportunities in an effort to bring finality to the dispute by affording both the chance to deal with the substantive issues concerning their claims. Accordingly, I make the following orders:

(i) Farber shall provide Goldfinger with any evidence dealing with the deficiencies in its unjust enrichment claim which I have identified above no later than November 30, 2013 and file with the Court, to my attention, a report dealing with that issue;

(ii) Goldfinger shall file any further submissions on this issue no later than January 15, 2014;

(iii) I shall then release supplementary reasons deciding Farber's claim by February 14, 2014.

139 Also, as already noted, SGW went into bankruptcy on June 28, 2010. SGG made the payments claimed more than two years prior to the bankruptcy of SGW. One could ask whether claims dating back to that period would be statute-barred. Farber did not adduce evidence to explain why the discoverability date for those payments should be other than the time the payments were made. Before deciding that point, I will give the parties an opportunity to make brief written submissions on the point:

(vii) Farber may serve and file brief written submissions, together with any authorities, no later than November 30, 2013;

(viii) Goldfinger may serve and file brief responding written submissions, together with authorities, no later than January 15, 2014; and,

(ix) Farber may file brief reply submissions no later than January 22, 2013.

VI. Summit Glen Waterloo: Claim by Goldfinger's company, 1830994 Ontario Ltd., based on the assignment of the CTC mortgages

A. Evidence

140 SGW acquired 105 University from Bolliger Holdings Corporation in 2000 for $950,000. Goldfinger advanced the required cash; Bolliger took back a $450,000 VTB with a term of six months, maturing on September 30, 2000. SGW did not pay out the VTB mortgage at that time.

141 Bolliger issued a notice of power of sale on January 5, 2001. To deal with the Bolliger VTB, two types of financing were arranged. First, SGW obtained $50,000 in direct financing from Community Trust Company ("CTC")

secured by a charge against 105 University. Second, Goldfinger and Kimel each borrowed $250,000 from CTC and signed promissory notes in its favour. SGW guaranteed those personal loans. SGW granted a $500,000 charge as security for those guarantees. Goldfinger and Kimel each guaranteed the other's borrowing. They both signed directions that the proceeds from their personal loans be paid to SGW. There is no dispute that funds CTC lent to Goldfinger and Kimel were contributed to SGW. [66] Most of the money from the CTC financing went to SGW to pay the Bollinger VTB, tax arrears and other SGW expenses and the Bolliger VTB, on which about $355,000 was due, was paid out as a result of that financing. The refinancing did result in excess funds paid to counsel for SGW of about $113,000.

142 On April 27, 2001, SGW granted a charge against 105 University to Community Trust Company in the amount of $50,000 (the "CTC $50K Charge) securing the loan made to SGW. The same day SGW granted a charge against 105 University to CTC as collateral security for the two promissory notes in the amount of $250,000 given to CTC by each of Goldfinger and Kimel (the "CTC $500K Charge"). According to Kimel, this three-part financing structure was used at the insistence of CTC.

143 On the registration of the CTC mortgages, Annopol postponed its mortgages to CTC.

144 The personal loans were renewed on an annual basis. SGW paid CTC the interest on each of the Goldfinger and Kimel loans. [67] In his trial evidence Kimel described what happened was as follows:

> Summit Glen Waterloo didn't actually have the funds to, uh, available to it to make those payments, moneys had to be funneled into Summit Glen Waterloo to make those payments. [68]

Upon the appointment of Zeifman as receiver of SGW, those payments ceased and CTC commenced an action against Goldfinger and Kimel to recover the amounts due under the personal loans. CTC also sued SGW and obtained default judgment dated May 22, 2009 in the amount of $573,506 (the "CTC Default Judgment"). Farber contended that the CTC Default Judgment was obtained without any leave granted to lift the stay of proceedings in the receivership and therefore the estate of SGW was not bound by the CTC Default Judgment.

145 On May 28, 2010, CTC informed Farber, as trustee of Annopol, that it intended to sell 105 University under power of sale; this was a month before SGW was adjudged bankrupt. On July 12, 2010, CTC wrote to Farber's counsel enclosing loan statements for its two mortgages, both of which showed the full amount of the principal outstanding. As well, both showed additional claimed expenses which brought the amounts due under each mortgage up to $142,819.10 and $582,690.76 respectively. CTC indicated that there would be additional unbilled legal fees and disbursements. CTC provided subsequent August 3, 2010 statements of mortgage showing the amounts due under each mortgage to be $151,239.26 and $586,034.58 respectively.

146 On August 4, 2010, CTC assigned both charges to a company which Goldfinger had incorporated, 1830994 Ontario Limited. Goldfinger deposed that 183 paid $751,000 for the two mortgages; Farber asserted that Goldfinger paid $742,273, which was the figure cited by CTC's counsel in its August 4, 2010 letter as the amount payable by 183. The assigned charges were registered on August 5, 2010. In addition, by assignments dated August 3, 2010, CTC assigned to 183 its CTC Default Judgment. Notice of that assignment was given to Farber's counsel on August 6, 2010.

147 183 filed a proof of claim dated September 17, 2010 for a secured claim of $765,792.38 in respect of the two charges.

B. The claim under the CTC $50K Charge

B.1 The position of Goldfinger and 183

148 Goldfinger argued that 183, as assignee of the two CTC mortgages, was entitled to stand in the same position as CTC because an assignee at law stands in the same position as the assignor in relation to the assigned chose in action. On

this basis, 183 contended that it was entitled to claim from the estate of SGW the amounts it had paid to CTC in return for the assignments of the two mortgages, including interest on that amount, together with its solicitorclient costs.

B.2 The position of Farber

149 Farber did not oppose the technical validity of the CTC $50K Charge. Nor did Farber dispute that CTC had advanced $50,000 to SGW and that CTC would have been entitled to claim against SGW for any amounts owing under the CTC $50K Charge.

150 Farber opposed 183's claim in respect of the CTC $50K Charge on two grounds. First, Farber took issue with the quantum of the amount due under the charge. Second, Farber argued that a release given by Goldfinger to SGW in 2009 released this claim against SGW.

151 As to the quantum, Farber argued that as trustee it was entitled under *BIA* s. 135(1) to require from 183 evidence in support of its security, but 183 had failed to provide documentary evidence to support portions of its claim under the CTC $50K Charge. Farber contended that a claim against the estate of a bankrupt was determined on the merits of the underlying claim and therefore an assignee could not take the position that its claim should be based on the amount it paid for the chose in action, rather than on the state of accounts between the assignor and the bankrupt. On this basis, the trustee disputed the following amounts claimed by 183 under the CTC $50K mortgage:

> (i) Legal fees of $35,000, when the CTC August 3, 2010 statement of mortgage only indicated legal fees of $26,441.14;
>
> (ii) Three months interest under section 17 of the *Mortgages Act*. Farber took the position that such an amount could not be claimed where a mortgagee was taking steps to enforce payment of amounts owing under a charge. It is worth observing that Farber did not dispute that amount in its Reports dated January 18, 2011 and July 23, 2011;
>
> (iii) Realty taxes of $37,301.49 outstanding as at August 5, 2010. Farber contended that 183 did not provide any evidence about the amount of realty taxes in fact paid by CTC and that as of November 15, 2010, only $10,655 in realty taxes were owing for 105 University. Farber stated that all outstanding realty taxes were paid from the proceeds of sale;
>
> (iv) Operating expenses of $25,283.67, subject to a credit of $8,921.70 in rental income. Farber reported that 183 had not provided any documentation to support claims that CTC had contributed cash to make a shortfall in operating costs for 105 University; and,
>
> (v) "Estimated utility expenses for July to September" 2010 in the amount of $15,000. Farber reported that 183 had not provided any documentation to support those claims.

Accordingly, Farber argued that 183's claim based on the CTC $50K Charge should be fixed at $50,000, plus interest and nominal costs.

152 In correspondence that passed between counsel prior to the hearing, Goldfinger took the position that the documents supporting the amounts claimed under the charges were not relevant and that Goldfinger was entitled simply to rely on the CTC statement. [69] Goldfinger, in his August 8, 2012 affidavit, tried to mitigate the effect of that position by contending that the documents were not in his possession, leaving hanging the implication that he could not obtain them.

153 Finally, Farber took the position that 183's claim against SGW based on the August 5, 2010 assignments had been extinguished by the release given by Goldfinger to SGW as part of the December 16, 2009 Minutes of Settlement. Farber contended that Goldfinger was bound by the Second Settlement even if one of the transactions which formed part of that settlement (the charge against 40 Park Lane) was successfully challenged under the *BIA*.

B.3 Analysis

154 There is no dispute concerning the validity or enforceability of the assignment of the CTC $50K Charge from CTC to 183. The assignment was made for valuable consideration. Consequently, 183, as assignee, is entitled to payment of the principal amount of the CTC $50K Charge, together with interest until the date of payment, and I so order.

155 *BIA* s. 135(1) clearly provides that a trustee "may require further evidence in support of the claim or security". Consequently, Farber was acting well within the rights of a trustee to require 183 to provide further evidence of the various amounts claimed in respect of the CTC $50K Charge. 183's position that the trustee was not entitled to such information because 183 could claim the amount which it had paid its assignor was incorrect. The trustee could have asked for such further information from CTC; its assignee stood in no better position.

156 One can understand why Farber would have asked for further evidence in support of various amounts, given that the expenses claimed exceeded the principal amount of the charge.

157 Although I am tempted simply to disallow 183's claim for those expenses because of its unreasonable refusal to provide the further evidence requested by the trustee, unreasonableness has characterized the positions of both parties to this Claims Motion. Consequently, I make the following orders:

> (i) 183 shall provide Farber, as trustee of SGW, with the further evidence previously requested in respect of the additional items claimed for the CTC $50K Charge no later than November 30, 2013;
>
> (ii) Farber shall file with the Court, to my attention, no later than December 24, 2013, a further report providing its views about the sufficiency of the further evidence provided and its position on the amounts claimed in light of that further evidence;
>
> (iii) 183 shall file any further submissions on this issue no later than January 15, 2014, with such submissions not to exceed 10 pages;
>
> (iv) I shall then release supplementary reasons deciding 183's claim for those additional amounts by February 14, 2014.

158 From this it follows that I have rejected Farber's argument that 183's claim against SGW in respect of the CTC $50K Charge was extinguished by the release given by Goldfinger to SGW as part of the December 16, 2009 Minutes of Settlement.

159 The parties to the December, 2009 Second Settlement were Morris Goldfinger, on the one hand, and on the other: Jack Lechcier-Kimel, Summit Glen Trayvan Holdings Inc., Summit Glen Waterloo/2000 Developments Inc., Summit Glen Brantford Holdings Inc., Raleigh Street Investments Inc., Summit Glen Bridge Street Inc., Summit Glen Fairway Holdings Inc., Annopol Holdings Ltd. and Mahvash Lechcier Kimel. The Second Settlement required the parties to enter into Mutual Releases:

> 13. The parties hereto will promptly exchange full and final mutual releases in the form attached as schedule #1 once each of the following has occurred ("the Release Date"):
>
> a) the Park Lane Mortgage has been registered; and
>
> b) any existing mortgages in favour of the Plaintiff registered on the Remaining Properties have been discharged and replaced with the Valleyview/University Mortgages.
>
> 14. *The parties agree that the aforementioned releases are intended to release the Plaintiff* and the Defendants *from any claims they may have between each other arising from Community Trust Company's action against Jack Lechcier-*

Kimel and Morris Goldfinger (Hamilton Court file #09-8872) and also from any claims relating to any possible flow of funds out of the defendant companies. (emphasis added)

160 As to the nature of the claims released, the operative language of the Full and Final Mutual Release read as follows:

SAVE AND EXCEPT AS NOTED BELOW, HEREBY RELEASE, ACQUIT AND FOREVER DISCHARGE, EACH OTHER WJTHOUTQUALIFICATION OR LIMITATION:

from all manner of actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contract, complaints, claims and demands for damages, monies, losses, indemnity, costs, interest in loss, or injuries howsoever arising which hereto may have been or may hereafter be sustained by Goldfinger or the Kimel Parties directly, or indirectly, as a consequence of any agreement between the parties and from any and all actions, causes of action, claims or demands of whatsoever nature, whether in contract or in tort or arising as a result of a fiduciary duty or by virtue of any statute or upon or by reason of any damage, loss or injury arising out of the matters set forth above and, without limiting the generality of the foregoing, from any and all matters that were pleaded in, or could have been pleaded, in Ontario Superior Court of Ontario Action 00007823-00Cl (herein referred to as the "Action").

. . .

WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, the parties hereto declare that the intent of this Full and Final Mutual Release subject to the specific exclusions set out herein, is to conclude all issues arising from the matters set forth above and from the Action and it is understood and agreed that this Release is intended to cover, and does cover, not only all known injuries, losses and damages, but also injuries, losses and damages not now known or anticipated but which may later develop or be discovered, including all the effects and consequences thereof.

AND FOR THE SAID CONSIDERATION it is agreed and understood that Goldfinger and the Kimel Parties *will not make any claim or take any proceedings against any other person or corporation who might claim, in any manner or forum, contribution or indemnity* in common law or in equity, or under the provisions of any statute or regulation, including the *Negligence Act* and the amendments thereto and/or under any successor legislation thereto, and/or under the *Rules of Civil Procedure*, from each of Goldfinger and The Kimel Parties discharged by this Full and Final Mutual Release, *in connection with the matters outlined above and in the Action*.

(emphasis added)

161 I have rejected Farber's submission that the 2009 Release applied to bar 183's claim as assignee of the CTC Charges for several reasons:

(i) 183, the assignee of the CTC Charges, was not a party to that release. Although the 2009 Release included in the definition of "Goldfinger" any "successor corporations under his control", that term, when read in the context of the entire definition, referred to any successor corporation who was claiming "a right or interest *through him*" in respect of the matters released. 183 took assignments of the CTC charges in its own right and was not claiming a right or interest through Goldfinger;

(ii) The assignments were made well after Goldfinger and the Kimel Parties had entered into the 2009 Release;

(iii) The assignments were made for valuable consideration given at the time of the assignments;

(iv) Finally, to the extent that the release may have caught post-execution events, the assignment of the charges by CTC to 183 did not fall within the matters released, which the 2009 Release described as matters:

...which hereto may have been or may hereafter be sustained by Goldfinger or the Kimel Parties directly, or indirectly, as a consequence of any agreement between the parties and from any and all actions, causes

> of action, claims or demands of whatsoever nature, whether in contract or in tort or arising as a result of a fiduciary duty or by virtue of any statute...

C. The claim under the CTC $500K Charge

C.1 The position of Farber

162 Farber opposed 183's claim under the CTC $500K Charge on three grounds. First, Farber submitted that the assignment from CTC to 183 was incomplete. Second, Farber contended that the charge could not support a claim against SGW because of its collateral nature. Finally, Farber argued that a release given by Goldfinger to SGW in 2009 released this claim against SGW.

163 In its first argument, Farber contended that although 183 had taken an assignment from CTC of the charge "and any debt owing under the CTC Charges", [70] 183 had failed to take an assignment of the SGW Guarantee of the personal loans to Goldfinger and Kimel and also failed to take an assignment of the promissory notes given by Goldfinger and Kimel to CTC, with the result that "183 Ontario cannot rely on the SGW Guarantee or the CTC $500K Charge in circumstances where it is not able to assign to SGW, on payment, the debt owing by Goldfinger and [Kimel] to which the SGW Guarantee and the CTC $500K Charge relate."

164 In respect of its second argument, Farber stated that SGW had granted CTC the $500K Charge to stand as security for SGW's guarantee of the loans CTC had made to each of Goldfinger and Kimel in the amount of $250,000. Farber argued that if the estate of SGW was required to pay 183, as assignee of CTC, the full amounts due under the CTC $500K Charge, then Goldfinger, as the principal debtor on the personal loan from CTC, should be required to pay SGW (i) an amount equal to what SGW pays 183 in respect of its guarantee of the Goldfinger personal loan together with (ii) 50% of what SGW pays 183 in respect of the guarantee of the Kimel personal loan, the latter because Goldfinger had provided CTC with his own guarantee of the Kimel loan.

165 In effect, this argument by Farber did not deny the validity of the CTC $500K Charge, its assignment to 183 or the amount claimed under the charge. Farber argued that the potential claim-over by SGW against Goldfinger, both in respect of his personal loan and Kimel's loan, should trigger an immediate obligation by Goldfinger to pay SGW all but $125,000 of the amount paid by SGW to 183 under the CTC $500K Charge, plus interest and costs. Farber contended that its position on this point was supported by the fact that Goldfinger had provided 183 with the funds to acquire the CTC Charges. As the argument was put in its January 18, 2011 Report, Farber contended that:

> Farber understands that the CTC $500,000 Charge relates to these personal loans [to Goldfinger and Kimel]. Dr. Goldfinger is, by using 183 Ontario to acquire CTC's claim vis a vis the personal loans, attempting to recover a personal loan made to him and a personal loan made to Mr. Lechcier-Kimel that he guaranteed from SG Waterloo.

Or, as put by Farber's counsel in his letter of August 13, 2010 to 183:

> As the guarantor of the obligations owing by Dr. Goldfinger and Mr. Lechcier-Kimel by Community Trust, SG Waterloo is entitled, on the payment of the amount guaranteed, to take an assignment of the claims as against Dr. Goldfinger and Mr. Lechcier-Kimel. In this regard, 183 Ontario owes an obligation to the SG Waterloo bankruptcy estate not to prejudice SG Waterloo's interest as guarantor of the obligations now owing to 183 Ontario.

166 Finally, Farber contended that the Release given as part of the 2009 Second Settlement affected 183's ability to claim as assignee of the CTC Charges in two ways. First, Farber pointed to paragraph 14 of the Second Settlement which stated:

> The parties agree that [the full and final release is] intended to release the Plaintiff and Defendants from any claims they may have between each other arising from Community Trust Company's action against Jack Lechcier-Kimel and Morris Goldfinger...

Second, Farber argued that under the Release, Goldfinger was prohibited from making any claim that would result in any person claiming contribution or indemnity from Kimel, and since 183, a company controlled by Goldfinger, was now asserting a claim which could result in SGW seeking contribution and indemnity from Kimel, the Release barred such a claim.

C.2 The position of Goldfinger and 183

167 Goldfinger argued that 183, as assignee of the two CTC mortgages, was entitled to stand in the same position as CTC since an assignee at law stands in the same position as the assignor in relation to the assigned chose in action. On this basis, 183 contended that it was entitled to claim from the estate of SGW the amounts it had paid to CTC in return for the assignment of the two mortgages, including interest on that amount, together with its solicitor-client costs.

168 183 argued that Farber's arguments based on the nature of the CTC $500K Charge as collateral security for SGW's guarantee of personal loans to Goldfinger ignored the separate legal existence of 183. As put by Goldfinger and 183 in their Factum:

> 104. If 183 is not permitted to stand in the shoes of CTC as ranking as first mortgagee, the effect would be to put Farber in a better position than if 183 had not paid off CTC and the related encumbrances. Such a result would be unfair. Thus, if for some reason, 183 was not entitled to stand in the same position as CTC, subrogation would be an appropriate remedy in this case.

C.3 Analysis

First argument: The completeness of the assignment

169 In support of its argument that the assignment from CTC to 183 was incomplete, Farber relied on the decision of the Court of Appeal in *McLennan v. McLennan* [2003 CarswellOnt 401 (Ont. C.A.)]. [71] One must approach applying that decision with some caution, turning as it did on complex facts concerning "unusual transactions". In that case the Court of Appeal was not prepared to interfere with the findings of fact made by lower courts that, properly interpreted in its factual matrix, the assignment of a collateral mortgage assigned only the mortgage, but not the debt secured by the mortgage.

170 By contrast, in the present case, the Assignment of Security and Mortgage Debt executed on August 4, 2010 by CTC and 183 (the "Assignment") in respect of both CTC Charges provided, in part:

> Whereas the Assignor holds first and second registered Mortgages/Charges on the lands and premises described municipally as 105 University Avenue East, Waterloo...
>
> . . .
>
> *And Whereas the Assignor holds a Security Agreement as a Secured Party given by Summit Glen Waterloo/2000 Developments Inc. (the "Debtor"), on or about the 25th day of April, 2001.*
>
> . . .
>
> *[T]he Assignor assigns to the Assignee all of the outstanding Mortgage debt in and to the Mortgaged Lands*, debts, sums of money, choses in action, causes of action, Judgments and *all other right, title, and interest in the Mortgage debt and in the security it presently holds in respect of the debtors obligations as that term is defined in the Security Agreement* which is annexed hereto as Schedule "A", for the absolute use and benefit of the Assignor. (emphasis added)

171 The Security Agreement dated April 25, 2001 from SGW to CTC stated that it was given "as security for the repayment of all present and future indebtedness of the Debtor [SGW] to the Secured Party [CTC] and interest thereon and for the payment and discharge of all other present and future liabilities and obligations, direct or indirect, absolute or contingent, of the Debtor to the Secured Party (all such indebtedness, interest, liabilities and obligations being hereinafter collectively called the "Obligations")". Section 9 provided that default by SGW "under any of the Obligations" constituted a default under the Security Agreement, and section 10 provided that upon such a default CTC "may declare any or all of the Obligations to be immediately due and payable..." The liabilities and obligations of SGW to CTC were set out in the guarantee dated April 25, 2001 from SGW to CTC, under which SGW "guarantees payment to Community Trust of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Borrower [Kimel and Goldfinger] to Community Trust or remaining unpaid by the Borrower to Community Trust..." Section 3 provided that CTC was not bound to exhaust its recourse against Kimel and Goldfinger before entitled to payment from SGW.

172 Given the assignment of the "Mortgage debt" and the definition of "Obligations" used in the Security Agreement, which was also assigned, I find that by its terms the Assignment assigned the debt created as between SGW and CTC. The language of the Assignment certainly evidenced an intention that it would assign the underlying debt to the assignee of the charges. Nor did CTC purport to retain for its own benefit any part of the guaranteed debt; it made a full assignment to 183.

173 Moreover, Farber's argument ignored the simple fact that 183 paid valuable consideration to CTC for the assignment of the CTC Charges. Given that 183 took out CTC by paying off what CTC contended was due to it on the mortgage debt, in the circumstances of this case the principle of equitable subrogation would apply to place 183 fully in the shoes of CTC in order to achieve fairness in light of all the circumstances. [72]

174 Finally, the right of action enjoyed by the estate of SGW to recover from the principal debtors amounts paid under the guarantee arises by operation of law. [73]

175 For these reasons I do not accept Farber's argument that the Assignment was not effective to enable 183 to enforce the debt secured by the CTC $500K Charge.

Second argument: the collateral nature of the Assignment

176 An assignee of a charge is subject to the state of account upon the charge as between the chargor and chargee, and the assignee can assert no greater rights than those held by its assignor of the charge. [74] More generally, an assignee steps into the shoes of the assignor and has the rights and is subject to the obligations of the assignor under the assigned agreement. [75]

177 If a third party other than 183 had taken an assignment of the CTC security for value, it is highly unlikely that Farber would be advancing arguments about the collateral nature of the charge. The assignee would take subject to the state of the account between SGW and CTC, and it would not be open to Farber to argue for the disallowance of the assignee's proof of claim by contending that the bankruptcy estate might enjoy some right to seek recovery from another person for the monies paid. I do not see how the identity of the assignee changes that analysis with respect to the validity of a claim against SGW under the CTC $500K Charge. 183 enjoys a separate legal personality from Goldfinger. 183 paid good and valuable consideration for the assignment; this is not a case involving some sort of sham transaction. As an assignee for value of the Charge and the mortgage debt, 183 is subject to the state of account between SGW and its predecessor, CTC, but is not subject to the state of account between SGW and some other person.

178 Whether the estate of SGW might enjoy some claim of recovery against some other person, such as Goldfinger or Kimel's bankruptcy estate, is a matter for the trustee to assess in light of all the circumstances, including the obligations

imposed upon SGW by the releases exchanged as part of the 2009 Settlement — releases, which I should note, Farber did not attack.

179 In the circumstances of this case, I do not accept Farber's contention that as part of the process of reviewing a creditor's proof of claim under the *BIA*, the court notionally should entertain and determine the surety's potential *quia timet* "action" against one of the principal debtors, Goldfinger. Quite apart from the conflation which would result of a *BIA* proof of claim process with the determination of a civil cause of action, the proof of claim under review is that of a person — 183 — which enjoys a separate legal personality from the principal debtor, Goldfinger, and which paid valuable consideration for the Assignment.

Third argument: recovery under the Assignment is barred by the 2009 Settlement Release

180 I reject Farber's submission that the 2009 Release barred 183's claim under the CTC $500K Charge for the reasons given above rejecting a similar argument in respect of the CTC $50K Charge.

181 By way of summary, I allow 183's claim in respect of the CTC $500K Charge, with interest until the date of payment.

VII. Summit Glen Waterloo: Goldfinger's constructive trust claim

182 Although not specifically mentioned in his notice of motion, in his factum Goldfinger argued that since he had made all of the cash payments for the acquisition of 105 University by SGW, as well as a payment against the Bolliger VTB, he should be entitled to a constructive trust claim against the estate of SGW for those amounts.

Goldfinger's argument

183 Goldfinger deposed that in the first quarter of 2000, he had issued cheques totaling $130,000 to Summit Glen Fairway Holding which were used, in part, to pay the deposit for the 105 University property, title of which was taken in the name of SGW. The acquisition closed on April 14, 2000. Goldfinger deposed that he provided all the cash for the closing (about $415,000) by way of a $467,000 cheque dated April 13, 2000 to SGW, with Bolliger taking a $450,000 five-month VTB for the balance of the purchase price.

184 Although the Bolliger mortgage was to mature in September, 2000, the parties continued the arrangement for a period of time until the Community Trust Company refinancing took place. On October 16, 2000, SGW paid down $50,000 of the Bolliger VTB principal. Goldfinger deposed that the monies SGW used came from a $25,000 cheque he made out to SGW on July 6, 2000 and from an August 10, 2000, cheque for $35,000 which he provided to Summit Glen Fairway Holdings.

185 As part of the First Settlement, SGW was to deliver to Goldfinger a promissory note "in a principal amount equal to the unpaid Shareholder Loans of the company as set forth in Schedule 3". In the case of SGW, the amount of the Shareholder Loan, or "outstanding indebtedness to Goldfinger", was fixed by the parties at $867,556. The note, dated June 6, 2008, was to be paid in two installments ending in December, 2009. Kimel and each of the Summit Glen Companies, including SGW, severally guaranteed repayment of the Shareholder Loans, and each company was to grant to Goldfinger second mortgages on the Properties, which included 105 University. Annopol delivered a postponement, in favour of Goldfinger, of "all present and future debts and liabilities of whatever nature or kind due or accruing due to" it by, *inter alia*, SGW. Although the First Settlement contemplated that Goldfinger would deliver a release to Kimel and the Summit Glen Companies, he was only required to do so once they had fully complied with all of the terms of the First Settlement. They never did so.

Analysis

186 Section 81(1) of the *BIA* requires that any person who claims property in the possession of the bankrupt must file a proof of claim with the trustee; *BIA* s. 124 requires that every creditor shall prove his claim by delivery to the

trustee of a proof of claim. Goldfinger did not file with the trustee of SGW a proof of claim in respect of a trust property claim or a proof of claim in respect of a related debt or liability claim. Goldfinger raised the issue for the first time in his factum. In light of Goldfinger's failure to comply with the claims mechanisms specified by the *BIA*, I disallow his "constructive trust" claim.

187 In any event, Goldfinger's claims also fails for substantive reasons. In *Credifinance Securities Ltd., Re*, the Ontario Court of Appeal considered the issue of claims in a bankruptcy founded on constructive trust:

> There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings. Both the case law and authors of texts make this clear, although the test for proving the existence of a constructive trust in a bankruptcy setting is high: L.W. Houlden & Geoffrey Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: WL Can, 2011) at F§5(1). The authors add this at F§5(8):
>
> > A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct" (citations omitted).
>
> . . .
>
> Thus, a constructive trust in bankruptcy proceedings can be ordered to remedy an injustice; for example, where permitting the creditors access to the bankrupt's property would result in them being unjustly enriched. The prerequisite is that the bankrupt obtained the property through misconduct. The added necessary feature is that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct.
>
> . . .
>
> Constructive trust is a discretionary remedy. In a bankruptcy there are other interests to consider besides those of the defrauder and the defraudee: there are other creditors. Thus, the exercise of remedial discretion must be informed by additional considerations than in a civil fraud trial. [76]

188 The evidence does not support Goldfinger's claim for a constructive trust in respect of the monies which he advanced to SGW in 2000 to finance part of the purchase price for 105 University and to make a payment against the Bolliger VTB. On his own evidence, Goldfinger made those advances, as well as all his other advances to SG companies, on the expectation that his loans would be repaid from the successful re-development of those properties and, in addition, he would share in the ultimate net profit from the resale of the properties. In the present case, the redevelopment of 105 University was not successful and SGW went into bankruptcy. In making his investments Goldfinger assumed the risk of an investor who looked to the profits of the undertaking to recoup his investment. At the time he extended his loans to Kimel's companies, it was open to Goldfinger to require that they grant him security in return; he did not obtain such security, yet advanced funds.

189 Goldfinger argued that it would be inequitable to deny him a constructive trust on some of the assets of SGW because Kimel deceitfully placed the Annopol mortgages on the property without the knowledge of Goldfinger. On his own evidence, Goldfinger became aware of Kimel's activities in 2007. He then entered into the First Settlement with Kimel. When Kimel breached that settlement, Goldfinger commenced the Goldfinger Action. The Second Settlement resolved that action. Neither the First nor Second Settlement gave Goldfinger a constructive trust over some of the assets of SGW.

190 Finally, the 2009 Release precludes Goldfinger from asserting such a claim at this point of time. The claim falls within the matters released, and Goldfinger executed that release with full knowledge of the long history of Kimel's misconduct against him and others.

191 Given those circumstances, I see no substantive basis for Goldfinger's constructive trust claim — there was no injustice which required a remedy by way of constructive trust. For these reasons, I dismiss Goldfinger's constructive trust claim.

VIII. Goldfinger's claim as the sole shareholder of Summit Glen Waterloo

A. Evidence

192 From the incorporation of SGW in April, 2000 until 2008, Mahvash was its sole registered shareholder.

193 According to Goldfinger, during that period of time he believed he should have an equity interest in SGW and other SG companies. After Goldfinger and Kimel had arrived at an agreement in principle to resolve their dispute in the Fall of 2007, Goldfinger engaged two lawyers at the Minden Gross firm, Reuben Rosenblatt and Carl Schwebel, to flesh out and paper their agreement. Both lawyers testified at the trial. Both testified that while Goldfinger thought that he had been promised shares in the Summit Glen group of companies, neither lawyer had ever seen any share certificates which evidenced his shareholding in SGW or other Summit Glen companies. [77]

194 As part of the closing structure of the First Settlement, Mahvash transferred 50% of the shares of SGW to Goldfinger who immediately transferred them to Kimel. The transfer from Mahvash to Goldfinger reflected the following acknowledgement contained in the First Settlement:

> Notwithstanding that the shares of the Summit Glen Companies have not been formally issued, Goldfinger is, and for all purposes shall be deemed to be, the legal and beneficial owner of 50% of the share capital of each of the Summit Glen Companies...

SGW was included in the definition of "Summit Glen Companies". On the closing of the First Settlement, Goldfinger transferred all his "deemed" shares in the Summit Glen Companies to Kimel for $5 million, half of which had been satisfied by the late 2007 and early 2008 payments of $2.5 million, and the rest was to be paid out by the end of 2009. It never was.

195 As part of their later matrimonial separation arrangement, Kimel transferred his 50% shareholding to Mahvesh. Goldfinger ultimately acquired the outstanding shares of SGW from Mahvesh for $50,000 through a Transfer of Shares dated September 27, 2010.

196 Although Farber argued that Goldfinger had been a shareholder of SGW from its inception, pointing to statements contained in (i) 2007 memoranda prepared by Minden Gross LPP, (ii) Goldfinger's accountant's recording of $50 for Goldfinger's capital contribution to SGW, and (iii) recitals in the First Settlement, the corporate records of SGW contained no entry showing Goldfinger as a shareholder or the issuance of any shares to Goldfinger.

197 Goldfinger moved for an order that the net surplus of monies remaining from the sale of 105 University, after payment of proper amounts owing to creditors, be paid to him. Farber opposed Goldfinger's request for a distribution of any of the sale proceeds to him as the sole shareholder of SGW on the basis that the administration of the SGW bankruptcy was not yet complete and therefore it was unclear whether any surplus funds would be available for distribution to an equity claimant.

198 Farber contended that the transactions through which Goldfinger acquired the shares of SGW *prima facie* would be void against the trustees of the estates of Kimel and Mahvash (in the event that a bankruptcy order issued against her) under the *BIA*. That issue is not before me for determination. Farber is not the trustee of the Kimel's estate. No claim to that effect by Kimel's trustee is before me. Mahvash has not been adjudged bankrupt; Farber is not the trustee proposed in the bankruptcy proceedings against Mahvash.

B. Analysis

199 Goldfinger's claim to part of the proceeds of the sale of 105 University as sole shareholder of SGW clearly is an "equity claim" as defined by *BIA* s. 2. Section 140.1 of the *BIA* provides that a creditor is not entitled to a dividend from the estate in respect of an equity claim until all claims that are not equity claims have been satisfied. Further, section 144 of the *BIA* stipulates that the bankrupt only is entitled to any surplus following payment to the bankrupt's creditors and payment of the costs, charges and expenses of the bankruptcy proceedings.

200 Farber, as trustee of SGW, reported that the administration of that bankrupt's estate was not yet complete. In my view, it would be premature to make any order regarding the distribution of any surplus of the estate of SGW until the trustee reports that all claims of nonequity creditors have been paid and the costs of administration satisfied. Accordingly, I am not prepared to make the order sought by Goldfinger for a distribution of surplus to him in his capacity as shareholder of SGW.

201 That said, it is important that the administration of the estate of SGW be completed within a reasonable period of time. Accordingly, I am seizing myself of all court proceedings involving the SGW estate, and I require counsel to appear before me on a 9:30 appointment before the end of November, 2013, to report on what further steps remain in the administration of this estate and the anticipated timing for their completion.

D. Allegations of conflict of interest against Farber by Goldfinger

202 Goldfinger submitted that by acting as trustee in bankruptcy of SGW, as well as trustee for claimants against SGW, such as the estates of Montor, Annopol and SGG, Farber stood in a conflict of interest position, had failed to act impartially in respect of the claims advanced against the estate of SGW and had failed to provide full information to interested parties, in breach of the *BIA Rules* governing the conduct of trustees. Goldfinger also contended that the reports filed in this proceeding by Farber adopted an adversarial position and went beyond the scope of such reports as mandated by *BIA* s. 170. [78]

203 On the latter point I would note that Goldfinger previously brought a motion in the Preferences Application to strike out one of Farber's reports. That motion was dismissed on March 31, 2011.

204 While my review of Farber's reports does not raise undue concerns about the trustee's attempt to provide the Court with full and impartial information, the various hats worn by Farber in this proceeding causes some concern. The proof of claim scheme created by the *BIA* contemplates that the trustee of the bankrupt will examine every proof of claim and then either allow or disallow the claim. A trustee must give reasons for its determination or disallowance, and the trustee's decision is final and conclusive unless the claimant appeals to the court. That scheme assumes that the trustee who examines and determines a claim has no interest in the claim. In the present case, Farber was acting as trustee both for the bankrupt, SGW, and several of the claimants: Annopol, Montor and SGG. In light of those mandates, Farber could not act impartially in considering the claims filed by Annopol, Montor and SGG. Thus resulted this motion where the court, in effect, played the role of the trustee under section 135 of the *BIA* in examining and determining claims.

205 In my view, such a procedure for considering claims against a bankrupt should be avoided to the extent possible. The *BIA* squarely places the responsibility for the examination and determination of proofs of claims in the hands of the trustee. In order to be able to discharge that duty, a trustee should avoid taking on any mandate which might put it in a conflict of interest situation where it is contemplated that there may be a highly contested claims process. I am concerned that Farber, by acting as trustee for both the bankrupt and claimants, did not afford the court the full benefit of independent arguments in respect of the claims on behalf of the estate, on the one hand, and the claimants, on the other. That said, I am satisfied in the present case that Farber placed before the court a sufficiently fulsome record relating to the claims advanced, and I am not persuaded, as argued by Goldfinger, that Farber's obvious conflict of interest in the claims procedure caused an inadequate record to be placed before the court, although I have required Farber to provide more sufficient information for SGG's unjust enrichment claim.

IX. Summary of conclusions on the Claims Motion

206 A summary of the orders disposing of the Claims Motion can be found towards the end of these Reasons in Part XIV.

X. The Preferences Application: Summary of the allegations against Dr. Goldfinger

207 In the Preferences Application, Farber, in its capacity as the trustee in bankruptcy of the estates of Montor, Annopol and SG Brantford, has advanced claims to set aside a number of transactions which formed part of, or which were related to, the First Settlement (2008) between Goldfinger, on the one hand, and Kimel, Mahvash and their companies on the other. Specifically, according to Farber's July 3, 2012 Fresh as Amended Notice of Application, it seeks the following orders:

> (i) repayment of the $2.5 million paid by Annopol to Goldfinger in December, 2007 and January, 2008 in anticipation of the First Settlement;
>
> (ii) alternatively, an order requiring Mahvash, as a director of Annopol, to pay the $2.5 million to the Annopol estate;
>
> (iii) setting aside the charges/mortgages of land granted by SG Brantford to Goldfinger over a property at 176 Henry Street in Brantford, Ontario (the "Goldfinger 176 Henry Charges");
>
> (iv) setting aside charges/mortgages of land granted by Summit Glen Bridge Street Inc. ("SG Bridge") to Goldfinger over a property located at 70 Bridge Street in Kitchener, Ontario (the "Goldfinger 70 Bridge Charges");
>
> (v) setting aside subordinations made by Annopol of charges/mortgages of land granted by SG Brantford (the "Annopol 176 Henry Charges") and SG Bridge (the "Annopol 70 Bridge Charges") in favour of the Goldfinger Charges on those properties (the "Annopol Subordinations");
>
> (vi) the repayment of $471,000 paid by SG Brantford to Goldfinger in November, 2008 to discharge the Goldfinger 176 Henry Charges; and,
>
> (vii) payment to the Annopol estate of the surplus from the sale of 70 Bridge (the "Bridge Surplus") currently being held in trust for the benefit of Goldfinger's counsel, Davis Moldaver LLP ("Davis") and Farber's counsel, Gowling Lafleur Henderson LLP ("Gowlings").

208 Although Farber initially also attacked the 2009 Second Settlement, by the time of trial it had amended its application to limit its preference claims to the $2.5 million paid under the First Settlement, the $471,000 payment made in November, 2008, and Goldfinger's claim to the surplus of SG Bridge. [79]

209 Goldfinger contended that Farber's position was unfair in that it sought to deprive him of substantial benefits negotiated under the First Settlement while holding Goldfinger to releases which he gave in the Second Settlement (2009). Goldfinger deposed that he would not have entered into the Second Settlement without having obtained the payments which formed part of the First Settlement.

XI. The 2007/2008 $2.5 million settlement payments to Goldfinger

A. The allegations and positions of the parties

210 Farber seeks the repayment of the $2.5 million paid by Annopol to Goldfinger in December, 2007 and January, 2008 in anticipation of the execution of the First Settlement. The date of the initial bankruptcy event in the Annopol

bankruptcy was May 26, 2009; the date of bankruptcy was May 27, 2010. Farber seeks to void or set aside the $2.5 million payment on several grounds:

> (i) as a transfer at undervalue under s. 96 of the *BIA*;
>
> (ii) as a voidable transaction under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F. 29 (the "*FCA*") or the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33 (the "*APA*");
>
> (iii) as relief for a finding of oppressive conduct made under s. 248 of the *OBCA*; or,
>
> (iv) on the basis of unjust enrichment.

Farber did not attack the payments under *BIA* s. 95.

211 Goldfinger opposed any such findings or remedies.

B. The First Settlement: 2008

212 As mentioned, in May and June, 2008, Goldfinger, Kimel and many of his companies signed the First Settlement. The parties to it were Goldfinger, on the one hand, and Kimel, Mahvash, Annopol, as well as several of Kimel's companies on the other, collectively referred to as the Summit Glen Companies (the "SG Companies"), which included Summit Glen Brantford Holdings Inc. ("SG Brantford") and Summit Glen Bridge Street Inc. ("SG Bridge"). Annopol was not included in the definition of the SG Companies. All parties acknowledged in the First Settlement having been represented by independent counsel. Farber is trustee for three of the signatories (Annopol, SG Brantford, SG Waterloo) and a petitioning creditor for yet another (Mahvash).

213 The First Settlement was designed in such a way as to repay to Goldfinger the amounts already lent to the SG Companies and to enable Goldfinger to extract an amount representing his notional equity or profit in the various real estate developments. The material terms concerning the repayment of amounts already advanced by Goldfinger were as follows:

> (i) The SG Companies acknowledged that they were indebted to Goldfinger in the amount of $6.5 million, which amount was termed the "Shareholder Loans". (As noted, the SG Companies did not include Annopol.) Those companies provided Goldfinger with promissory notes in the amount of the unpaid Shareholder Loans, with payment of half the principal amount due December 11, 2008, and the balance on December 11, 2009;
>
> (ii) Kimel and each of the SG Companies guaranteed repayment of the Shareholder Loans;
>
> (iii) As collateral security for the repayment of the Shareholder Loans, the SG Companies granted to Goldfinger what were called the Shareholder Mortgages, each in the amount of $6.5 million on specified properties, including 176 Henry Street, Brantford owned by SG Brantford and 70 Bridge Street West, Kitchener, owned by SG Bridge.

214 Although shares in the SG Companies had never been issued, the First Settlement deemed Goldfinger to own beneficially 50% of the shares of each company and went on to provide that:

> (i) The SG Companies would purchase Goldfinger's 50% interest in the companies for $5 million, or what was termed the Share Purchase Price. The parties agreed that the $2.5 million previously paid to Goldfinger represented a partial payment of the Share Purchase Price. Kimel would provide Goldfinger with a secured promissory note for $1.5 million, with the final payment due December 11, 2009, and Kimel would provide Goldfinger with an unsecured promissory note for $1 million, again with the final payment due by December 11, 2009;

> (ii) Each SG company guaranteed payment of both notes, and granted Goldfinger $1.5 million Third Mortgages on each property;
>
> (iii) Also, each member of the Kimel Group, which included Annopol, postponed all their claims against the SG Companies to the prior payment of the Shareholder Loans and both notes. Annopol also agreed to postpone $750,000 charges it held on the 176 Henry and 70 Bridge properties in favour of Goldfinger's Shareholder Mortgages and Third Mortgages.

215 The Kimel Parties agreed that until all of the payments to Goldfinger were made, the SG Companies would not sell or encumber the properties, except the Valleyview and Fairway properties. If either property was sold or mortgaged, the proceeds would be paid out in accordance with an agreed formula.

216 The First Settlement contained an Indemnity under which Kimel and the SG Companies would indemnify and hold Goldfinger harmless from certain claims:

> On closing, Kimel and each of the Summit Glen Companies shall jointly and severally, covenant and agree to indemnify and hold harmless Goldfinger, his personal representatives, heirs, executors, administrators, successors and assigns (collectively, the "Indemnified Parties"), from and against any and all claims, damages, losses, liabilities, demands, suits, judgments, causes of action, legal proceedings, penalties or other sanctions and any and all costs and expenses arising in connection therewith, including, without limitation, reasonable legal fees and disbursements on a solicitor and his own client substantial indemnity basis, which may be suffered or incurred by any of the Indemnified Parties howsoever resulting from or arising out of: (i) a breach or inaccuracy of any of the representations or warranties made by the Kimel Group or the Summit Glen Companies (or any of them) in this Agreement; (ii) any non-observance or nonperformance of any of the covenants, obligations and agreements of the Kimel Group or the Summit Glen Companies (or any of them) under this Agreement; (iii) any liabilities, debts, contracts or obligations of the Summit Glen Companies, whether present or future, absolute or contingent, direct or indirect; and (iv) any claims, suits and proceedings which are pending or hereafter made against the Summit Glen Companies.

217 The First Settlement also required Kimel, Mahvash, Annopol and the SG Companies to provide Goldfinger with a release containing the following language:

> IN CONSIDERATION of the sum of TWO DOLLARS ($2.00), the completion of the transactions contemplated in the Memorandum of Agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), [Kimel, Mahvash, Annapol and the SG Corporations] (collectively, the "Releasing Parties") [do] hereby irrevocably release, remise, and forever discharge each and all of [Goldfinger, his personal representatives, heirs, executors, administrators, successors and assigns], their respective officers, directors, shareholders, heirs, personal representatives, successors and assigns, from any and all manner of Claims which the Releasing Parties or any of them has or in the future may have, suffer or incur, by reason of, arising from or in connection with, or in any way relating to, the Properties and other assets, undertaking, operations and liabilities of the Summit Glen Companies.
>
> And for the same consideration, each of the Releasing Parties further agrees not to make any Claims, or take any proceedings in connection with any Claims released herein against any other person or corporation who might claim contribution or indemnity under the provisions of any statute or otherwise from any of the Released Parties.

218 The lawyers who papered the First Settlement for Goldfinger, Messrs. Rosenblatt and Schwebel of the Minden Gross firm, were not involved in the negotiation of the $2.5 million payment; they understood that Goldfinger and Kimel had agreed on that amount before approaching the lawyers. Schwebel understood that conceptually the $2.5 million payment would represent a partial payment to Goldfinger of his notional equity in all the properties, while the mortgages issued by the SG Companies would serve to secure repayment of Goldfinger's Shareholder Loans.[80] However, the

lawyers also testified that the allocation of the indebtedness due to Goldfinger amongst the SG Companies which were party to the First Settlement was not based on valuations of the properties, but on an agreement reached amongst the two parties. [81]

219 The First Settlement was completed on June 8, 2008, at which time Goldfinger received the promissory notes, guarantees, postponements, and mortgages due to him under it.

220 As part of the closing of the First Settlement, shares in SG Waterloo were transferred to Goldfinger from Mahvash, and then immediately transferred to Kimel.

221 In the Preferences Application Farber has not challenged the validity or enforceability of the Indemnity or the Release contained in the First Settlement.

C. Farber's claim under BIA s. 96

C.1 The statute

222 Farber seeks to set aside or declare void the $2.5 million payment to Goldfinger made prior to the execution of the First Settlement as a transfer at undervalue under *BIA* s. 96. Although Farber's amended notice of application and factum were not as clear as they could have been on this point, presumably Farber brought its challenge to the transaction in its capacity as trustee in bankruptcy of Annopol, the entity from which the cheques were issued to Goldfinger. Section 96 of the *BIA* provides as follows:

> 96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> (a) the party was dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
>
> (iii) the debtor intended to defraud, defeat or delay a creditor; or
>
> (b) the party was not dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
>
> (B) the debtor intended to defraud, defeat or delay a creditor.
>
> (2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

C.2 The transfers

223 *BIA* s. 2 defines a "transfer at undervalue" as "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor". That section includes "money" in the definition of "property", so a payment of money falls within the definition of a disposition of property.

224 The evidence established that Goldfinger received payments totaling $2.5 million from Annopol. The company's bank statements showed that on December 5, 2007 Annopol transferred $1.5 million to Goldfinger. Annopol also issued four cheques to Goldfinger which he negotiated in December, 2007 and January, 2008: December 12, 2007 ($300,000); December 21, 2007 ($200,000); December 28, 2007 ($300,000); January 10, 2008 ($200,000). Each cheque bore the notation: "re-purchase shares".

225 Goldfinger, in his September 6, 2011 affidavit, deposed that he had "no idea as to the source of the funds" for the $2.5 million payment "or that there was any issue regarding the solvency of Kimel, Mahvash or any of the SG companies":

> At the time I received the payment, Kimel told me that approximately $1.5 million came from Mahvash's inheritance, and the balance came from an elderly gentleman who attended the same synagogue as Kimel. I was further told that Kimel was required to sign an "I.O.U" in front of the synagogue's rabbi. [82]

226 Farber stated that the $2.5 million paid to Goldfinger came from (a) inter-company loans from related companies and (b) a $200,000 loan by a third-party, Mr. Srubiski, to Annopol. [83]

227 According to Kimel, the funds used to make the payments largely came from three sources. First, part came from the proceeds of the sale on October 4, 2007 of a property owned by Summit Glen Fairway (the 293 Fairway property). Of the net sale proceeds of about $1 million, Kimel testified that half was paid to Annopol. That company's bank statement showed the deposit of $485,000 received on October 5, 2007 from SG Fairway. [84] Annopol had a mortgage registered against that property which was discharged on the closing.

228 It is not self-evident from the record that funds from the SG Fairway property sale were used to fund part of the payments to Goldfinger. All payments to Goldfinger were made out of Annopol's HSBC bank account. On December 2, 2007, three days before the first payment (wire transfer) to Goldfinger, the balance in Annopol's HSBC account was just over $1,000.00, raising questions about what had been done with the early October deposit of funds Annopol had received from SG Fairway. Kimel testified that the funds could have been put into a term certificate or "temporarily utilized to pay down a line of credit in another company, or various things". [85] The records for that bank account disclosed that the funds Annopol used to cover the $1.5 million wire transfer to Goldfinger consisted of a December 5 transfer to Annopol from SG Trayvan ($1 million), together with a series of transfers on that date to Annopol from a variety of Summit Glen companies, with SG Fairway contributing only $24,000.00.

229 One must note that Annopol's opening bank account balance on December 5, before the wire transfer to Goldfinger, was just over $6,000.00, with a $39.64 closing balance following the wire transfer to Goldfinger. That banking history leads me to find that Annopol used monies from other Summit Glen companies transferred to it on December 5, 2007 to fund its $1.5 million wire transfer to Goldfinger. That wire transfer had no material impact on Annopol's bank account balance for that day.

230 Second, Kimel testified that another source of the funds which enabled Annopol to pay Goldfinger were proceeds from the re-financing of the Trayvan properties (41-67 Valleyview) in the Fall of 2007. Annopol's HSBC bank statements do show a transfer from SG Trayvan to Annopol of $1 million immediately prior to the $1.5 million wire transfer sent to Goldfinger on December 5, 2007.

231 As to the balance, Kimel variously testified that about $200,000 might have come from his wife, Mahvash, or from a third party investor, Srubiski. [86]

232 Turning from the wire transfer to the Annopol cheques provided to Goldfinger, Annopol's HSBC bank records disclosed the following transactions:

> (i) the initial cheque of December 12, 2007 for $300,000 was debited from Annopol's HSBC account on December 14, 2007. The account's closing balance on December 12 was just over $2,000.00. On December 13 a number of deposits were made, most identified as coming from other Summit Glen companies, including a $25,000 transfer from SG Fairway. Following the negotiation of the cheque to Goldfinger, the closing balance in Annopol's bank account was just over $18,000;
>
> (ii) the December 21 cheque for $200,000 was debited from Annopol's HSBC account the same day. The closing balance on December 20 was about $2,000. The cheque to Goldfinger was covered by the deposit on December 21 of a $200,000 cheque from another HSBC account and a $10,000 transfer from SG Fairway. Kimel was unsure whether those funds came from his wife or from a third party investor, Mr. Srubiski. The closing balance at the end of December 21 was just over $10,000;
>
> (iii) the December 28 cheque for $300,000 was debited the same day from Annopol's HSBC bank account. The cheque was covered by a $300,000 transfer of funds from SGG the same day. SGG had an operating line of credit with HSBC; the cheque to Annopol drew that line of credit up over the $2 million mark. On December 28 the HSBC account's opening balance was just over $10,000; its closing balance was an overdraft of about $3,000, largely the result of other cheques written that day on the account;
>
> (iv) the January 10, 2008 cheque for $200,000 was debited the same day from Annopol's HSBC account. The prior opening balance was about $2,500. The cheque to Goldfinger was covered by a transfer to Annopol from SGG which SGG, in turn, funded by drawing on its HSBC line of credit, pushing it up to $2.376 million. The day's end closing balance on Annopol's account was the same as the opening balance.

In sum, Annopol's bank records disclosed that it relied on transfers of funds from other Summit Glen companies just prior to the negotiation of the cheques in order to cover the amounts paid to Goldfinger. SGG's HSBC line of credit statements showed that it borrowed $500,000 from its line to fund, through Annopol, that amount of the payments made to Goldfinger. It is not possible from the record to determine the ultimate source of the other funds transferred by the other Summit Glen companies in order to cover the cheques paid to Goldfinger.

C.3 Was the transfer at undervalue?

233 Mr. Baigel, one of the trustees at Farber, deposed, in his August 15, 2012 affidavit, that the value of the $2.5 million paid by Annopol to Goldfinger obviously was $2.5 million and Annopol did not receive any consideration from Goldfinger in return for the $2.5 million or, if there was consideration, the value of that consideration was zero. Farber pointed to *BIA* s. 96(2) which requires the trustee to state its opinion about the value of the actual consideration received by the debtor, and then goes on to provide that "the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee". Farber then argued that Goldfinger had not adduced any evidence to question the correctness of the trustee's opinion as to value, so "the Court must, as a result, conclude that Goldfinger provided no consideration in return for the $2.5 million".

234 I disagree. Additional evidence regarding the value of the consideration was filed, in particular the text of the First Settlement, together with evidence explaining how the First Settlement came about.

235 By its terms the First Settlement constituted the compromise of a dispute between Kimel and Goldfinger. Section 1(e) stated:

> This Agreement accurately records our understanding of the discussions that have taken place between the Parties to date in connection with the resolution of the existing shareholders' dispute.

Section 17 provided that if the Kimel Group and the Summit Glen Companies performed all their obligations under the settlement, Goldfinger would be required to deliver a release in their favour from all claims relating to the Properties and other assets of the companies. Annopol would be a beneficiary of such a release.

236 Goldfinger argued that the First Settlement constituted a legitimate exchange of value: a compromise of Goldfinger's claims to recover his $6.7 million investment and a surrender of some mortgage security, in return for only some of the misappropriated money from Kimel and his companies. He deposed that he entered into the First Settlement after "formal demand" had been made by his lawyers against Kimel.[87] Goldfinger also deposed that he would not have entered into the First Settlement without the prior payment of the $2.5 million: "Rather I would have immediately commenced and continued the litigation against the Kimels and their various companies."[88] Goldfinger deposed that over the course of his dealings with Kimel, $2.956 million of his money had been deposited into Annopol.[89]

237 Forbearance from suit, either actual or promised, can constitute good consideration to support a transaction.[90] Under cross-examination Goldfinger agreed that instead of commencing legal proceedings against Kimel, he sat down with him and negotiated a resolution of their dispute.[91] Indeed, in November, 2007, Goldfinger had threatened litigation and had gone so far as having counsel prepare a draft affidavit for him to swear in an action he was thinking of bringing against Kimel and several Summit Glen companies, including Annopol, for the appointment of a receiver over a number of the properties.[92] In the context of a dispute where one party had invested $6.5 million with the other, the partial repayment of $2.5 million of that investment in return for the investing party compromising and fixing his rights in accordance with the terms contained in the First Settlement, does not strike me as a circumstance where the "the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor". I therefore conclude that the payments of $2.5 million by Annopol to Goldfinger did not constitute a "transfer at undervalue".

238 In the event that I am wrong about that conclusion, let me proceed to examine the other elements a trustee must establish under *BIA* s. 96.

C.4 Were Goldfinger and Annopol at arm's length?

239 Different tests apply depending upon whether the party, Goldfinger, was or was not dealing at arm's length with the debtor, Annopol. Persons who are related to each other are deemed not to deal with each other at arm's length: *BIA*, s. 4(5). The evidence disclosed that at the time of the First Settlement, Goldfinger was not a registered shareholder of Annopol. Although the First Settlement "deemed" Goldfinger to be a shareholder of Annopol, taken as a whole the evidence regarding the First Settlement indicated that such a designation was merely a technical device, probably tax-driven, by which to structure the deal. Viewed substantively, prior to the execution of the First Settlement (and indeed thereafter), Goldfinger never exercised any control over the affairs of Annopol, or any other Summit Glen company. I therefore find that Goldfinger and Annopol were not related persons within the meaning of *BIA* s. 4(2) and (3).

240 That does not end the inquiry. *BIA* s. 4(4) provides that "it is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length". An oft-cited statement of the test for

ascertaining whether parties, in fact, are acting at arm's length, can be found in the decision in *Abou-Rached, Re*[93] which followed the test in *Gingras, Robitaille, Marcoux Ltée v. Beaudry*[94] as follows:

> ... a transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction is questions is not at arm's length.

More recently, the Alberta Court of Appeal, in *Piikani Nation v. Piikani Energy Corp.*, held that factors which have been developed in the jurisprudence under the *Income Tax Act* concerning "not dealing at arm's length" can provide helpful guidance in the *BIA* context, in particular three factors identified by the Supreme Court of Canada in *McLarty v. R.*:[95] (i) was there a common mind which directs the bargaining for both parties to a transaction; (ii) were the parties to the transaction acting in concert without separate interests; and, (iii) was there *de facto* control?[96]

241 Farber submitted that Goldfinger did not act at arm's length with Annopol, whose affairs were directed by Kimel, because he was a close personal and family friend of Kimel, as well as his business associate. While it is true that Goldfinger had been close friends with Kimel, one must look at the nature of their relationship at the time the payments of $2.5 million were made. The evidence disclosed that although Goldfinger had lent a large amount of money to Kimel and his companies, he had not been involved in the operation of the Summit Glen companies and had quite limited information about their affairs. In 2007 Goldfinger discovered that he had been misled by Kimel, in particular learning that many of the Summit Glen properties were encumbered with mortgages about which Goldfinger was not aware. Goldfinger sought explanations and a return of his money, but Kimel stalled. Settlement discussions commenced only after Goldfinger had retained counsel who, in letters dated November 12 and 13, 2007, required Kimel to respond to a settlement proposal, failing which proceedings would be commenced against him in this Court. Each side was represented by their own counsel. Although the amount of the initial $2.5 million repayment was arrived at by Goldfinger and Kimel, the overall structure and details of the First Settlement were negotiated with the assistance of counsel. In my view, those facts do not disclose bonds of "dependence, control or influence" which generally are necessary in order to find that two parties are not acting at arm's length.

242 Farber relied on a few cases to argue that a broader view should be taken of those relationships which could qualify as not at arm's length. In *Piikani Nation v. Piikani Energy Corp.*,[97] the Alberta Court of Queen's Bench considered an application by a trustee under *BIA* s. 95 to set aside payments to two individuals and one of their wholly-owned corporations at a time when the two individuals were directors and officers of the bankrupt corporation. The payments in issue represented the unearned portion of one person's service contract with the bankrupt and a severance payment to the other. In finding both individuals to be not at arm's length to the bankrupt, the court focused on the process by which a corporation, such as the bankrupt, would make decisions to pay others. Both individuals were directors of the corporation which had made the challenged payments, and the court stated that "it is hard to think that such decisionmakers could be at arm's length to the corporation when they make payment decisions, especially to themselves".[98] That decision recently was over-turned on appeal.[99]

243 Farber also relied on another decision of the Alberta Court of Queen's Bench, this one in *Visionwall Technologies Inc., Re*.[100] That case did not involve sections 95 or 96 of the *BIA*, rather the unpaid supplier provisions of *BIA* s. 81.1(1), specifically the ability of a supplier to repossess goods as long as at the time of demand the goods had not been resold at arm's length and were not subject to any agreement for sale at arm's length. In dispute was whether the Export Development Corporation was an arm's length purchaser of the materials in question. EDC had guaranteed

the performance bond which had been issued to the bankrupt for the completion of a construction contract, for which the materials in question had been ordered. When the bankrupt company encountered financial difficulties, a plan was developed which would see the construction contract completed by another company and, to facilitate that plan, EDC agreed to purchase the materials in question. As put by the court, if the construction contract was not completed and EDC was called on its guarantee of the bond, it would face a potential hit of $3 million. Against that background the court concluded that EDC was not at arm's length to the bankrupt because it was "a vital cog" in the transaction to complete the construction contract and "stood to lose $3,000,000 if the contract was not completed". That financial interest in the transaction meant EDC was not an arm's length purchaser of the materials. [101] Also, the court noted that the trustee had dealt the materials to EDC after it had received notice from the supplier for their return.

244 The present case is distinguishable from that in *Visionwall*. When considering a transaction under *BIA* s. 96, the party who dealt with the bankrupt necessarily had a financial interest in the transaction. The question is whether the transfer was at undervalue. Consequently, the existence of a financial interest by the party to the transfer cannot, in and of itself, turn that party into a person not dealing at arm's length with the bankrupt. Something more is required.

245 For those reasons, I conclude that in respect of the payments of $2.5 million, Goldfinger was dealing at arm's length with the debtor, Annopol.

C.5 Did the transfer take place within one year before the date of the initial bankruptcy event?

246 In light of that finding, *BIA* s. 96(1)(a) governs the balance of the analysis. Did the payments occur "during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy"? In the case of Annopol, the date of the initial bankruptcy event was May 26, 2009 and the date of bankruptcy was May 27, 2010. Accordingly, the review period for transfers under *BIA* s. 96 commenced May 26, 2008. The $2.5 million payments occurred in the period between December 5, 2007 and January 10, 2008, prior to and outside of the statutory review period.

247 Consequently, the transfers of $2.5 million are not reviewable under *BIA* s. 96 and Farber's claim, as trustee of Annopol, under that section must fail.

248 Notwithstanding that conclusion, I shall deal with the remaining elements of a challenge under *BIA* s. 96 since they involve some of the same factual issues as arise in Farber's claims under provincial preferences legislation.

C.6 Was Annopol insolvent at the time of the transfer or was Annopol rendered insolvent by it?

249 Section 2 of the *BIA* defines an insolvent person as one who is not bankrupt, but (i) who is unable to meet its obligations as they generally come due, (ii) has ceased paying its current obligations in the ordinary course of business as they generally become due, or (iii) the aggregate of whose property, at fair valuation, would not be sufficient to enable payment of its obligations, due and accruing due.

250 As set out in a response to an undertaking given on the examination of Michael Baigel, Farber stated that it was relying on the following evidence in support of its assertion that Annopol was insolvent at the time the $2.5 million payments were made to Goldfinger: (i) Mr. Baigel's affidavit of August 15, 2012; (ii) Annopol's financial statements for 2007 and 2008; and, (iii) the fact that Annopol had to borrow funds to pay its expenses and interest.

251 Baigel, in his March 19, 2010 affidavit, deposed simply that "based on the value at which the Goldfinger/Kimel Properties were sold, it appears that the Goldfinger/Kimel Companies are and have always been insolvent." Annopol was not included in Baigel's definition of the "Goldfinger/Kimel Companies".

252 The Statement of Affairs signed by Kimel for Annopol on June 14, 2010 showed that liabilities of $12.875 million greatly exceeded assets of $350,000.

253 Perelmuter prepared Annopol's financial statements at the material time, but he did so on a "notice to reader" basis, relying largely on information provided to him by Kimel. Perelmuter conceded that he was familiar "to some degree" with the financial affairs of Kimel's company, and he testified that in December, 2007 [102] and August, 2008 he had assumed that Annopol was solvent. [103]

254 This evidence does not establish that at the time of the transfers (December, 2007 and January, 2008) Annopol had ceased paying its obligations or was unable to meet its obligations as they became due. Annopol's bank account statements for that period disclosed that it received funds from other Summit Glen companies, and perhaps third parties, which enabled it to meet its on-going obligations. However, applying the balance sheet test of insolvency, its assets certainly were insufficient to meet its liabilities, as disclosed by the 2008 unaudited notice to reader financial statements, and that circumstance was corroborated by the 2010 statement of affairs signed by Kimel which showed liabilities greatly exceeding assets.

255 Against that evidence, Goldfinger advanced several reasons in support of his argument that Annopol was not insolvent at the time it made the $2.5 million payments to him. First, pointing to Montor's proof of claim in the Annopol bankruptcy which showed loans and payments made by Montor after the date of the payments to Goldfinger, he argued that Montor most likely would not have made those payments to Annopol (which amounted to about $500,000) had it known Annopol was insolvent at the time, particularly since Annopol's principal, Perelmuter, was the accountant for Annopol. [104] That evidence certainly tends to show that Perelmuter and Montor did not believe Annopol to be insolvent at the time of the transfers, but their perception of Annopol's affairs is not the same thing as whether Annopol, in fact, was solvent or insolvent.

256 Goldfinger also argued that since Annopol was not the ultimate source of the funds used to pay him the $2.5 million - rather the funds came from other Summit Glen companies or Kimel family money - one should not treat the payments, for purposes of assessing Annopol's solvency, as coming out of Annopol's assets. In the same vein Goldfinger deposed that at the time of the First Settlement, he received a June 11, 2008 statutory declaration from Kimel and Mahvash which led him to believe that the SG companies were financially viable. [105] Goldfinger also argued that since Annopol was merely a flow-through conduit for Kimel and the SG group of companies, Farber's claims on its behalf were "specious". Specifically, Goldfinger argued in his factum:

> 59. The $2.5 million paid to Goldfinger under the First Settlement was not Annopol's money as Farber, again, wrongly alleges. The money came principally from the sale of the Summit Glen Fairway property, and the refinancing of SG Trayvan's Valleyview property.

257 Earlier in these Reasons I reviewed how each payment to Goldfinger was funded through Annopol's bank account. Other Summit Glen companies transferred funds to Annopol to enable it to cover the cheques issued to, or wire transfer made to, Goldfinger and, in the result, those payments had no net impact on Annopol's bank accounts. In that sense, the payments did not render Annopol insolvent, at least on a cash-flow basis. But, those transfers in and out would have given rise to credits and debits on Annopol's balance sheet, and the 2008 financial statements, unaudited though they may have been, were based on information which came from Kimel and showed a very significant excess of liabilities over assets.

258 Consequently, I find that at the time of the December, 2007 and January, 2008 transfer of $2.5 million from Annopol to Goldfinger, Annopol was insolvent under the balance sheet test.

C.7 Did Annopol intend to defraud, defeat or delay a creditor?

259 That then leads to the final inquiry under *BIA* s. 96(1)(a)(iii): did the debtor, Annopol, intend to defraud, defeat or delay a creditor by making the transfers to Goldfinger? For the purposes of this analysis, I accept Farber's submission

that the intention of Annopol at the time should be determined by reference to the intention of Kimel, the person who directed the company's affairs. [106]

The case law concerning ascertaining the debtor's intention

260 The general approach to ascertaining the intention of the debtor in respect of a transfer or transaction was summarized by Rouleau J., as he then was, in *Conte Estate v. Alessandro* [2002 CarswellOnt 4507 (Ont. S.C.J.)]: [107]

> In this type of case it is unusual to find direct proof of intent to defeat, hinder or delay creditors. It is more common to find evidence of suspicious facts or circumstances from which the court infers a fraudulent intent.
>
> These suspicious facts or circumstances are sometimes referred to as the "badges of fraud." These badges of fraud are evidentiary indicators of fraudulent intent and their presence can form the *prima facie* case needed to raise a presumption of fraud...
>
> The presence of one or more of the badges of fraud raises the presumption of fraud. Once there is a presumption, the burden of explaining the circumstantial evidence of fraudulent intent falls on the parties to the conveyance. The persuasive burden of proof stays with the plaintiff; it is only the evidentiary burden that shifts to the defendants.

261 The decision of Anderson J. in *Fancy, Re* [108] often is referred to as a classic enumeration of the badges of fraud. In the 1988 decision of *Nuove Ceramiche Ricchetti S.p.A. v. Mastrogiovanni* this Court dealt with *Fancy, Re* as follows:

> The law on the subject of fraudulent conveyances is accurately stated by Mr. Justice Anderson in *Re Fancy* (1984), 51 C.B.R. (N.S.) 29....
>
> > The plaintiff must prove that the conveyance was made with the intent defined in that section [i.e. section 2 of the *Fraudulent Conveyances Act*]. Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.
>
> The "badges of fraud" referred to by Mr. Justice Anderson are those et [*sic*] out in *Re Dougmor Realty Holdings Ltd.* (1966), 59 D.L.R. (2d) 432:
>
> > (1) Secrecy
> >
> > (2) Generality of Conveyance
> >
> > (3) Continuance in possession by debtor
> >
> > (4) Some benefit retained under the settlement to the settlor.
>
> The above passages set out the test to be applied. The badges of fraud alleged by the plaintiff are established. [109]

262 The case law [110] has identified the following circumstances as constituting "badges of fraud" for purposes of ascertaining the intention of a debtor: (i) the transferor has few remaining assets after the transfer; (ii) the transfer was made to a non-arm's length person; (iii) there were actual or potential liabilities facing the transferor, he was insolvent, or he was about to enter upon a risky undertaking; (iv) the consideration for the transaction was grossly inadequate; (v)

the transferor remained in possession or occupation of the property for his own use after the transfer; (vi) the deed of transfer contained a self-serving and unusual provision; (vii) the transfer was effected with unusual haste; or, (viii) the transaction was made in the face of an outstanding judgment against the debtor.

The evidence and analysis

263 The direct evidence adduced by the Trustee on the issue of the intention of Kimel/Annopol in respect of the $2.5 million payments was given by Michael Baigel. His evidence, in actual fact, was limited to the state of Goldfinger's knowledge. On his cross-examination Baigel was asked to identify the information which the Trustee possessed about Goldfinger's knowledge about the financial status of Annopol at the time:

> Q. 208. What evidence do you have that Goldfinger even knew that Annopol had other creditors at that point in time?
>
> A. I assume — well, I can't assume.
>
> Q. 209. Right.
>
> A. So I'll just say the evidence is that he was heavily involved with these people. Surely he wouldn't have just gone ahead and taken this, and he didn't have access to financial statements. He was investing heavily with these people. Wouldn't he have known that there were liabilities out there? I can't believe he would have put however many millions of dollars he says he's put in without following up and just trusting — especially where he was, Jack Lechcier-Kimel, and saying, yeah, that's okay. You've got no liabilities.
>
> Q. 210. I take it from that, that you have no evidence that Goldfinger even knew Annopol had other creditors in December of 2007 or January of 2008. Correct?
>
> A. Well, but hold on. There was back in one of his affidavits he starts talking about that he wasn't aware that Jack Lechcier-Kimel put other securities on the various properties. Annopol had related properties, and surely when he was talking about that — I think that started in July 2007 from memory — he would have been aware of all these other liabilities out there.
>
> Q. 211. Isn't it fair to say that you have it backwards, that what he wasn't aware of was the mortgages in favour of Annopol on these various properties, not loans or monies owing by Annopol? It was mortgages to Annopol that he was unaware of, correct?
>
> A. I agree with you on that, but I'm not sure it's backwards. It's because that obviously diminishes what he has available if there's mortgages there. [111]

. . .

> Q. 214. You've told me about mortgages that I suggested to you were backwards. I'm asking you a really simple question. What evidence do you have that Goldfinger knew that Annopol had creditors? If you have no such evidence, just tell me.
>
> A. At this point in time I would like to get back to you with anything that I do have.
>
> Q. 215. So today —
>
> A. Today I'm saying I can't remember.

264 In an answer to an undertaking given on that examination, Farber stated:

Farber does not know what Goldfinger knew vis-à-vis Annopol as at December of 2007 or January of 2008. However:

a. Goldfinger was aware that the $2.5 million was being paid to him by Annopol. He was, for example, given post-dated cheques from Annopol.

b. In an e-mail exchange between JLK and Goldfinger on 9 December 2007, JLK indicated to Goldfinger that money to pay the $2.5 million was being borrowed.

c. In paragraph 118 of his Affidavit sworn 6 September 2011 Goldfinger swears that he was told by JLK that the $1 million of the $2.5 million paid to him by Annopol was borrowed.

d. Rubin Rosenblatt has confirmed that JLK advised that money to make the $2.5 million payment was being borrowed.

265 The direct evidence of Kimel comes from his cross-examinations. On one of them Kimel was asked whether he had considered the impact the payment of the $2.5 million to Goldfinger would have on other creditors:

Q. 100. Please answer the question. Did you consider the impact of providing security to Goldfinger and subordinating Annopol's charge would have on the ability of Annopol to recover under the charge?

A. No, I didn't consider that.

Q. 101. You will agree that subordinating the charge...so $6.5 million in security to Goldfinger would make it difficult for Annopol to recover, correct?

A. I didn't, at that time, even think in terms of any of the concepts you are broaching.

Q. 102. So what were you thinking about at the time you granted the security?

A. Simply arriving at a fair and equitable settlement to buy his share back of the business...or buy him out of the business in total.

Q. 103. So you were not thinking about the other creditors of the companies or the other stakeholders in these businesses?

A. I didn't think in terms of any other stakeholders. I didn't consider there were any.

Q. 104. What about the people that were lending money to Annopol which is being advanced onto companies like SG Bridge?

A. Well, they had always advanced the money on the basis of properties being rezoned and redeveloped and being repaid from the redevelopment of those properties.

Q. 105. But by placing $6 million in security ahead of them, did you not prejudice their right to recover from the redevelopment?

A. I think you are asking me to look in hindsight and these were not items that...or thoughts that I, in any way, thought I had to consider at that time.

Q. 106. Okay, fair enough. So you didn't consider other interests except the interests of yourself and Dr. Goldfinger?

A. Yes. [112]

266 Elsewhere on that cross-examination Kimel testified:

Q. 386. When you were negotiating your settlement with Dr. Goldfinger, did you consider the possible impact that settlement might have on creditors like HSBC and Community Trust?

A. As I mentioned before, no, none of these situations were evident. The collapse hadn't taken place. The receivership hadn't occurred. I had no reason to assume that things wouldn't progress from a settlement to the ultimate plans that I had for redevelopment of the many properties.

Q. 387. But I guess...so you never considered their interests?

A. No.

Q. 389. When the first settlement got made, the one we call the December 2007 settlement, or the one that was finally finalized in June 2008, none of the companies who participated in that settlement had defaulted on any payments to anyone at all, right?

A. That's correct.

Q. 390. And as you understood it, none of those companies were insolvent, they were all companies with really strong potential for the various developments they were involved in, correct?

A. Yes, that's correct. [113]

267 Kimel testified that although his wife, Mahvash, was the sole owner and director of Annopol, he ran that company on a day-to-day basis and he did not discuss its affairs with her in any detail. Mahvash signed any documentation Kimel asked her to. [114] According to Kimel, Mahvash was aware of the $2.5 million payment to Goldfinger, but she had not been involved in the settlement negotiations. [115]

268 As to the direct evidence from Mahvash, she deposed that Kimel managed and controlled all of the family's finances and did not provide her with information about the companies' affairs. Mahvash stated that she became aware of the $2.5 million payment to Goldfinger in June, 2008, when she signed documents for the First Settlement, but only in 2010 did she become aware of the source of the funds for that payment. She stated that she had no way of knowing whether her personal funds had been used to fund that payment because Kimel had exercised complete control over all of the family's assets and he had not discussed with her the source of the settlement funds. In May, 2010, Mahvash deposed:

In summary, I did not cause any of the challenged transactions or payments to have been made, nor was I even aware that they were being made at the time that they occurred. I have only learned of these transactions as a result of the litigation instituted against me by Dr. Goldfinger and others during the past year and a half.

269 Goldfinger testified that he was not aware of the day-to-day business affairs of Kimel's companies nor did Kimel provide him with their financial statements. [116] He stated that Kimel provided him with "extremely limited information" about the companies. [117]

270 Finally, at trial the two lawyers who had represented Goldfinger during the negotiation of the First Settlement gave some evidence on the issue of the impact of that deal on other creditors. Schwebel testified that he did not recall any discussion with Goldfinger about the impact which the $2.5 million payment might have on the ability of the SG Companies to repay their creditors, but Schwebel described Goldfinger's understanding of those companies' state of affairs at that time as follows:

> A. Well, my understanding was that these — these properties had appreciated considerably in value and that there was a fair — a lot of equity in this — in this group of companies over and above the mortgages that were secured against them, and that — um, I think it was my understanding that Annopol or that the Kimels were the only other creditors of these companies.
>
> . . .
>
> Q. Was any consideration ever given to the impact that this settlement might have on the companies' ability to repay those loans?
>
> A. The — the understanding was that these mortgages would be paid out on the sale or refinancing of the property, um, at which time, the other mortgages would have to as well be taken account of. [118]

271 On that point, Rosenblatt testified as follows:

> Q. And at that point in time, it was likely — well, let me rephrase that for a moment. So, they weren't paying their debt to Dr. Goldfinger. Did you have any knowledge with respect to the value of their properties?
>
> A. We never did appraisals, but when we were — when Dr. Goldfinger and Mr. Kimel were negotiating what the "equity" was, is Dr. Goldfinger, I think, thought it was worth — the equity was 11 or 12 million dollars over and above the mortgages, Mr. Kimel thought they were around 9 million and Dr. Goldfinger thought his share was worth five and a half million, Mr. Kimel felt four and a half million. And that's how they worked it out at the five million. Other than that, we did not do appraisals. They — uh, they seemed to know the values, they agreed on the values, and that's what we thought the values were. [119]

272 When inquiring into the intention of a debtor for the purposes of *BIA* s. 96(1)(a)(iii) — and the provincial preferences statutes for that matter — a court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time. A court must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time. The focus must remain on the belief and intention of the debtor at the time, as well as the reasonableness of that belief in light of the circumstances then existing.

273 When looked at that way, the direct and circumstantial evidence, taken together, lead me to conclude, on the balance of probabilities, that by making the $2.5 million payments to Goldfinger, Kimel and Annopol did not intend to defraud, defeat or delay other creditors. I reach this conclusion for several reasons.

274 First, the terms of the First Settlement, which originated around the time the payments were made, indicated that the parties thought the Summit Glen companies would continue as going concerns and would generate sufficient value to repay fully Goldfinger for the advances he had made within two years — by December 11, 2009. The evidence disclosed that the parties to that agreement believed the properties owned by the Summit Glen companies possessed significant future value, a value which would prove sufficient to pay off those companies' liabilities and generate a profit for Kimel and Goldfinger to share. In hindsight one might question the reasonableness of that belief, but the evidence given by Schwebel and Rosenblatt about the parties' thinking at the time indicated a genuine belief in the value of the properties. I place significant weight on that evidence.

275 For the settlement to work, the parties had to expect that the Summit Glen companies would continue as going concerns and that the underlying real estate projects would generate a net benefit for division between the parties. Otherwise, the security granted to Goldfinger would have no value. As part of the closing documentation for the First Settlement, Goldfinger received a statutory declaration made by Kimel and Mahvash, in paragraph 6 of which they declared:

> There is no fact, matter or event which is known to me which has not been disclosed to Goldfinger which is likely to have a material adverse effect on the performance of the respective obligations of the Kimel Group and/or the Summit Glen Companies under this Agreement or which has or is likely to have a material adverse effect on the Properties or the operations of the Summit Glen Companies.

276 Of course, within half a year of the execution of the First Settlement the North American credit markets had collapsed, with a general depressing effect on real estate values. The parties did not adduce expert valuations of the properties at the time of the payments or the First Settlement. The monies paid into Court from the sale of 105 University and the prospect of full recovery in that estate of both secured and unsecured claims (subject to the issue of the Trustee's costs of administration) suggest that some of the properties had a net worth.

277 Second, the First Settlement was not put together in a rush; it was the product of over six month's negotiation. Both parties were represented by counsel.

278 Third, as I have found, they were dealing at arm's length.

279 Fourth, there was consideration for the settlement.

280 Fifth, the payment and the First Settlement were not put in place in the face of claims by judgment creditors against the debtor.

281 In sum, I conclude that the payments of $2.5 million to Goldfinger made in December, 2007 and January, 2008, were not made by the debtor, Annopol/Kimel, with the intent to defraud, defeat or delay a creditor.

282 For these reasons, I dismiss Farber's claim for a declaration under *BIA* s. 96(1) to set aside the payment of $2.5 million to Goldfinger pleaded in paragraph IV(a) of its July 3, 2012 Fresh as Amended Notice of Application.

D. Farber's claim under the Assignments and Preferences Act and Fraudulent Conveyances Act

283 In paragraph III(a) of its Fresh as Amended Notice of Application, Farber sought declarations that the $2.5 million payment to Goldfinger was void as a preference or fraudulent conveyance pursuant to the provincial *Assignments and Preferences Act* and the *Fraudulent Conveyances Act*.

The Assignments and Preferences Act claim

284 Sections 4(1)(2) and 5(1) of the *Assignments and Preferences Act* ("*APA*") provide:

> 4. (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.
>
> (2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.
>
> . . .

> 5. (1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of $100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

285 Although any payment of money to a creditor, whether or not the payment is intended to prefer the creditor and defeat other creditors, is protected under s. 5(1) of the *APA*, [120] in the present case Goldfinger has filed what he termed a "contingent" proof of claim in Annopol's bankruptcy, taking the position that he would only assert a claim as a creditor in the event the Court set aside the $2.5 million payment. In light of that position, the saving condition in *APA* s. 5(1) is not available to Goldfinger.

286 Considering Farber's claim under *APA* s. 4(1), I repeat my finding above that at the time of the $2.5 million payments Annopol was insolvent. I also repeat my finding that the debtor, Kimel/Annopol, did not intend to defeat, hinder, delay or prejudice creditors, and I rely on the same evidence for that finding to make the additional finding that neither did Goldfinger possess such an intent, to the extent such a finding might be necessary. On the latter point, Farber, in its February 8, 2013 Factum, stated that it was not asserting that in receiving the payments of $2.5 million or $471,000 (SG Bridge) Goldfinger had intended to defeat, hinder or delay creditors.

287 As to Farber's claim under *APA* s. 4(2), [121] Goldfinger did not file an unconditional proof of claim as a creditor, and Farber, in paragraph 129 of its February 7, 2013 Factum, was prepared to proceed on the basis that the payment of $2.5 million could not be attacked on the basis that Goldfinger was a creditor of Annopol. In any event, the evidence I have relied upon to make the findings above with respect to the intent of Kimel/Annopol and Goldfinger also leads me to conclude that at the time of the payments neither possessed the intent to give Goldfinger an unjust preference over other creditors.

The Fraudulent Conveyances Act claim

288 The *Fraudulent Conveyances Act* provides, in part, as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.
>
> 3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.
>
> 4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

As put by Sedgwick J. in *Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.* [1996 CarswellOnt 440 (Ont. Gen. Div.)]:

> If the court is satisfied that a conveyance is made with intent on the part of the grantor to defeat, hinder, delay or defraud creditors and others, the parties to the conveyance (the grantor and the grantees) must show that it was made for good consideration and good faith and to a person (or persons) who was (or were) without notice or knowledge of the grantor's fraudulent intent. *Bank of Montreal v. Jory* (1981), 39 C.B.R. (N.S.) 30 (B.C. S.C.). Otherwise, the conveyance is void against creditors of the grantor.

122

289 The evidence reviewed above concerning the intent of Kimel/Annopol and Goldfinger applies equally to Farber's claim under the *FCA*. Based on that evidence, I find that they did not possess the intent "to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures" as required by *FCA* s. 2.

Summary

290 For the reasons set forth above, I dismiss Farber's claim to set aside the $2.5 million payment to Goldfinger under the *APA* and *FCA* as pleaded in paragraphs III (a)(ii) and (c) of its Fresh as Amended Notice of Application.

E. The oppression claim under OBCA s. 248.

291 Next, Farber challenged the payment of $2.5 million to Goldfinger under the oppression provisions found in section 248 of the *Ontario Business Corporations Act*. Farber submitted that as trustee of Annopol it was a proper "complainant" under *OBCA* s. 248. Goldfinger contended that the court possessed the discretion to recognize a trustee as a complainant under *OBCA* s. 245(c), but it should not do so in the present case.

292 Where the bankrupt is a party to an impugned transaction, the court possesses the discretion to determine whether, in the circumstances of the particular case, the trustee is a proper person to act as a complainant. [123] In the *Olympia & York Developments* case, the Court of Appeal held that where it was likely the creditors of a bankrupt corporation would have been recognized as complainants for the purpose of challenging a transaction under *OBCA* s. 248, then it was proper to recognize the trustee of the bankrupt as a complainant "in effect on behalf of the creditors of" the bankrupt. [124] I will proceed with my analysis on the basis that Farber, as trustee of Annopol, has status as a "complainant" for purposes of *OBCA* s. 248.

293 The oppression remedy concerns the reasonable expectations of the stakeholders of a corporation and whether the corporation has acted in a way to violate those reasonable expectations by conduct which is "oppressive or that unfairly prejudiced" or "unfairly disregarded" those reasonable expectations. [125]

294 In its factum Farber framed the reasonable expectations it was advancing in the following terms:

> 77./ Applying these factors to the relationship between Annopol and its third-party creditors, the most basic reasonable expectations of those creditors are that:
>
> (a) Annopol would not make payments to reproduce salaries or by way of equity distributions (or gratuitous payments) where: (i) Annopol's financial situation was such that it was not be able to repay creditors; or (ii) the payments would result in Annopol being unable to repay its creditors;
>
> (b) Annopol would pay stakeholders only in accordance with the relative priority of their claims against Annopol; and,
>
> (c) Annopol would not take steps or enter into agreements that would prejudice the company's ultimate ability to pay its creditors.

295 I accept that creditors of a corporation possess a reasonable expectation that the company will not engage in conduct which runs afoul of the provincial preferences legislation or the preference/ transfer for undervalue provisions of the *BIA*. However, for the reasons set out above, I have concluded that the payment of $2.5 million by Annopol to Goldfinger did not run afoul of *BIA* s. 96, the *Assignments and Preferences Act* or the *Fraudulent Conveyances Act*. In reaching that conclusion I found that at the time of the payments neither Annopol/Kimel nor Goldfinger possessed the intent to defeat, hinder, delay or defraud creditors. I would rely on the same findings to conclude that Annopol's payment to Goldfinger did not violate the reasonable expectations of its creditors.

296 Although that part of Farber's argument seems duplicative of what it submitted under the *BIA*, *APA* and *FCA*, in its factum it put forth an additional submission:

> 84./ The payment of $2.5 million to Goldfinger could not possibly have been foreseen by Annopol's third-party creditors and there is nothing those creditors could have reasonably done to protect themselves from JLK and MLK causing Annopol to pay $2.5 million to Goldfinger.
>
> 85./ The detriment to Annopol's creditors caused by the $2.5 million payment is obvious. As a result of the $2.5 million payment, *Annopol was completely stripped of assets and incurred further debt in order to make a prohibited equity payment or distribution to Goldfinger*. The result has been the bankruptcy of Annopol and a significant loss to Annopol's creditors. By way of contrast, *Goldfinger recovered a $2.5 million equity payment*.

Farber argued that Goldfinger in fact was a shareholder of Annopol at the time the $2.5 million payment was made and that the payment constituted the re-purchase of his issued shares or the making of a capital dividend in contravention of *OBCA* ss. 30(2) and 38(3) which prohibit such actions where there are reasonable grounds to believe that the corporation is not solvent.

297 In December, 2007 and January, 2008, Goldfinger was not a shareholder of Annopol. He had not subscribed for any shares; Annopol had not issued any shares to him. As set out in paragraph 193 above, the two lawyers who acted for Goldfinger on the First Settlement never saw any share certificates issued to him by any of the Summit Glen group of companies. Also, Farber possessed the minute book for Annopol, which included a shareholder register, but it could not locate any share certificates or other documents which indicated that Goldfinger was a shareholder of Annopol. Although Goldfinger thought that under his arrangement with Kimel he would become a shareholder in many of the Summit Glen companies, that never came about.

298 It is true that each of the December, 2007 and January, 2008 cheques to Goldfinger bore the notation, "re-purchase of shares", but a notation on a cheque does not alter the state of a corporation's records or corporate treasury. Moreover, about six months after the $2.5 million payments were made, the First Settlement closed. As mentioned, in the First Settlement the parties acknowledged that no shares in the SG Companies (which did not include Annopol) had been issued to Goldfinger, but that for purposes of the settlement "Goldfinger is, and for all purposes shall be deemed to be, the legal and beneficial owner of 50% of the share capital of each of the Summit Glen Companies". Kimel then agreed to purchase Goldfinger's shares in the capital of the SG Companies (which did not include Annopol) for $5 million and, in respect of the payment of the Share Purchase Price, Goldfinger acknowledged "receipt prior to the execution of this Agreement of the sum of $2,500,000.00 on account of the Share Purchase Price". The SG Companies identified on Schedule 1 to the First Settlement consisted of those which owned properties. Given that the First Settlement agreement purported to be made as of December 11, 2007, but it was not executed until early June, 2008, its provisions concerning the purchase of Goldfinger's "deemed" shares in the SG Companies strongly suggest that the "repurchase shares" notation found on the cheques paid to him in December, 2007 and January, 2008 actually referred to the notional re-purchase of the deemed shares in the SG Companies, not to the re-purchase of Annopol shares.

299 It follows that since Goldfinger was not a shareholder of Annopol at the time the $2.5 million was paid to him, those payments did not constitute the purchase of shares which had been issued to him nor the payment of a dividend. On the latter point, no corporation resolution declaring a dividend was placed in evidence.

300 Moreover, when one steps back and takes a look at the substance of what happened under the First Settlement, Goldfinger received the re-payment of $2.5 million of the funds which he had loaned to Kimel and his companies, as well as some additional security. None of the properties into which his loans had been placed had yet been redeveloped to the point where they could be sold and, according to the initial arrangement between Kimel and Goldfinger, profit or equity would not be extracted until the properties were resold. The business substance of the December, 2007 and January, 2008 payments was that Goldfinger received back some of the principal he had invested; there was no profit or equity yet available for distribution.

301 I would observe that Farber, through Baigel's August 15, 2012 affidavit, speculated that "the $2.5 million was intended to be in respect of Goldfinger's equity interest in Annopol", not the return of part of his shareholder loans. Yet, four paragraphs later in that affidavit Baigel referred to a November 20, 2007 memo to file by Goldfinger's lawyers of a meeting with their client that "if the 2.5 million dollars is paid, then 4 million dollars are outstanding on the shareholder loan". I have great difficulty understanding how a trustee could forcefully characterize a payment as a return of equity while at the same time relying, for other purposes, on a contradictory characterization of it as a repayment of a loan.

302 Finally, in its written and oral argument Farber occasionally intimated that Goldfinger could be considered the legal partner of Kimel. That position was inconsistent with the main thrust of Farber's argument that at material times Goldfinger was a shareholder in Summit Glen companies, including Annopol. The evidence does not support a finding that Goldfinger and Kimel were legal partners; instead, Goldfinger lent money to Kimel's companies on the expectation that upon the successful redevelopment of the properties his money would be repaid and he would share in the up-side of the projects. In the meantime, Goldfinger took no role in the management of the affairs of those companies. Their business understanding was not reduced to writing, so section 4 of the *Partnerships Act* does not apply. [126] And, finally, Farber has not attempted to recover from Goldfinger any of the investments made by third parties to SG companies on the basis that Goldfinger was liable as a partner in those real estate ventures.

303 For these reasons, I dismiss Farber's claims under *OBCA* ss. 130(4) and 248 as advanced in paragraphs II (e) and V (b) of its Fresh as Amended Notice of Application.

304 In its February 7, 2013 Factum Farber also advanced a claim sounding in unjust enrichment on the basis that the $2.5 million payments were a re-purchase of shares or equity distribution. For similar reasons, I dismiss that claim.

F. Farber's claim for the $2.5 million payment against Mahvash

305 Farber also sought repayment of the $2.5 million from Mahvash, in her capacity as a director of Annopol, on two grounds. First, Farber asserted that the payment contravened section 130 of the *OBCA*. Sections 130(2)(b), (d) and (f) provide that directors of a corporation who vote for or consent to a resolution authorizing a purchase, redemption or other acquisition of shares contrary to *OBCA* ss. 30, 31 or 32, a payment of a dividend contrary to section 38, or a payment to a shareholder contrary to section 248, are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation. Since I have found that the payments to Goldfinger were not payments made under *OBCA* ss. 30 or 38 nor a payment to a shareholder contrary to section 248, this part of Farber's claim against Mahvash fails. Moreover, there was no evidence that a meeting of Annopol's directors was held at which a resolution was passed regarding the $2.5 million payment or action taken in that regard, or that Mahvash was present at a meeting of Annopol's directors at which share purchase or dividend declaring resolutions were passed. [127]

306 Second, Farber argued that Mahvash, as a director, was a "person who was privy to the transfer" of $2.5 million to Goldfinger and therefore was liable to repay Annopol that amount under *BIA* s. 96(1). Since I have dismissed Farber's claim under *BIA* s. 96(1), it follows that its claim against Mahvash under that section as a privy also is dismissed.

307 For these reasons, I dismiss Farber's claim against Mahvash as pleaded in paragraph V (a) of its Fresh as Amended Notice of Application.

G. Summary in respect of the repayment of $2.5 million

308 By way of summary, for the reasons given above, I dismiss Farber's claims against Goldfinger and Mahvash for the return of the $2.5 million paid to Goldfinger by Annopol in December, 2007 and January, 2008.

XII. Claims in respect of the SG Brantford transactions

A. The history of the charges granted to Goldfinger on 176 Henry Street, Brantford

309 Summit Glen Brantford owned property at 176 Henry Street in Brantford. SG Brantford was adjudged bankrupt on May 27, 2010 as a result of an application for bankruptcy issued April 30, 2009. Farber was appointed trustee and eventually sold 176 Henry on August 31, 2010 for $3.6 million. According to the February 25, 2011 Statement of Affairs for SG Brantford, claims by secured creditors totaled $3.55 million, while unsecured claims amounted to $1.426 million. From the sale the SG Brantford estate received about $183,000 in net proceeds.

310 As disclosed in Schedule 2 to the First Settlement, as of June, 2008 the property at 176 Henry Street was subject to three existing mortgages: $2.85 million to First National Financial Corporation (June 7, 2007), $450,000 to Montor (November 16, 2005) and $750,000 to Annopol (December 20, 2005), or total of $4.05 million in charges registered against the property. Since those charges were listed on a schedule to the First Settlement, Goldfinger knew about them.

311 As part of the First Settlement, the SG Companies, which included SG Brantford, gave collateral mortgages over their properties as security for the payment of the Shareholder Loans and Share Purchase Price. On June 13, 2008, two charges granted by SG Brantford to Goldfinger were registered on title (the "Goldfinger 176 Henry Charges"); so, too, were two postponements granted by Annopol in favour of Goldfinger (the "Annopol 176 Henry Postponements").

312 About five months after the First Settlement, in November, 2008, the loan by First National Financial to SG Brantford secured by the first charge/mortgage came due. SG Brantford negotiated a re-financing with First National to renew and increase the loan by approximately $470,000 to be secured by a new charge/mortgage over 176 Henry.

313 To close the re-financing with First National, SG Brantford required that Montor subordinate the Montor 176 Henry Charge to the new charge/mortgage to be provided to First National. While back in 2007 Montor had agreed to subordinate its charge to permit financing from First National, according to Farber its review of the books and records of Montor disclosed no agreement on its part to subordinate to First National's new security on the November, 2008 re-financing. Farber alleged that Kimel had forged Montor's signature on a subordination for the re-financing. [128]

314 On or about November 26, 2008, the re-financing with First National closed. SG Brantford paid $471,000 to Goldfinger and on that day the two Goldfinger 176 Henry Charges were discharged.

315 Just prior to that re-financing, on October 31, 2008, Goldfinger had started his action against Kimel and his companies, including SG Brantford. In that action Goldfinger alleged and deposed that SG Brantford had refused or neglected to pay obligations owing to him. On December 1, 2008, less than one week after the $471,000 was paid to Goldfinger, he obtained in his action against Kimel the appointment of Zeifman as interim receiver of SG Brantford pursuant to *BIA* s. 47.

B. The relief sought by Farber

316 In respect of SG Brantford, Farber, as trustee in bankruptcy of SG Brantford and Annopol, seeks relief in respect of the conduct of those companies which took place at two different points of time:

> (i) in respect of the First Settlement which closed on June 8, 2008, orders setting aside the security which Goldfinger received in respect of SG Brantford and 176 Henry: i.e, setting aside the two Goldfinger 176 Henry Charges, the two Annopol 176 Henry Postponements, as well as the guarantees given by SG Brantford to Goldfinger at that time; and,
>
> (ii) the repayment of the $471,000 paid by SG Brantford to Goldfinger on November 26, 2008 to discharge the Goldfinger 176 Henry Charges.

Accordingly, Farber seeks relief in respect of transactions which occurred in June and November, 2008. The date of bankruptcy of SG Brantford was May 27, 2010; the date of the initial bankruptcy event was April 30, 2009; both impugned transactions took place within one year prior to the date of the initial bankruptcy event.

A. Challenges to the First Settlement security granted to and in favour of Goldfinger

317 Farber seeks to set aside the Goldfinger 176 Henry Charges and the SG Brantford guarantees on three grounds: (i) as a transfer at undervalue under *BIA* s. 96; (ii) under the *APA*; or, (iii) under the *FCA*. Farber seeks to set aside the Annopol 176 Henry Postponements under *OBCA* s. 248.

318 Farber submitted that the grant of the charges on 176 Henry constituted "dispositions of property" within the meaning of the definition "transfer at undervalue". Goldfinger did not address this point. This Court has held that the definition of "transfer" should be interpreted liberally and in a purposive manner. [129] While I query whether a charge and guarantee fall within the ambit of a "disposition of property", especially given that *BIA* s. 95(1) distinguishes a "transfer of property" from a "charge on property", in light of Goldfinger's lack of opposition to Farber's position on this point, I am prepared to proceed on the basis that the granting of the charge and guarantee fell within *BIA* s. 96(1).

319 Previously I found that Goldfinger was at arm's length from Kimel and his companies. In the present case, the First Settlement closed less than one year prior to the date of the initial bankruptcy event.

320 Was SG Brantford insolvent at that time or rendered insolvent by the transfers? The unaudited, notice to reader financial statements for SG Brantford for the year ended September 30, 2007 showed liabilities ($3.908 million) exceeding assets ($3.687 million), with gross revenue ($421,000) falling below operating expenses ($526,690). Those for the year ended September 30, 2008, showed liabilities ($3.940) exceeding assets ($3.548), again with revenue ($424,231) falling short of expenses ($595,254). The December 17, 2008 First Report of the Receiver, Zeifman, reported that SG Brantford was operating on a cash deficit basis.

321 Under the First Settlement, the SG Companies, which included SG Brantford, each granted collateral mortgages to Goldfinger in the amounts of $1.5 million to secure payment of the Share Purchase Price and $6.5 million to secure payment of the Shareholder Loans. Schwebel, Goldfinger's lawyer on the First Settlement, acknowledged that the aggregate amount of all mortgages registered against 176 Henry following the closing of the First Settlement exceeded the value of the property. [130]

322 That said, two pieces of evidence could suggest that on a going-concern basis SG Brantford was not insolvent at the time. First, in the SG Brantford bankruptcy Farber, as trustee of Montor, filed a proof of claim in respect of which the last payment made by Montor to SG Brantford was one in the amount of $450,000 made on August 14, 2008, two months after the closing of the First Settlement. Perelmuter, however, testified that at the time he did not know about the First Settlement.

323 Second, Goldfinger pointed out that the $471,000 paid to him came from the First National refinancing, an event, he argued, which would not have occurred had SG Brantford been insolvent. As a result of the discharge of the Goldfinger 176 Henry Charges in November, 2008, it may well be that the secured liabilities of SG Brantford did not exceed the value of the property, its sole asset. Indeed, Farber realized a small net profit on the eventual sale of the property.

324 Nevertheless, the evidence disclosed that on a balance sheet basis, SG Brantford was insolvent at the time it granted the Goldfinger 176 Henry Charges and made the guarantees.

325 However, for the reasons previously set out in paragraphs 274 to 280 above, I find that at the time of the closing of the First Settlement Kimel and his signatory companies, which included SG Brantford, did not intend to defraud, defeat or delay creditors. Accordingly, Farber's claim under *BIA* s. 96(1) fails.

326 Similarly, in respect of Farber's claims founded on the *APA* and *FCA*, I previously concluded in paragraphs 274 to 280 above that neither Kimel nor his companies, nor Goldfinger, intended to defeat, hinder, delay or defraud creditors by making the $2.5 million payment which formed part of the First Settlement. The evidence in support of that conclusion also supports a finding that the granting of the security from SG Brantford to Goldfinger as part of the First Settlement was not done by Kimel/SG Brantford (or Goldfinger) with the intent to defeat, hinder, delay or defraud creditors. Accordingly, Farber's claims under the *APA, FCA* and *BIA* s. 96 fail.

327 I would rely on the same findings to conclude that Annopol's subordination of its security to Goldfinger as part of the First Settlement did not violate the reasonable expectations of its creditors and therefore no remedy under *OBCA* s. 248 is justified.

328 For those reasons, I would dismiss the claims pleaded by Farber in paragraphs II(b),(c)(i) and (ii), (d), III (b) and IV (b) of its Fresh as Amended Notice of Application as they relate to Annopol and the grant by SG Brantford of the Goldfinger 176 Henry Charges and guarantees.

B. Challenge to the November 26, 2008 payment to Goldfinger

329 In order to re-finance with First National in November, 2008, SG Brantford had to deal with the other mortgages on title which, in order of priority, were Montor, Goldfinger and Annopol. In the result, Goldfinger was paid $471,000 from the re-financing to discharge both the Goldfinger 176 Henry Charges, Annopol subordinated to First National, as did Montor, although the circumstances surrounding its subordination require special attention.

330 Farber seeks to set aside the payment of $471,000 to Goldfinger under *BIA* s. 96(1), the *APA* and the *FCA*. The evidence I relied upon to find that SG Brantford was insolvent at the time of the First Settlement in June, 2008, also supports a finding that SG Brantford was insolvent, on a balance sheet basis, on November 26, 2008.

331 I have found that the Goldfinger 176 Henry Charges did not offend *BIA* s. 96(1), the *APA* or the *FCA*. SG Brantford paid Goldfinger the $471,000 pursuant to, and in order to discharge, that security. The face amounts of those charges greatly exceeded $471,000. [131] Consequently, I give no effect to Farber's argument that the payment constituted a transfer at undervalue. In my view, the appropriate focus of the analysis should be on the *APA, FCA* or *OBCA* s. 248.

332 Section 4 of the *APA* does not apply to this payment of money because section 5(1) of the *APA* provides that section 4 does not apply "to any payment of money to a creditor". As noted earlier, any payment of money to a creditor, whether or not the payment is intended to prefer the creditor and defeat other creditors, is protected under s. 5(1) of the *APA*. [132] Under the terms of the First Settlement, SG Brantford had agreed to pay certain sums to Goldfinger. By signing the First Settlement, both Goldfinger and SG Brantford acknowledged that Goldfinger was a creditor of SG Brantford. I so find, notwithstanding that the evidence suggested that the allocation of Goldfinger's investment funds

against various properties set out in the settlement agreement was derived by his lawyers at Minden Gross and he did not verify whether the allocation numbers were accurate. [133]

333 That leaves the *FCA* and *OBCA* s. 248. [134] In terms of the *FCA*, I conclude that the payment by SG Brantford to Goldfinger of $471,000 in preference to the payment of that amount to Montor, a chargee which stood in priority to Goldfinger, violated *FCA* s. 2 and was not saved by *FCA* s. 3.

334 I reach that conclusion because the evidence regarding the intent of both Kimel/SG Brantford and Goldfinger as of November 26, 2008 differed materially from the state of affairs prevailing on June 8, 2008, at the time of the First Settlement. More specifically:

> (i) Goldfinger deposed that no sooner had Kimel entered into the 2008 Settlement, than he breached it, in large part by dealing improperly with properties which formed part of the settlement — i.e. SG Trayvan gave a $4 million mortgage to Community Trust Company, and soon after Kimel sold the SG Fairway property;
>
> (ii) In July, 2008, Goldfinger made demands for payment on SG Brantford and SG Bridge, as well as others, and delivered notices pursuant to *BIA* s. 244 to those companies;
>
> (iii) In the late summer and early fall of 2008 Goldfinger negotiated agreements with Kimel under which he gained rights to control the business of SG Brantford;
>
> (iv) On October 31, 2008, Goldfinger commenced an action seeking damages and the appointment of a receiver over a number of SG companies, including SG Brantford and SG Bridge;
>
> (v) On November 4, 2008, Goldfinger swore an affidavit in his action in which he deposed that the defendants had refused to pay the amounts demanded and that Kimel had advised he would no longer provide funds to operate the properties, including 176 Henry Street and 70 Bridge Street; and,
>
> (vi) On November 26, 2008, Goldfinger moved in his action to appoint Zeifman as interim receiver of several SG companies, including SGW, SG Brantford and SG Bridge.

In sum, as of November 26, 2008, Goldfinger knew that Kimel and his companies, including SG Brantford, had defaulted on their obligations to him and were refusing to pay him. Goldfinger had commenced legal process to pursue his remedies.

335 As of November 26, 2008, Goldfinger also knew that Montor held a mortgage in the amount of $450,000 on 176 Henry Street in priority to his own, and he was aware that there were not sufficient funds to pay the Goldfinger 176 Henry Charges if the Montor 176 Henry Charge was paid from the proceeds from the First National re-financing. As stated at trial by Carl Schwebel, one of Goldfinger's lawyers at the time, when asked about his client's state of knowledge about the consequences of the payout:

> Q. So, there was not sufficient proceeds from the refinancing to pay Dr. Goldfinger. If you had to refinance First National, you had to pay Montor, there wouldn't be enough to pay Dr. Goldfinger.
>
> A. The Dale & Lessmann requisition letter that I was given said that it was an open question whether Montor's mortgage would be discharged or postponed. If the mortgage was going to be — if the Montor mortgage was going to be paid out, then there was not money to pay out the Goldfinger mortgages.
>
> Q. And was Dr. Goldfinger aware of that?
>
> A. Yes. [135]

Since Goldfinger knew that state of affairs, it is reasonable to draw the inference that Kimel did as well, and I so find.

336 Schwebel was also asked about Goldfinger's understanding of the priority of the Montor mortgage at the time of the re-financing:

> Q. Do you have any knowledge with respect to the subordination of Montor's charge at that point in time?
>
> A. I — I understood at the time of closing that Montor had subordinated its charge.
>
> Q. Did you see a copy of the subordination?
>
> A. Not at the time of the closing, not prior to the closing.
>
> Q. At the closing, who delivered the subordination; do you recall?
>
> A. I — I don't know. It would have involved Dale & Lessmann and Mr. — the company — Mr. Kimel's companies' lawyers. [136]

337 In a 2010 affidavit Kimel had deposed that he did not tell Montor's principal, Perelmuter, about the $471,000 payment before it was made. [137]

338 While Farber submitted that Kimel had forged Montor's signature on its postponement of charge to First National, there is insufficient evidence to make such a serious finding of fact. The evidence does support a finding, however, that the Montor postponement was signed by Kimel purporting to act as the Secretary-Treasurer of Montor, and that Montor's sole shareholder, Perelmuter, was not aware that part of the proceeds of the First National refinancing would be paid to a junior secured party and Kimel deliberately refrained from disclosing that fact to Perelmuter. At a minimum, Montor's postponement of its charge resulted from Kimel/SG Brantford deliberately misrepresenting the true state of affairs to Montor and, I find that Kimel/SG Brantford did so in order to defeat, hinder, delay or defraud Montor of its just and lawful debts.

339 I further find that Goldfinger had notice or knowledge of that intent within the meaning of *FCA* s. 3. As a result of events since the closing of the First Settlement, Goldfinger knew that Kimel/SG Brantford had defaulted on their obligations to him and did not intend to pay him, and he knew as well that not only did Montor stand in priority to his charge, but the re-financing would not generate sufficient funds to pay out both Montor and himself. Given that state of affairs, it is reasonable to find, as I do, that Goldfinger knew that the payment of the $471,000 to him would prefer his interests over those of Montor. I therefore find that Goldfinger sought and obtained the payment of the $471,000 to him with the intent to defeat, hinder, delay or defraud another creditor, Montor.

340 I therefore declare void the November 26, 2008 payment of $471,000 from SG Brantford to Goldfinger, and I order Goldfinger to repay that amount to Farber, in its capacity as trustee in the bankruptcy of SG Brantford. Farber stated, in paragraph 31 of its February 8, 2013 Factum, that in the event Goldfinger was ordered to repay that money, he could file a claim in the SG Brantford bankruptcy proceeding in accordance with the *BIA*.

341 I would have reached a similar result under *OBCA* s. 248. A secured creditor, such as Montor, reasonably expects that if its consent is requested for the postponement of its security to that of another, the borrower seeking the postponement will make full and fair disclosure about all material circumstances concerning the reasons for the request, including the effect that the postponement would have on the secured position of the postponed party. It is clear Kimel did not make such disclosure to Montor, and Kimel was the directing mind of SG Brantford. For this reason, I find that such non-disclosure effected an oppressive result on Montor, as a creditor of SG Brantford, and the appropriate remedy, given Goldfinger's knowledge of the consequences of the transaction on Montor, is to order him to repay the $471,000 to Farber in its capacity as the trustee in bankruptcy of SG Brantford.

342 Consequently, I grant the relief sought by Farber in respect of the $471,000 payment to Goldfinger sought in paragraphs II(b), (c), (f) and III(b) of its Fresh as Amended Notice of Application.

XIII. Claim in respect of SG Bridge

343 Summit Glen Bridge Street Inc. owned property located at 70 Bridge Street, Kitchener. SG Bridge is not bankrupt. Kimel and Mahvash are the sole officers and directors of SG Bridge. SG Bridge's only asset was 70 Bridge, which was a vacant piece of land that generated no revenue. Zeifman, the interim receiver, sold property in August, 2009. After the payment of Zeifman's professional fees and the uncontested charges/mortgages registered against the property, there was a surplus of approximately $280,000 — the Bridge Surplus.

344 On May 6, 2005, prior to the First Settlement, SG Bridge had granted a $750,000 charge in favour of Annopol. [138] The charge's "Additional Provisions" section provided, in part, as follows:

> This Charge shall secure the aggregate of all present and future indebtedness and liabilities of the Chargor to the Chargee (direct or indirect, absolute or contingent, matured or not, wheresoever and however incurred as principal or surety, whether incurred alone or with another or others, and whether arising from dealings between the Chargee and the Chargor or from other dealings or proceedings by which the Chargee may become a creditor of the Chargor) including without limitation the outstanding balance of the Principal Amount advanced to the Chargor from time to time, interest thereon at the Interest Rate and all other present and future indebtedness and liabilities of the Chargor to the Chargee payable under or by virtue of the Charge.

According to Farber, between September 13, 2005 and November 21, 2008, Annopol loaned the net amount of $211,550 to SG Bridge.

345 As part of the First Settlement SG Bridge granted Goldfinger charges over 70 Bridge — a $6.5 million charge and a $1.5 million charge - as collateral security for the obligations to pay the Shareholder Loans and Share Purchase Price (the "Goldfinger 70 Bridge Charges"). As well, Annopol subordinated its $750,000 mortgage on 70 Bridge to Goldfinger's charges. Schedule 3 to the First Settlement stipulated that the parties agreed SG Bridge owed Goldfinger $1,011,027 in Shareholder Loans.

346 Chaitons LLP provided Zeifman with a February 23, 2010 opinion on the validity of the Goldfinger 70 Bridge Charges Subject to the standard qualifications and exceptions, Chaitons opined that both charges were validly and properly registered against title to the property.

347 In respect of the mortgage SG Bridge had granted to Annopol, Kimel testified:

> 406. Q. Mr. Shea showed you a mortgage from Summit Glen Bridge to Annopol for $750,000 dated May 6th, 2005, do you remember?
>
> A. I do.
>
> 407. Q. And that's just like all the other $750,000 mortgages in that no monies were advanced under that mortgage, correct?
>
> A. That's correct. [139]

That mortgage covered future indebtedness, and Farber filed reports which stated that SG Bridge owed a net amount to Annopol of at least $211,000.

348 A dispute exists about whether Goldfinger or Annopol is entitled to the Bridge Surplus. The dispute turns on whether the Goldfinger 70 Bridge Charges and the Annopol Subordinations are valid or voidable. No process was put

in place by Ziefman to determine the validity of Goldfinger's claim to the Bridge Surplus which presently is held in an RBC bank account for the benefit of counsel for the parties. Farber seeks the following relief:

> (i) to set aside the Goldfinger 70 Bridge Charges and the guarantees granted by SG Bridge to Goldfinger as part of the First Settlement;
>
> (ii) to set aside subordinations by Annopol of its charge over 70 Bridge as part of the First Settlement; and,
>
> (iii) to determine entitlement to the surplus from the sale of 70 Bridge.

349 SG Bridge is not bankrupt. The *BIA* does not apply. Farber seeks to set aside or declare void the Goldfinger 70 Bridge Charges either under (i) the *FCA* or (ii) the *APA*. As well, it seeks to set aside the Annopol subordinations regarding 70 Bridge under *OBCA* s. 248.

350 The unaudited financial statements of SG Bridge for the year ended September 30, 2007, showed that liabilities (($1.223 million) slightly exceeded assets ($1.021 million), and that revenues (Nil) exceeded expenses ($24,364). Zeifman, in its December 17, 2008 First Report stated that SG Bridge was operating on a cash deficit basis.

351 Since the claims Farber asserts in respect of the package of security Goldfinger received for 70 Bridge as part of the First Settlement mirror the claims it asserted under the *APA*, *FCA* and *OBCA* s. 248 in respect of the package of security granted by SG Brantford as part of the First Settlement, it follows that the analysis I undertook in respect of the SG Brantford-related security applies with equal force to the SG Bridge-related security. I therefore dismiss Farber's claims to set aside the Goldfinger 70 Bridge Charges, the guarantees granted by SG Bridge and the Annopol subordinations in respect of 70 Bridge, all as pleaded in paragraphs II(b), (c), (d), (g) and III (a) and (d) of its Fresh as Amended Notice of Application.

XIV. Summary and costs on the Claims Motion and Preferences Application

A. Summary of orders on the Claims Motion

352 For the reasons set out above, I make the following orders in the Claims Motion:

> **Montor claim**
>
> (i) The secured claim of Montor in the amount of $500,000 is allowed, together with interest until the date of payment in accordance with the terms of the loan;
>
> (ii) An unsecured claim of Montor in the amount of $25,000 is allowed, together with interest until the date of payment in accordance with the terms of the loan;
>
> **Annopol's First Proof of Claim**
>
> (iii) In respect of Annopol's First Proof of Claim, its secured claim of $100,000 is allowed, together with interest until the date of payment in accordance with the terms of the loan;
>
> (iv) In respect of the unsecured portion of Annopol's First Proof of Claim, I require submissions from the parties on the issue of whether all or part of Annopol's unsecured claim is statute-barred on the following timetable:
>
> > a. Farber may serve and file brief written submissions, together with any authorities, no later than November 30, 2013;
> >
> > b. Goldfinger may serve and file brief responding written submissions, together with authorities, no later than January 15, 2014; and,

c. Farber may file brief reply submissions no later than January 22, 2014.

Annopol's Second Proof of Claim

(v) I disallow Annopol's Second Proof of Claim for a secured claim in the amount of $750,000.

SGG's debt claim

(vi) In respect of SGG's Debt Claim against SGW, I require submissions from the parties on the issue of whether all or part of the $16,500 claim is statute-barred:

a. Farber may serve and file brief written submissions, together with any authorities, no later than November 30, 2013;

b. Goldfinger may serve and file brief responding written submissions, together with authorities, no later than January 15, 2014; and,

c. Farber may file brief reply submissions no later than January 22, 2014.

SGG's unjust enrichment claim

(x) In respect of SGG's unjust enrichment claim against SGW:

a. Farber shall provide Goldfinger with any evidence to deal with the deficiencies in its unjust enrichment claim which I identified no later than November 30, 2013 and file with the Court, to my attention, a report dealing with that issue;

b. Goldfinger shall file any further submissions on this issue no later than January 15, 2014, with such submissions not to exceed 10 pages;

(iv) Further, I require submissions from the parties on whether any part of this claim may be statute-barred on the following timetable:

a. Farber may serve and file brief written submissions, together with any authorities, no later than November 30, 2013;

b. Goldfinger may serve and file brief responding written submissions, together with authorities, no later than January 15, 2014; and,

c. Farber may file brief reply submissions no later than January 22, 2013.

183's Proof of Claim

(xi) I allow 183's proof of claim in respect of the CTC $50K Charge to the extent of $50,000, together with interest until the date of payment in accordance with the terms of the loan. As to the balance of that claim:

a. 183 shall provide Farber, as trustee of SGW, with the further evidence previously requested in respect of the additional items claimed for the CTC $50K Charge no later than November 30, 2013 and file that evidence with the Court;

b. Farber shall file with the Court, to my attention, no later than December 24, 2013, a further report providing its views about the sufficiency of the further evidence provided and its position on the amounts claimed in light of that further evidence; and,

c. 183 shall file any further submissions on this issue no later than January 15, 2014, with such submissions not to exceed 10 pages;

(v) I allow 183's claim in respect of the CTC $500K Charge, with interest until the date of payment in accordance with the terms of the loan;

Goldfinger's constructive trust claim

(vi) I dismiss Goldfinger's constructive trust claim.

Goldfinger's claim for the distribution of surplus funds to him as shareholder

(vii) No order shall be made at this time regarding a distribution to Goldfinger of any surplus in the SGW estate in his capacity as the sole shareholder of SGW. I am seizing myself of all court proceedings involving the SGW estate, and I require counsel to appear before me on a 9:30 appointment before the end of November, 2013, to report on what further steps remain in the administration of this estate.

B. Summary of orders on the Preferences Application

353 By way of summary, I make the following orders in the Preferences Application:

(i) The November 26, 2008 payment from SG Brantford to Goldfinger is set aside, and Goldfinger shall pay to Farber, in its capacity as the trustee in bankruptcy of SG Brantford, the sum of the $471,000; and,

(ii) In all other respects, the Preferences Application is dismissed.

C. Costs

354 In respect of the matters on which further submissions are to be made, I shall release supplementary reasons by February 14, 2014, and I defer the scheduling of cost submissions until that time.

XV. Motion by Goldfinger's trial counsel for a charging order

A. Background and position of the parties

355 Several months after the conclusion of the trial, counsel for Goldfinger, 1830994 Ontario Limited and Goldfinger Jazrawy Diagnostic Services Ltd. ("Diagnostic"), the Davis Moldaver LLP firm, moved for a charging order against any proceeds or monies payable to any of Goldfinger, 183 and Diagnostic in the Claims Motion or Preferences Application, together with an order removing the firm as lawyers of record in the Claims Motion. The Davis Moldaver firm had acted for Goldfinger in five proceedings, including the Claims Motion and Preference Application. Notices of changes of lawyers ultimately were served by Goldfinger in all proceedings.

356 About a week after the conclusion of final submissions in the Preferences Application, Goldfinger issued a notice of action against the Davis Moldaver firm and subsequently issued a statement of claim alleging professional negligence in regards to legal services provided by the firm in 2009 and 2010. The plaintiffs seek damages of $8 million. Goldfinger's claim has nothing to do with the services the Davis Moldaver firm provided in these proceedings, but alleges that the Davis Moldaver firm failed to inform Goldfinger that he enjoyed potential causes of action against the Minden, Gross firm in respect of services they had provided Goldfinger relating to the implementation of the First Settlement. Their client's commencement of an action against them placed the Davis Moldaver firm in a conflict and they could no longer act for Goldfinger.

357 According to the evidence filed, a significant amount remains unpaid on accounts rendered by Davis Moldaver to Goldfinger (the "Unpaid Amount"). Consequently, Davis Moldaver seeks a charging order over the interest of

Goldfinger, 183 and Diagnostic in the proceeds of the Claims Motion and Preferences Application. Goldfinger deposed that he had already paid the Davis Moldaver firm far more than the Unpaid Amount in fees for the two proceedings, and he thinks the fees invoiced have been excessive. Goldfinger intends to assess his former lawyer's accounts.

358 Goldfinger acknowledged that Davis Moldaver was entitled to a charging order, but submitted that such an order should be subject to several conditions:

> (i) First Condition: the order would be without prejudice to his rights to assess the invoices rendered by Davis Moldaver;
>
> (ii) Second Condition: the order would be without prejudice to his rights to pursue any claims against Davis Moldaver;
>
> (iii) Third Condition: Davis Moldaver be required to provide him with a copy of all his files in the five proceedings; and,
>
> (iv) Fourth Condition: any monies which might become the subject matter of a charging order would be paid into Court or a solicitor's trust account pending assessment of the invoices

359 Davis Moldaver agreed with the First and Second Conditions. The firm opposed the Third Condition, arguing that its solicitor's lien over the files should only be lifted in the event the clients' rights were in jeopardy and no such jeopardy or prejudice existed in this case because the trial had been completed. As to the Fourth Condition, the firm contended that any recovery under the charging order should be paid to the lawyers, with the lawyers under an obligation to repay the client any amounts determined through the assessment process. Davis Moldaver noted that Goldfinger had not made any effort to pay the outstanding accounts; on the contrary, Goldfinger has stated he refuses to pay them.

360 In response, Goldfinger submitted that potential prejudice could arise in these proceedings if copies of the files were not turned over because cost submissions would be required and there might be an appeal. Also, he argued that the other three files remained active, with some steps scheduled for November or December, although details were not provided.

361 I would note that as a result of directions given in these Reasons in the Claims Motion, Goldfinger may wish to make further submissions on some issues.

B. Analysis

362 Goldfinger acknowledged that a charging order should issue. What amounts will such an order likely charge? In the Claims Motion, I have found that the claim filed by 183 should be allowed, in large part, with an opportunity to provide further information on specified points. 183 therefore will recover at least $550,000 from the proceeds of the sale of 105 University. On the other hand, in the Preferences Application, I have ordered Goldfinger to repay the $471,000 received from SG Bridge in November, 2008. So, while the charging order may well have some value, it most likely will fall short of the Unpaid Amount claimed by Davis Moldaver. In other words, the charging order will have some value as security for amounts unpaid, but most likely will not provide full security.

363 When a client discharges a lawyer without just cause, the lawyer may exercise a lien for fees over the documents in his possession, and the lawyer may retain the file material until he is paid, subject to the court's jurisdiction to interfere with the exercise of the lien, without actually nullifying it, to protect the interests of third parties. [140]

364 In the present case Davis Moldaver was entitled to assert a solicitor's lien. It had no choice but to get off the record because its client had sued the firm. Since the charging order most probably will not provide sufficient security to cover the Unpaid Amount, Davis Moldaver is entitled to some continuation of its solicitor's lien. Under Rule 15.03(5) of the *Rules of Civil Procedure* the Court may impose such terms as are just in connection with the lien.

365 In the present case, Goldfinger has made no effort to satisfy the Unpaid Amount. The evidence filed by the parties did not disclose what, if any, work remained to be done on the three other proceedings. Until he started the new action against Davis Moldaver, Goldfinger had been making payments almost every month to that firm in the range of $20,000 to $25,000; this is not a case where the client is impecunious.

366 In these two proceedings, Goldfinger enjoys the right to make further submissions on aspects of the Claims Motion, as well as making submissions on costs. The further submissions in the Claims Motion concern the following issues:

> (i) securing and adducing any evidence to support the expenses claimed on the CTC $50K Charge;
>
> (ii) responding to any additional information Farber provides in respect of the SGG unjust enrichment claim; and,
>
> (iii) making submissions on what, if any, limitations period issue exists in respect of Annopol's unsecured claim against SGW and SGG's unjust enrichment claim against SGW.

367 I think fairness requires that the solicitor's lien be lifted to the extent of requiring Davis Moldaver to deliver to Goldfinger those portions of its files dealing with the documentation relating to those three issues. The parties provided me with an electronic copy of the entire trial record, so the delivery to Goldfinger of the ordered materials should not require much in the way of time or expense to effect.

368 At the same time, fairness requires a *quid pro quo* because Goldfinger has not made any payments against the Unpaid Amount and he precipitated the present difficulty when he started the new action against Davis Moldaver. In light of the solicitor-client confidences contained in the motion records for the charging order, I am not prepared to disclose the amount of the Unpaid Amount. However, given the discrete and limited nature of the remaining liability issues on which submissions may be made, I conclude that requiring Goldfinger to pay Davis Moldaver the sum of $40,000 against the Unpaid Amount, without prejudice to any right he may enjoy to assess that firm's accounts, would constitute a reasonable and proportionate condition for lifting the lien to that extent to enable Goldfinger, or his new counsel, to deal with the remaining issues.

369 Although Goldfinger also may make submissions on costs, I am not prepared to lift the lien any further without Goldfinger making a substantial further payment against the Unpaid Amount. Goldfinger possesses the invoices from the Davis Moldaver firm which describe the work they performed in these two proceedings. To the extent he requires the assistance of his trial counsel to understand and respond to any cost submissions made by Farber, it was Goldfinger's conduct in initiating action against Minden Gross and Davis Moldaver which has deprived him of his trial counsel's assistance. In those circumstances, I see no basis for the court to interfere any further with the solicitor's lien.

370 Finally, I am not prepared to alter the normal working of a charging order so that any net funds recovered in the Claims Motion and Preferences Application be paid into court or to a person satisfactory to both client and solicitor. Goldfinger does not complain about how Davis Moldaver handled both proceedings, although following their conclusion he has complained about the overall quantum of fees. From the record before me, no such complaint was made prior to the completion of the trials. Accordingly, the normal course shall prevail, and any net funds attached by the charging order shall be paid to Davis Moldaver.

C. Conclusion on charging order motion

371 By way of summary, I grant the motion by Davis Moldaver LLP for a charging order on the following terms and conditions:

> (i) the order is without prejudice to any rights which Goldfinger, 183 and Diagnostic may enjoy to assess the invoices rendered by Davis Moldaver;

(ii) the order is without prejudice to any rights which Goldfinger, 183 and Diagnostic may enjoy to pursue any claims against Davis Moldaver; and,

(iii) upon the payment to them by Goldfinger of the sum of $40,000, Davis Moldaver shall deliver to Goldfinger, or to his direction, those portions of its files dealing with the documentation relating to the following issues in the Claims Motion on which Goldfinger/183 may make further submissions:

a. the securing and adducing of any evidence to support the expenses claimed on the CTC $50K Charge;

b. responding to any additional information Farber provides in respect of the SGG unjust enrichment claim against SGW; and,

c. making submissions on what, if any, limitations period issue exists in respect of Annopol's unsecured claim against SGW and in respect of SGG's unjust enrichment claim against SGW.

I also order that the motion materials for the charging order motion be sealed and they shall not be opened without an order from this Court.

372 There shall be no costs of the motion.

Order accordingly.

Footnotes

1 Goldfinger testified that his loans were made to "the general enterprise of Jack to rehabilitate buildings", and he did not expect specific companies to pay him back specific advances: Transcript of Goldfinger November 14, 2012 cross-examination, Q. 307.

2 In his November 4, 2008 affidavit Goldfinger talked about making a demand on Kimel in 2007 for the repayment of his "shareholder loans" (para. 24).

3 Trial Transcript, October 10, 2012, pages 13 and 14.

4 Goldfinger November 4, 2008 Affidavit, para 6.

5 Farber Factum, Preferences Application, para. 29.

6 Transcript of cross-examination of Morris Goldfinger, April 25, 2012, Q. 100.

7 Transcript of cross-examination of Kimel, November 12, 2012, Q. 189.

8 Trial transcript, October 10, 2012, p. 58.

9 Transcript of the cross-examination of Goldfinger, November 14, 2012, Q. 335; Goldfinger November 4, 2008 Affidavit, para 3.

10 Goldfinger September 27, 2010 affidavit, paras. 96 to 99.

11 2010 SKQB 182 (Sask. Q.B.).

12 See Goldfinger affidavit, July 18, 2012, paras. 23 through 26.

13 October 10, 2012 Trial Transcript, pp. 111-112.

14 Kimel testimony, October 10, 2012 Trial Transcript, p. 112.

15 Trial Ex. 9.

16 Trial Ex. 11.

17 October 10, 2012 Trial Transcript, p. 116.

18 October 10, 2012 Trial Transcript, p. 117.

19 Transcript of the September 19, 2012 examination of Jack Perelmuter, Q. 210.

20 Perelmuter transcript, Q. 213.

21 Affidavit of Michael Baigel (Farber) sworn June 25, 2010, para. 7.

22 SGW's March 31, 2006 and 2007 unaudited financial statements, in the "liabilities" section of the balance sheet, recorded "mortgages payable" of $1.050 million, which I find referred to the amounts payable under the CTC and Montor mortgages.

23 October 10, 2012 Trial Transcript, p. 122.

24 *Quick Credit v. 1575463 Ontario Inc.*, 2010 ONSC 7227 (Ont. S.C.J.), para. 20; aff'd 2012 ONCA 221 (Ont. C.A.); *Bank of Montreal v. Bonner*, [1988] B.C.J. No. 115 (B.C. S.C.)

25 These were also filed by Farber in its January 18, 2011 Report.

26 Transcript of cross-examination of Martin Cyr, April 27, 2012, Q. 60.

27 October 11, 2012 Trial Transcript, p. 19 and Exhibit 14. Farber, at pp. 10-12 of its October 5, 2012 Answers to Questions, provided a detailed description of the business conducted by Annopol and the properties it had owned.

28 Farber, August 17, 2012 Brief of Documents, Vol. 3, Tab 21H.

29 To complicate matters, in a way which only Kimel seemed capable of doing, the evidence contained an April 14, 2000 Trust Declaration to the effect that the Annopol $750,000 Charge "represents funds totally advanced to Annopol Holdings by Morris Goldfinger and is being held in Trust strictly and solely by Annopol Holdings for Morris Goldfinger". Goldfinger knew nothing about the mortgage until 2007 and in this proceeding he did not assert a claim for himself under that mortgage.

30 This position was repeated in Farber's June 25, 2012 Report.

31 October 11, 2012 Trial Transcript, pp. 36-37.

32 *Ibid.*, p. 38.

33 *Ibid.*, p. 63.

34 As to his plan to protect his family's equity in 105 University, see Kimel's evidence at trial, October 10, 2012, pp. 31 to 33.

35 Farber's January 18, 2011 Report made no mention of any advances by Annopol to SGW at the time of the Annopol $100K Charge.

36 These were also filed by Farber in its January 18, 2011 Report.

37 Farber Brief of Documents, June 25, 2012, Volume 1, Tab 3.

38 Transcript of the cross-examination of Martin Cyr, April 27, 2012. I appreciate that the cross-examination took place in the context of a motion to remove Farber as trustee by reason of conflicts of interest, but I find it unusual that a trustee would refuse to disclose information to support a filed proof of claim.

39 October 10, 2012 Trial Transcript, pp. 16 and 17.

40 *Ibid.*, pp. 20-22.

41 *Ibid.*, pp. 28-29.

42 *Ibid.*, p. 52.

43 *Ibid.*, pp. 72-73.

44 *Ibid.*, p. 56.

45 *Ibid.*, p. 60

46 *Ibid.*, pp. 74 and 75.

47 *Ibid.*, pp. 98-99.

48 October 11, 2012 Trial Transcript, pp. 9-10

49 See, for example, the Annopol (Kimel) letter to Ronel Srubiski, December 21, 2007, Brief of Exhibits from Cross-examination of Jack Lechcier-Kimel, Tab 16; also, Trial Exs. 14, 15, 16 and 17.

50 Farber Answers to Questions, October 5, 2012, Vol. 3, Tab 20.

51 October 11, 2012 Trial Transcript, pp. 11-12.

52 Goldfinger, Yellow Exhibit Brief, Tab 2.

53 Transcript of Perelmuter examination conducted September 19, 2012, Q. 265.

54 2001 CarswellOnt 568 (Ont. S.C.J.), aff'd 2002 CarswellOnt 424 (Ont. C.A.).

55 Farber Claims Motion Factum, paras. 79 *et seq*.

56 See the cases digested in Houlden, Morawetz and Sarra, *The 2013 Annotated Bankruptcy and Insolvency Act*, G§47. The conflicting interests represented by Farber as a result of it wearing many hats evidently resulted in Farber, as trustee of SGW, failing to put forth arguments dealing with limitation periods, an omission which should not have occurred given the duties of a trustee in bankruptcy.

57 The applicable limitation period is set out in the *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

58 October 11, 2012 Trial Transcript, p. 39.

59 *Ibid*, p. 42.

60 Farber Priorities' Factum, paras. 91 to 95.

61 *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.), para. 30.

62 *Ibid.*, para. 31.

63 *Ibid.*, paras. 44 to 46.

64 Goldfinger Priorities' Factum, paras. 128 to 130.

65 Farber, Brief of Documents, June 25, 2012, Vol. 1, Tab 9.

66 Farber, Answers to Question, October 5, 2012, p. 13, Items 28 and 30.

67 Farber July 23, 2011 Report, para. 47.

68 October 10, 2012 Trial Transcript, p. 44.

69 See Tab M, Farber January 18, 2011 Report.

70 Farber Factum in the SGW Proceeding, para. 119.

71 2003 CanLII 13384.

72 *Elias Markets Ltd., Re* (2006), 25 C.B.R. (5th) 50 (Ont. C.A.), paras. 51 to 53.

73 Halsbury's Laws of Canada, First Edition, *Guarantee and Indemnity 2010* (Toronto: LexisNexis, 2010), p. 624.

74 *Chisos Investment Co. v. Firm Capital Equities Corp.*, 1998 CarswellOnt 3861 (Ont. Gen. Div. [Commercial List]), para. 15; *Land Titles Act*, R.S.O. 1990, c. L.5, s. 101(4).

75 *SimEx Inc. v. IMAX Corp.* [2005 CarswellOnt 7297 (Ont. C.A.)], 2005 CanLII 46629, para. 49.

76 2011 ONCA 160 (Ont. C.A.), paras. 33, 37 and 44; see also *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), paras. 34 to 36.

77 Trial Transcript, December 5, 2012: Carl Schwebel, pp. 19, 20; Reuben Rosenblatt, pp. 56, 58, 59, 70.

78 See, *Canrock Ventures LLC v. Ambercore Software Inc.*, [2011] O.J. No. 729 (Ont. S.C.J. [Commercial List]), paras. 28 to 30.

79 Baigel, November 19, 2012 transcript, Q. 478.

80 December 5, 2012 Trial Transcript: Schwebel, pp. 29, 30, 32. See also Rosenblatt, p. 72.

81 December 5, 2012 Trial Transcript: Schwebel, pp. 24

82 Goldfinger September 6, 2011 Affidavit, paras. 117 and 118. Goldfinger deposed that at the time of the settlement he had no reason to believe that the SG Holding Companies were insolvent: Goldfinger September 27, 2010 affidavit, para. 38. December 9 and 10, 2007 emails between Kimel and Goldfinger disclosed that Goldfinger was aware Kimel was borrowing some of the money.

83 Kimel CX November 12, 2012: QQ 237-240, 241-243, 263- 270, 271-274, and Exhibit P.

84 Kimel CX November 12, 2012: QQ. 207-219.

85 *Ibid.*: QQ. 231-2.

86 October 10, 2012 Trial Transcript, p. 58; Kimel, CX November 12, 2012, QQ. 264-268.

87 Goldfinger September 6, 2011 Affidavit, para. 36.

88 Goldfinger July 20, 2012 Affidavit, para. 15(a).

89 Baigel acknowledged that Goldfinger previously had paid $2.9 million to Annopol: Baigel CX November 19, 2012, Q. 111.

90 John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), p. 226.

91 Goldfinger CX, November 14, 2012, QQ. 451-457.

92 Goldfinger CX, November 14, 2012, QQ. 447-450, Exhibit H.

93 2002 CarswellBC 1642 (B.C. S.C.).

94 (1980), 36 C.B.R. (N.S.) 111 (C.S. Que.).

95 2008 SCC 26 (S.C.C.).

96 *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293 (Alta. C.A.), para. 29.

97 2012 ABQB 187 (Alta. Q.B.).

98 *Ibid.*, paras. 129 and 130.

99 2013 ABCA 293 (Alta. C.A.).

100 2002 ABQB 993 (Alta. Q.B.).

101 *Ibid.*, paras. 19 and 23

102 Transcript of the September 19, 2012 examination of Jack Perelmuter, QQ. 198-201.

103 *Ibid.*, Q. 259.

104 Goldfinger July 20, 2012 Affidavit, paras. 18 to 21.

105 Goldfinger September 27, 2010 affidavit, paras. 40 and 41.

106 Farber Factum, February 7, 2013, para. 67.

107 2002 CanLII 20177, paras. 20-22.

108 (1984), 51 C.B.R. (N.S.) 29 (Ont. Bktcy.)

109 [1988] O.J. No. 2569 (Ont. H.C.), pp. 4 and 5.

110 *Conte*, *supra.*, para. 43; *Boudreau v. Marler* [2004 CarswellOnt 1502 (Ont. C.A.)], 2004 CanLII 19333, para. 70.

111 Transcript of the cross-examination of Michael Baigel, November 19, 2012, QQ.

112 Transcript of cross-examination of Jack Lechcier-Kimel, November 12, 2012, QQ. 100-107.

113 Kimel, November 12, 2012, QQ.

114 *Ibid.*, QQ. 171-175.

115 *Ibid.*, QQ. 178-181.

116 Goldfinger, September 20, 2012, Q. 12, 15.

117 Transcript of cross-examination of Goldfinger, September 20, 2012, Q. 441.

118 December 5, 2012 Trial Transcript, pp. 33, 34.

119 December 5, 2012 transcript, p. 65.

120 *Kisluk v. B.L. Armstrong Co.* (1982), 44 C.B.R. (N.S.) 251 (Ont. S.C.), para. 45.

121 May I note that there was an unhelpful lack of precision by Farber in its factum, failing to indicate clearly whether it was claiming under *APA* s. 4(1), or 4(2), or both.

122 1996 CanLII 8253, para. 57.

123 *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), para. 45.

124 *Ibid.*, para. 46.

125 *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.).

126 R.S.O. 1990, c. P.5.

127 *OBCA*, s. 135(1) and (3).

128 Baigel affidavit, August 15, 2012, paras 60-67.

129 *City Peel Taxi v. Hanna*, 2012 ONSC 2450 (Ont. S.C.J.), paras. 129 and 162.

130 Trial Transcript, December 5, 2012, p. 40.

131 *Royal City Chrysler Plymouth Ltd., Re* [1998 CarswellOnt 1041 (Ont. C.A.)], 1998 CanLII 1337.

132 *Kisluk v. B.L. Armstrong Co.* (1982), 44 C.B.R. (N.S.) 251 (Ont. S.C.), para. 45.

133 Goldfinger November 14, 2012 CX, Q. 328.

134 Paragraph II(b) of Farber's Fresh as Amended Notice of Application.

135 Trial Transcript, December 5, 2012, p. 42. See also Goldfinger September 27, 2010 Affidavit, para. 37.

136 Trial Transcript, December 5, 2012, p. 44.

137 Ex. 11.

138 Farber Compendium, February 11, 2013, Vol. 2, Tab 11.3.E.

139 Kimel, November 12, 2012, QQ. 406-7.

140 *Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182 (Ont. S.C.J.), para. 82; *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2013 ONCA 119 (Ont. C.A.).

End of Document

1991 CarswellOnt 281
Ontario Court of Justice (General Division)

Polsinelli v. Polsinelli

1991 CarswellOnt 281, [1991] W.D.F.L. 795, 26 A.C.W.S. (3d) 960, 2 P.P.S.A.C. (2d) 124, 33 R.F.L. (3d) 138

MIMMA GIROLAMA POLSINELLI v. ANTONIO THOMAS POLSINELLI and FRANCO POLSINELLI

Granger J.

Heard: June 18, 19, 20 and 21, 1990
Judgment: May 9, 1991
Docket: Doc. 9771/86

Counsel: *Donald E. Crabbe*, for plaintiff Mimma Girolama Polsinelli.
Brian P. Pilley, for defendant Franco Polsinelli.

Subject: Insolvency; Family; Property; Contracts; Corporate and Commercial; Torts
Related Abridgment Classifications
Civil practice and procedure
III Parties
III.10 Miscellaneous
Debtors and creditors
XI Fraudulent preferences
XI.12 Practice and procedure
XI.12.b Parties
XI.12.b.i Creditors
XI.12.b.i.B Miscellaneous
Debtors and creditors
XII Fraudulent conveyances
XII.5 Conveyances for valuable consideration
XII.5.e "Family arrangements"
XII.5.e.i General principles
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.f Evidence of intention
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.h Transferee's knowledge of intention to defraud
Debtors and creditors
XII Fraudulent conveyances
XII.11 Practice and procedure
XII.11.c Parties
XII.11.c.i Creditors
XII.11.c.i.A General principles
Family law

III Division of family property
III.7 Events after separation
III.7.b Sale or dissipation of assets
III.7.b.ii Transfers to third parties
III.7.b.ii.C Fraudulent conveyances legislation
Personal property security
VI Remedies
VI.2 Retention of collateral
VI.2.a Notice

Headnote

Family Law --- Family property on marriage breakdown — Events after separation — Sale or dissipation of assets — Transfers to third parties — Fraudulent conveyances legislation

Fraud and Misrepresentation --- Fraudulent preferences — Practice and procedure — Parties — Creditors

Fraud and Misrepresentation --- Fraudulent conveyances — Conveyances for valuable consideration — "Family arrangements"

Fraud and Misrepresentation --- Fraudulent conveyances — Fraudulent intent — Evidence of intention

Fraud and Misrepresentation --- Fraudulent conveyances — Fraudulent intent — Transferee's knowledge of intention to defraud

Fraud and Misrepresentation --- Fraudulent conveyances — Practice and procedure — Parties — Creditors

Personal Property Security --- Remedies — Retention of collateral

Matrimonial property — Constructive and resulting trusts — Husband transferring assets to brother in exchange for payment of debts — No bad faith — No attempt to defeat claims by wife — Wife having no interest in assets — Family Law Act, 1986 not creating interest in other spouse's property — Wife not a creditor based on right to claim under Family Law Act, 1986 — Wife not able to rely on Assignment and Preferences Act — No violation under Fraudulent Conveyances Act by brother — Brother not owing any duty to wife in managing husband's finances — Any duty owed only to husband and not breached by transfer of assets at fair value — Family Law Act, 1986, S.O. 1986, c. 4 — Assignment and Preferences Act, R.S.O. 1980, c. 33 — Fraudulent Conveyances Act, R.S.O. 1980, c. 176.

The parties were married in 1972 and separated in 1985 as a result of the husband's substance abuse. In order to finance some investments, the husband arranged for his family to borrow money on his behalf. When the husband's finances deteriorated, his brother took over the payments in order to protect the parents' security. In 1984 the brother arranged to look after the husband's finances. The husband's finances became worse and the brother agreed to advance funds in return for a transfer of ownership of two vehicles. In 1985 the husband entered into a pledge agreement, pledging his share in the family holding company to the brother as security for his indebtedness. The wife co-signed the debt but was not called upon to pay. Her note was later replaced and she was no longer a debtor. The husband made a few payments, but when he was unable to honour the debt, the brother took over the interest under the pledge agreement. The husband's pleadings in the matrimonial proceedings were struck out so that he was deemed to admit all of the wife's statements, including the allegation that she had an interest in the company shares.

The wife sought to set aside the transfers to the brother of vehicles and shares under trust law, the *Personal Property Security Act*, the *Assignment and Preferences Act*, and the *Fraudulent Conveyances Act* (Ont.).

Held:

The action was dismissed.

While the *Rules of Civil Procedure* may provide that the husband is deemed to admit the allegations in the wife's pleadings after the husband was noted in default, such allegations of fact do not affect the brother's rights, and the wife must prove her case against the brother.

There was no evidence of any contribution by the wife to the shares or the vehicles. There was no evidence to impose a constructive trust that might affect the brother when the property came under his control. Nor does the *Family Law Act, 1986* vest any interest in the husband's separate property in the wife. Accordingly, the husband owned the shares and vehicles free of any legal or beneficial claim by the wife.

The pledge agreement was subject to the *Personal Property Security Act* (Ont.), s. 2(*a*)(i). In addition to express rights under the pledge agreement, the Act gave rights under s. 56(4). There was compliance with the Act surrounding the pledge agreement. Since the wife did not have an interest in the collateral, she was not entitled to notice that the creditor elected to retain the collateral. The note she had signed had been replaced and she was not a debtor entitled to notice.
All of the transfers to the brother were for good consideration. There was no basis to attack the transfers under the *Fraudulent Conveyances Act* because there was no evidence that the brother had, or was a party to, an attempt to defeat or hinder debtors. The fact that the shares may have been transferred after the separation does not make the wife a creditor. There was no obligation on her to seek financial relief against her husband under the *Family Law Reform Act* or the *Family Law Act, 1986*. The brother had no knowledge that she might be pursuing a claim and that the transfers could hinder or delay it. Her right to claim support did not make her a creditor. Accordingly, she could not rely on the *Assignment and Preferences Act* to impugn the transactions to the brother.
Any duty the brother owed the husband as a result of taking on his financial affairs was solely to the husband, and such duty did not include the disposition of the assets. The husband freely agreed to the transfers and received market value for those assets. The property did not come to the brother in violation of a fiduciary duty impressed with a trust.

Annotation

The judgment in *Polsinelli v. Polsinelli* reinforces a number of points raised in other cases. The separate property regime continues to regulate the spouses' rights over matrimonial property under the *Family Law Act, 1986*, S.O. 1986, c. 4, during cohabitation and after separation until court order. The *Family Law Act, 1986* does not create any property rights in the assets of the other spouse. If a property interest is to be raised in the property of the other spouse, it must be based in trust law. The court will not readily impose a constructive trust so as to interfere with a spouse's right to deal with his or her own property.

Marriage does not operate as a conveyance. Each spouse owns his or her own assets and is entitled to deal with them as he or she sees fit, subject to any agreement or court order to the contrary. However, if the property is co-owned or a trust is imposed, the spouse may be subject to fiduciary duties in respect of the property: see *Gregoric v. Gregoric* (1990), 28 R.F.L. (3d) 419, 39 E.T.R. 63 (Ont. Gen. Div.), additional reasons at (May 9, 1991), Doc. ND143165/87, Granger J. (Ont. Gen. Div.).

The *Family Law Act, 1986* is not a true "property" statute: see *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194 (C.A.). The Act provides for the equitable distribution of matrimonial property by means of a balancing claim called an equalization entitlement. The court is only entitled to rearrange property rights in order to realize the equalization entitlement: see *Berdette v. Berdette*.

In *Polsinelli*, Granger J. found that the wife had no interest in the husband's property. He refused to impose a trust on the husband's assets. He was not satisfied with the nature of the wife's contribution and found that she had suffered no deprivation. In *Rawluk v. Rawluk* (1986), 3 R.F.L. (3d) 113, 29 D.L.R. (4th) 754, 55 O.R. (2d) 704, 23 E.T.R. 199 (H.C.), affirmed (1987), 10 R.F.L. (3d) 113, 28 E.T.R. 158, 61 O.R. (2d) 637, 43 D.L.R. (4th) 764 (C.A.), affirmed [1990] 1 S.C.R. 70, 23 R.F.L. (3d) 337, 65 D.L.R. (4th) 161, 36 E.T.R. 1, 103 N.R. 321, 71 O.R. (2d) 480, 38 O.A.C. 81, Walsh J. held that, while constructive trust was available in *Family Law Act, 1986* proceedings, it would not regularly be imposed.

Unlike British Columbia, in Ontario, separation or some other triggering event does not vest property interest in any particular asset. All that the untitled spouse has is a right to apply for an equalization determination under the *Family Law Act, 1986*. As in *Maroukis v. Maroukis* (1981), 24 R.F.L. (2d) 113, 33 O.R. (2d) 661, 21 R.P.R. 1, 125 D.L.R. (3d) 718 (C.A.), affirmed [1984] 2 S.C.R. 137, 41 R.F.L. (2d) 113, 34 R.P.R. 228, 5 O.A.C. 182, 54 N.R. 268, 12 D.L.R. (4th) 321, this right to apply does not affect third parties who act in good faith. The point left open in *Polsinelli* is whether the non-titled spouse could assert rights in property against a third person who took at less than fair value knowing of the potential *Family Law Act, 1986* claim. From the case, it seems the claim properly should be made under the *Fraudulent Conveyances Act*, R.S.O. 1980, c. 176, in order to return the property to the husband and then proceed with the *Family Law Act, 1986* claim.

Although the *Family Law Act, 1986* is a debtor-creditor statute, Granger J. held that it did not create any debt until the matter was settled or a court order was made. Thus, prior to the order or agreement, there was no debt sufficient to support a proceeding under the *Assignment and Preferences Act*, R.S.O. 1980, c. 33.

The fact is that the brother was trying to protect the family. Granger J. was satisfied that he was not trying to obtain personal gain. The brother did not appear to be taking advantage of his position for personal gain. A result of the brother taking over the husband's financial affairs is that he stands in a fiduciary relationship to the husband. However, Granger J. did not appear to believe that this relationship extended to the wife. If the husband's source of funds is the family's main source of funds, the brother may, in fact, reasonably be held to stand in a fiduciary relationship to the family as a whole. It appears from the judgment that the brother sees himself acting for the family as a whole. On this basis, since his actions could affect the wife, it may be that some fiduciary duty could be imposed.

Granger J. seemed to be satisfied that the brother stood in a fiduciary relationship to the husband. However, the relationship is not the same as a strict trustee relationship. Apparently, the brother is not disentitled from dealing with the brother. Granger J. did not set out the nature of the relationship but it seems that the duty simply restrains the brother from abusing his position. It is clear from recent developments that there is a spectrum of fiduciary relationships. The duties and responsibilities vary. It is important that courts spell out the relationship and the nature of the duties.

James G. McLeod

Table of Authorities

Cases considered:

Becker v. Pettkus, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 — *applied*

Book v. Book (1958), 14 D.L.R. (2d) 329 (Ont. H.C.) — *applied*

Gilbert Steel Ltd. v. University Construction Ltd., [1973] 3 O.R. (2d) 268, 36 D.L.R. (3d) 496 (H.C.), affirmed (1976), 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (C.A.) — *referred to*

Gilbert Steel Ltd. v. University Construction Ltd. (1976), 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (C.A.) — *applied*

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *applied*

Perras v. Brault, [1940] S.C.R. 547 — *applied*

Statutes considered:

Assignment and Preferences Act, R.S.O. 1980, c. 33 —

s. 4

Family Law Act, 1986, S.O. 1986, c. 4.

Family Law Reform Act, R.S.O. 1980, c. 152.

Fraudulent Conveyances Act, R.S.O. 1980, c. 176 —

s. 1

s. 2

Personal Property Security Act, R.S.O. 1980, c. 375 [as am. S.O. 1981, c. 2; am. S.O. 1981, c. 58; subsequently repealed by Personal Property Security Act, 1989, S.O. 1989, c. 16, s. 84] —

Part V

s. 2(a)(i)

s. 56

s. 61

s. 62

s. 63

Rules considered:

Ontario Rules of Civil Procedure —

r. 19.02(1)(a)

Action to set aside transfers of matrimonial property and to declare rights in such property and distribute the property under the *Family Law Act, 1986* (Ont.).

***Granger J.*:**

1 On December 31, 1985, Mimma Girolama Polsinelli ("Mrs. Polsinelli") and Antonio Thomas Polsinelli ("Mr. Polsinelli"), who were married on May 27, 1972, separated as a result of Mr. Polsinelli's addiction to cocaine. On February 27, 1986, Mrs. Polsinelli instituted these proceedings against her husband and her brother-in-law Franco Polsinelli ("Frank Polsinelli"). The relief claimed against Mr. Polsinelli is, in general terms, a trust claim to establish a beneficial ownership in assets registered in Mr. Polsinelli's name during cohabitation, and relief pursuant to the *Family Law Act, 1986*, S.O. 1986, c. 4 ("F.L.A."). The claim against Frank Polsinelli is to set aside the pledge and conveyance of Mr. Polsinelli's shares in Rosepol Holdings Ltd., and the transfer of a 1963 Corvette and 1930 Ford truck to him, or damages for his breach of an alleged fiduciary duty.

2 When Mr. and Mrs. Polsinelli were married, Mr. Polsinelli was employed as a mechanic by Rigid Automotive Parts Inc. ("Rigid"). He subsequently left Rigid and worked for a furniture company for approximately 9 years. In 1978 or 1979, Mr. and Mrs. Polsinelli purchased as joint tenants 5 Gracey Boulevard ("5 Gracey"), Weston, Ontario, as a matrimonial home. In 1982 Mr. Polsinelli and James De Rose purchased Rigid. Mr. Polsinelli paid for his equal interest by securing a loan against 5 Gracey.

3 It appears that, immediately after Mr. Polsinelli purchased Rigid, he experienced financial difficulties. In the latter part of 1982, Rigid was seeking new premises, and, after locating 140 Ormont Drive, North York, Mr. Polsinelli, his brother Frank Polsinelli, James De Rose, and John De Rose agreed to incorporate and own equally Rosepol Holdings Ltd. ("Rosepol") for the sole purpose of purchasing and owning the property.

4 The purchase price of Ormont Drive was $370,000, with the purchase to be completed during May 1983. Each shareholder of Rosepol was required to contribute $25,000 in cash to fund the purchase by Rosepol. When the offer to purchase was executed in December 1982, each shareholder was required to contribute $3,750 to Rosepol in order that it could pay the deposit of $15,000. As Mr. Polsinelli did not have the cash for his share of the deposit, Frank Polsinelli advanced his (Mr. Polsinelli's) share.

5 In order to meet his financial needs, Mr. Polsinelli arranged for his parents, Guido and Pasqualina Polsinelli, to borrow the sum of $75,000 from the Independent Order of Foresters ("I.O.F."), secured by a mortgage on their house at 110 Clement Road, Weston, Ontario. The borrowed funds were given to Mr. Polsinelli on his verbal promise to make the monthly mortgage payments and eventually discharge the mortgage. Mr. Polsinelli used $25,000 to satisfy his obligation to Rosepol and $50,000 to refinance Rigid. Frank Polsinelli, who was extremely concerned about the financial security of his parents, verbally guaranteed to his parents the repayment of the mortgage.

6 Mr. Polsinelli made approximately two or three payments on the mortgage to I.O.F. and then Frank Polsinelli took over the pay ment in order to avoid his parents's house being foreclosed or sold. Although the evidence is rather vague on when Mr. Polsinelli made the payments on the I.O.F. mortgage, it is a reasonable assumption that he made the payments prior to September 1984.

7 In the summer of 1984, Frank Polsinelli became aware that, in addition to financial problems, Mr. Polsinelli was involved with drugs, namely, cocaine. When Frank Polsinelli learned that his brother and sister-in-law were contemplating selling their home and purchasing a larger home, he requested that they sign a demand promissory note in favour of Guido and Pasqualina Polsinelli in the amount of $75,000, payable on demand or on the sale of 5 Gracey Boulevard. In December 1984, 5 Gracey Boulevard was sold and 166 Kilmuir Gate, Woodbridge, Ontario, was purchased by Mr. and Mrs. Polsinelli, but they did not repay the sum of $75,000 as required by the promissory note.

8 In the summer of 1984, when Frank Polsinelli learned of his brother's addiction to cocaine, he agreed to his brother's request that he manage his financial affairs.

9 In 1974 Mr. Polsinelli and his brother acquired a 1930 Ford truck for $1,100. Frank Polsinelli paid $550 towards the purchase of the truck, which was registered in Mr. Polsinelli's name alone for insurance purposes. On January 14, 1983, Frank Polsinelli, as evidenced by Exhibit No. 5, purchased a one half interest in the 1963 Corvette registered in Mr. Polsinelli's name for $8,500. I am satisfied that by January 14, 1983, Frank Polsinelli owned a one half interest in the Ford truck and Corvette. In January 1985 Frank Polsinelli took over ownership of the Corvette and Ford. The Corvette had an appraised value of $33,000 and the Ford truck was appraised at $10,500.

10 During January 1985 Mr. Polsinelli was in a desperate financial situation; he required cash to pay his creditors and household expenses in the ensuing year. In addition, it was obvious that he could not afford to make payments on the I.O.F. mortgage. In response to his brother's request, Frank Polsinelli agreed to advance future funds in return for full ownership of the Corvette and Ford. During 1985 Frank Polsinelli advanced approximately $29,000 on behalf of Mr. Polsinelli. In addition, he discharged Mr. Polsinelli's loan of $8,822 at Canada Permanent Trust Co. During the same period, he collected, on behalf of Mr. Polsinelli, the sum of $14,000. Although Frank Polsinelli did not feel that fair market value of the vehicle was as high as the appraised values, the moneys which he paid on behalf of his brother constituted consideration for the transfer to him. There was a complete lack of evidence to establish that Mrs. Polsinelli had any legal or beneficial interest in the vehicles.

11 On February 14, 1985, Mr. Polsinelli entered into a written pledge agreement, pledging his share in Rosepol to Frank Polsinelli as security for his indebtedness. On the same date, Mr. Polsinelli executed a promissory note in the sum of $75,000 in favour of Frank Polsinelli. The promissory note was to replace the original promissory note in favour of Guido and Pasqualina Polsinelli as Frank Polsinelli was guaranteeing the repayment of the I.O.F. mortgage from the sale of his house. On March 14, 1985, Guido and Pasqualina Polsinelli assigned to Frank and Rosemary Polsinelli all of their rights under the promissory note dated September 19, 1984. On the same day, Frank Polsinelli paid $36,146.77 on the I.O.F. mortgage.

12 When Mr. Polsinelli and his brother agreed to Frank Polsinelli taking over responsibility for repayment of the I.O.F. mortgage, they thought Mr. Polsinelli's share in Rosepol was worth approximately $75,000. The appraisal by Michael F. Potashnyk valued 140 Ormont Drive, the only asset of Rosepol, at $500,000 during 1985, resulting in an adjusted book value per share of $60,000.

13 On July 17, 1985, Frank Polsinelli, by registered mail, demanded payment by Mr. Polsinelli of the sum of $75,000. On October 2, 1985, when Mr. Polsinelli remained in default of the sum of $75,000, all of the shareholders of Rosepol (Mr. Polsinelli, Frank Polsinelli, Giacinto De Rose, and Giovanni De Rose) executed an acknowledgment that Frank Polsinelli wished to exercise his rights under the pledge agreement.

14 The shareholders agreed that Mr. Polsinelli's one share was to be transferred to Frank Polsinelli absolutely on January 2, 1986, in full satisfaction of the amount due under the promissory note unless the sum was paid prior to January 2, 1986. When Mr. Polsinelli failed to pay the sum of $75,000, his share in Rosepol was transferred to Frank Polsinelli on January 2, 1986.

15 As previously indicated, Mr. Polsinelli left his wife and children, Anthony Polsinelli, born May 27, 1981, and Sabrina Melissa Polsinelli, born May 11, 1979, on December 31, 1985.

16 On November 24, 1986, the statement of defence and counterclaim of Mr. Polsinelli were struck out by the order of Master Cork. On January 28, 1987, the plaintiff herein obtained default judgment against Mr. Polsinelli, vesting all of Mr. Polsinelli's shares in Rigid in her name alone.

17 Pursuant to r. 19.02(1)(*a*), a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim. Mrs. Polsinelli submits that, as a result of r. 19.02(1)(*a*), she has established a beneficial interest in Mr. Polsinelli's share in Rosepol and that the transfers of assets from Mr. Polsinelli to his brother were fraudulent conveyances, fraudulent preferences, and made without consideration.

18 Although Mr. Polsinelli may be deemed to admit these allegations, if they are allegations of fact, such admissions do not affect the rights of Frank Polsinelli.

19 In *Book v. Book* (1958), 14 D.L.R. (2d) 329 (Ont. H.C.), McRuer C.J.H.C. stated at p. 331:

> This however, is not the crux of this case. What I am required to find is that the conveyance from Book to his daughter, Mrs. Stern, was a fraudulent conveyance made with intention of defeating his wife's claim and for that reason should be set aside.
>
> In para. 8 of the statement of claim the plaintiff alleges that the conveyance was made after the commencement of the plaintiff's action for alimony and 'after both defendants had knowledge of the same, for the purpose of defeating, hindering, delaying or defrauding the plaintiff herein, in enforcing the judgment obtained against the defendant David Book by her.'

20 Accordingly, Mrs. Polsinelli must prove in this trial that she has a beneficial interest in the Rosepol share and that the transfers of assets from Mr. Polsinelli to his brother were fraudulent.

21 Mrs. Polsinelli has failed to establish any beneficial interest in the Corvette, Ford truck, or the Rosepol share. As this action is governed by the F.L.A., there are no family assets as defined by the *Family Law Reform Act*, R.S.O. 1980, c. 152 ("F.L.R.A."), which could be used as a foundation for an equitable trust claim.

22 There was also a total lack of evidence to establish an express or implied intention between Mr. and Mrs. Polsinelli that Mrs. Polsinelli was to have a beneficial interest in Rosepol or the vehicles. In my view, Mrs. Polsinelli's claim to a beneficial interest must arise from a financial contribution by her or an unjust enrichment of Mr. Polsinelli.

23 When Mr. Polsinelli decided to acquire an interest in Rosepol, he paid for his share by arranging for his parents to borrow the sum of $75,000, and they loaned this money to him in order that he could refinance Rigid and pay for his share of Rosepol. Mrs. Polsinelli was not involved in the initial raising of funds to purchase the Rosepol share. She became involved when she executed the promissory note on September 19, 1984, but neither she nor Mr. Polsinelli made any payments on the promissory note. Apparently two or three payments were made on the I.O.F. mortgage, but the evidence indicates that they were made prior to September 19, 1984. Regardless of when the payments were made on the I.O.F. mortgage, such few payments could not, when the whole indebtedness is considered, entitle Mrs. Polsinelli to a beneficial interest in the Rosepol share. There was no evidence that her separate funds were ever used to pay for any part of the share or that the mortgage payments were for Rosepol as opposed to Rigid. There was no evidence that Mrs. Polsinelli contributed directly or indirectly any moneys or work to the acquisition or maintenance of the Corvette or Ford.

24 On all of the evidence there was no unjust enrichment of Mr. Polsinelli upon which a constructive trust could be founded. Even if there was an enrichment of Mr. Polsinelli, there was no evidence of a corresponding deprivation to Mrs. Polsinelli.

25 In *Becker v. Pettkus*, [1980] S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384, Dickson J. set out the requirement to establish a constructive trust at pp. 273-274 [D.L.R., p. 180 R.F.L.]:

> How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the Courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

26 It must be remembered that the F.L.A. does not, per se, vest any part of Mr. Polsinelli's separate property in Mrs. Polsinelli either before or after separation. In this case Mrs. Polsinelli failed to establish any interest, legal or equitable, in the property of Mr. Polsinelli. In my view, Mr. Polsinelli owned the assets registered in his name free of any legal or beneficial proprietary claim of Mrs. Polsinelli.

27 Mrs. Polsinelli makes a number of attacks on the transfer of the Rosepol share, the Corvette, and Ford to Frank Polsinelli pursuant to the *Personal Property Security Act*, R.S.O. 1980, c. 375, as amended by S.O. 1981, c. 2; S.O. 1981, c. 58; the *Fraudulent Conveyances Act*, R.S.O. 1980, c. 176; and the *Assignment and Preferences Act*, R.S.O. 1980, c. 33. In addition, Mrs. Polsinelli submits that, as a result of the breach of a fiduciary duty which Frank Polsinelli owed to her, he holds one share of Rosepol for her as a result of a constructive trust.

Personal Property Security Act ("P.P.S.A.")

28 Mrs. Polsinelli submits that there has not been compliance with the provisions of the P.P.S.A., and, pursuant to s. 63(1), P.P.S.A., she is entitled to an interest in the collateral:

> *63.* — (1) Where a secured party in possession of collateral is not complying with any of the obligations imposed by section 19 or, after default, is not proceeding in accordance with this Part or the account is disputed, the debtor or any person who is the owner of the collateral or the creditors of either of them or any person other than such secured party who has an interest in the collateral may apply to the Supreme Court or to a county or district court having jurisdiction with respect thereto, and the court may, upon hearing any such application, direct that the secured party comply with the obligations imposed by section 19, or that the collateral be or be not disposed of, or order an account to be taken or make such other or further order as the court considers just.

29 The pledge agreement dated February 14, 1985, is subject to the provisions of the P.P.S.A., s. 2(*a*)(i). In addition to any rights which the debtor has pursuant to the pledge agreement, he is entitled to the rights and remedies set out in Part V of the P.P.S.A., and such rights and remedies cannot be waived or varied:

> s. 56(4) Where the debtor is in default under a security agreement, he has, in addition to the rights and remedies provided in the security agreement and any other rights and remedies, the rights and remedies provided in this Part and in section 19.
>
> (5) Except as provided in sections 61 and 62, the provisions of subsections 59(3), (4) and (5) and of sections 60, 61, 62 and 63, to the extent that they give rights to the debtor and impose duties upon the secured party, shall not be waived or varied, but the parties may by agreement determine the standards by which the rights of the debtor and the duties of the secured party are to be measured, so long as such standards are not manifestly unreasonable having regard to the nature of such rights and duties.

30 The pledge agreement secured the sum of $75,000 owing to Frank Polsinelli pursuant to the promissory note dated February 14, 1985. By February 1985 it had become apparent that Frank Polsinelli would have to sell his house in order to avoid his parents' house from being sold under the terms of the I.O.F. mortgage, and he demanded security for the obligation he was undertaking. The promissory note dated February 14, 1985, replaced the promissory note

dated September 19, 1984. On July 17, 1985, Frank Polsinelli demanded from Mr. Polsinelli payment of the promissory note in the amount of $75,000. As Frank Polsinelli intended to retain the collateral, he was required to comply with the provisions of s. 61 and s. 62 of the P.P.S.A.:

> s. 61 (2) In any case other than that mentioned in subsection (1), a secured party in possession of the collateral may, after default, propose to retain the collateral in satisfaction of the obligation secured, and notification of such proposal shall be given to the debtor and to any other person whom such secured party knows to be the owner of the collateral and, except in the case of consumer goods, to any other person who has a security interest in the collateral and who has registered a financing statement in the prescribed form under this Act indexed in the name of the debtor or who is known by the secured party in possession to have a security interest in the collateral.
>
> (3) If any person entitled to notification under subsection (2) objects in writing within fifteen days after being notified, the secured party in possession shall dispose of the collateral under section 59, and, in the absence of any such objection, such secured party shall, at the expiration of such period of fifteen days, be deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation secured, and thereafter is entitled to hold or dispose of the collateral free of all rights and interests therein of any person entitled to notification under subsection (2) who was given such notification.
>
> s. 62 At any time before the secured party has disposed of the collateral by sale or exchange or contracted for such disposition under section 59 or before the secured party shall be deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation under subsection 61(2), the debtor, or any person other than the debtor who is the owner of the collateral, or any secured party other than the secured party in possession, may, unless he has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral together with a sum equal to the reasonable expenses of retaking, holding, repairing, processing, preparing the collateral for disposition and in arranging for its disposition, and, to the extent provided for in the security agreement, the reasonable solicitor's costs and legal expenses.

31 On October 2, 1985, all of the shareholders of Rosepol, including Mr. Polsinelli, executed an acknowledgment that Frank Polsinelli was electing to retain the collateral, and the share would be transferred to him on January 2, 1986, in full satisfaction of the amount due under the promissory note unless such sum was satisfied by January 2, 1986.

32 In my view, there was full compliance with the provisions of the P.P.S.A. as Mr. Polsinelli was the only person with an interest in the share. Mrs. Polsinelli did not have a beneficial interest in the share and, accordingly, was not entitled to notice that Frank Polsinelli was electing to retain the collateral pursuant to s. 61(2). In addition, Mrs. Polsinelli was not a debtor as the promissory note dated September 19, 1984, had been replaced and she was released from any indebtedness. Indirectly, Mrs. Polsinelli received a benefit from this action as a large part of the $75,000 debt was invested in Mr. Polsinelli's share of Rigid, which was subsequently vested by default judgment in Mrs. Polsinelli.

Fraudulent Conveyances Act ("F.C.A.")

33 The transfer of the vehicles and the pledge of the Rosepol share are subject to attack under the provision of the F.C.A.:

> *1.* In this Act,
>
> (*a*) 'conveyance' includes gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise;
>
> (*b*) 'personal property' includes goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in a bank, company or corporation, and any interest therein;
>
> (*c*) 'real property' includes lands, tenements, hereditaments and any estate or interest therein. R.S.O. 1970, c. 182, s. 1.

34 In my opinion, both the transfer of the vehicles and the pledge agreement were made for good and valuable consideration. Mrs. Polsinelli attacks the pledge agreement on the grounds that the indebtedness of $75,000 was secured by a pre-existing promissory note and, accordingly, there was no new consideration to support the pledge agreement.

35 In *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (C.A.), the Court held that, where a company is bound by agreement to supply goods at a certain price, a subsequent agreement to supply the same goods at a higher price is not sufficient consideration to enforce the subsequent agreement. The Appeal Court embraced the reasons of the trial Judge, Pennell J., [1973] 3 O.R. 268, 36 D.L.R. (3d) 496 (H.C.), who stated at pp. 276-277 [O.R.]:

> The validity of the oral agreement remains to be considered. It is assailed as invalid for want of consideration to support it.
>
> It is familiar learning that the doctrine of consideration has been criticized as anomalous and unjust. Although the Courts may have sometimes protested they have bowed to it in deference to precedent. It may have been whittled down by artificial distinctions but its hold upon the common law remains firm and real; it is embedded in the very foundation of the law of contract.
>
> The instant case, therefore, hinges upon first principles. Long ago it was held that there is no consideration if all the plaintiff does is to perform, or promise the performance of an obligation already imposed upon him by a previous contract between himself and the defendant: *Stilk v. Myrick* (1809), 2 Camp. 317, 170 E.R. 1168. Another case may be cited, not so similar in its facts and yet pointing in the same direction: *Sharpe v. San Paulo R. Co.* (1873), 8 Ch. App. 597 at p. 608. The ancient rule to that effect is sustained in modern times *Smith v. Dawson* (1923), 53 O.L.R. 615. It controls the case at hand. The plaintiffs had contracted to deliver reinforcing steel at a fixed price. In the circumstances they could not have done less without being guilty of a wrong. The plaintiffs, therefore, did nothing more than it was their duty to do without additional reward. I think the oral agreement stands condemned for want of a consideration.

36 In this case, there was new and different consideration. The original promissory note was due on demand or sale of 5 Gracey Boulevard. The new promissory note extended the time for repayment, relieved Mrs. Polsinelli of any obligation to repay the debts, and required the payment of the sum of $75,000 to Frank Polsinelli, who undertook to discharge the mortgage on his parents' house. Eventually, Guido and Pasqualina Polsinelli assigned their interest in the promissory note dated September 19, 1984, to Frank Polsinelli. In my opinion, there was good consideration for the transfer of Mr. Polsinelli's interest in the vehicles. I am satisfied that the fair market value was substantially less than the appraised value.

37 As there was valuable consideration for the transfer of vehicles and the pledge agreement, Mrs. Polsinelli, if she is a "creditor or others," must prove an actual and express intent to defraud, hinder, delay, or defeat creditors or others. The grantee must be a party to, or have knowledge of, such intention: *Perras v. Brault*, [1940] S.C.R. 547. The evidence of Frank Polsinelli and his wife convinces me that he was attempting as best he could to assist his brother and his brother's family by paying off Mr. Polsinelli's creditors. This was a case of brother helping brother, not of two brothers attempting to adversely affect Mrs. Polsinelli's rights or remedies. Quite the contrary, Frank Polsinelli was attempting to indirectly assist his sister-in-law, niece, and nephew. Frank Polsinelli's conduct in taking title to the vehicles and the share of Rosepol did not contravene s. 2 of the F.C.A. In my opinion, Mrs. Polsinelli, at the time of the transfer of the vehicles or the execution of the pledge agreement, was not a creditor or other person within the meaning of s. 2 of the F.C.A.:

> s. 2 Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

38 According to Mrs. Polsinelli, she separated from Mr. Polsinelli on December 31, 1985, 2 days before the Rosepol share was transferred. The fact that the share was transferred after the date of separation does not make Mrs. Polsinelli a

creditor. Under the F.L.R.A. and the F.L.A., Mrs. Polsinelli had a right to seek support from her husband and a division of family and non-family assets or to seek equalization of net family property. She was not required to seek division of assets, support, or equalization of net family property.

39 There was no evidence that Frank Polsinelli knew or ought to have known that Mrs. Polsinelli would be pursuing a claim for support, division of assets, or equalization, and that the transfer of property could hinder, delay, or defeat such a claim.

Assignments and Preferences Act ("A. & P. Act")

40 Mrs. Polsinelli submits that the pledge agreement and subsequent transfer of the Rosepol share constitute a preference and is void as against the creditor or creditors injured, delayed, or prejudiced pursuant to s. 4 of the A. & P. Act.:

> *4.* — (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.
>
> (2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insol vency, to or for a creditor with the intent to give such creditor an unjust preference over his other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.
>
> (3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed *prima facie* to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.
>
> (4) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of his creditors, be presumed *prima facie* to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.
>
> (5) The word 'creditor' in the fifth line of subsection (2), in the second line of subsection (3), and the second line of subsection (4), includes any surety and the endorser of any promissory note or bill of exchange who would upon payment by him of the debt, promissory note or bill of exchange, in respect of which such suretyship was entered into or such endorsement was given, become a creditor of the person giving the preference within the meaning of those subsections.

41 This statute is for the protection of creditors to ensure that one creditor is not given a preference over another creditor. The difficulty which Mrs. Polsinelli faces with this attack is that there was no evidence adduced to show that there were any creditors of Mr. Polsinelli apart from Frank Polsinelli. Frank Polsinelli, by his actions, paid all of the creditors or potential creditors of Mr. Polsinelli. Mrs. Polsinelli has not pursued to judgment a claim for her support, child support, or equalization. In my view, the right which Mrs. Polsinelli had to claim support from Mr. Polsinelli does not make her a creditor until she elects to exercise that right and obtains a judgment for support. Accordingly, this statute is of no help to Mrs. Polsinelli as there was no attempt to defeat, hinder, delay, or prejudice any creditor.

Constructive Trust

42 Mrs. Polsinelli claims that, as a result of Frank Polsinelli agreeing to be Mr. Polsinelli's financial manager, he owed a fiduciary duty to her, which he ultimately breached, and, as a result of such breach, the share of Rosepol which he obtained from Mr. Polsinelli is subject to a constructive trust. If property is obtained as a result of a breach of a fiduciary duty, a constructive trust can be imposed as a remedy for such breach. In *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, La Forest J. stated at pp. 28-29 [D.L.R., pp. 646-649 S.C.R.]:

> Much of the confusion surrounding the term 'fiduciary' stems, in my view, from its undifferentiated use in at least three distinct ways. The first is as used by Wilson J. in *Frame v. Smith*. There the issue was whether a certain class of relationship, custodial and non-custodial parents, were a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. This was made clear by Southin J. (as she then was) in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at p. 362 (S.C.). She stated:
>
> > Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.
>
> It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. In determining whether the categories of relationship which should be presumed to give rise to fiduciary obligations should be extended, the rough and ready guide adopted by Wilson J. is a useful tool for that evaluation. This class of fiduciary obligation need not be considered further, as Corona's contention is not that 'parties negotiating towards a joint-venture' constitute a category of relationship, proof of which will give rise to a presumption of fiduciary obligation, but rather that a fiduciary relationship arises out of the particular circumstances of this case.
>
> This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected. I agree with this comment of Professor Finn in 'The Fiduciary Principle', *supra*, at p. 64:
>
> > What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability,, trust, confidence or dependence doubtless will be of importance in

> making his out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relation ship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists fo the "fiduciary expectation". Such a role may generate an actual expectation that that other's interests are being serviced. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.

It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship: see D.W. Waters, *The Law of Trusts in Canada*, 2nd ed. (1984), at p. 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

43 In my view, any duty which Frank Polsinelli owed as a result of taking on the management of Mr. Polsinelli's financial affairs was solely to Mr. Polsinelli, and such duty did not include the disposition of the vehicles or the pledge agreement. I am satisfied that Mr. Polsinelli freely agreed to the transfer of the vehicles and pledge agreement and received fair market value for such assets.

44 There was nothing in the evidence to establish that Frank Polsinelli was aware that Mrs. Polsinelli had or was claiming an interest in the Rosepol share or the vehicles. Accordingly, there was no breach of a fiduciary duty to Mrs. Polsinelli.

45 Accordingly, the action is dismissed as against Frank Polsinelli. Counsel may make written submissions on costs within 30 days.

Action dismissed.

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2000 CarswellOnt 4114
Ontario Court of Appeal

Straka v. Humber River Regional Hospital

2000 CarswellOnt 4114, [2000] O.J. No. 4212, 100 A.C.W.S. (3d) 761, 137 O.A.C. 316, 193 D.L.R. (4th) 680, 1 C.P.C. (5th) 195, 51 O.R. (3d) 1

Pavel F. Straka (Applicant/Appellant) and Humber River Regional Hospital and St. Michael's Hospital (Respondents/Respondents in the Appeal)

McMurtry C.J.O., Morden, Catzman JJ.A.

Heard: June 29, 2000
Judgment: November 9, 2000
Docket: CA C33398

Proceedings: affirmed *Straka v. Humber River Regional Hospital* (1999), 1999 CarswellOnt 3725, 45 O.R. (3d) 630 (Ont. S.C.J.)

Counsel: *Neil M. Abramson*, for Appellant
W.D.T. Carter, for Respondent, Humber River Regional Hospital
Barnet H. Kussner, for Respondent, St. Michael's Hospital

Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.iii Private and confidential communications

Headnote
Practice --- Discovery — Discovery of documents — Privileged document — Private and confidential communications
Physician was denied position on active medical staff after respondent hospital received critical references from physician's former associates — Physician's application for production of letters, in order to assess whether they provided basis for action against former associates, for action for defamation or interference with economic relations, or basis to grant full staff privileges at respondent hospital, was dismissed — Trial judge found R. 14.05(3)(h) was rule of procedure and did not confer substantive rights — Trial judge found that references qualified as hospital or labour relations records or personal evaluations that were supplied in confidence and were subsequently excluded from ambit of Freedom of Information Act — Trial judge concluded public has interest in protecting confidentiality and privilege of peer review which outweighs benefit gained from disclosure — Physician's appeal dismissed — Right to discovery could exist in absence of action or before commencement of action not conveyed, despite fact that rules only provide for discovery within confines of actions — Application for production of letters not "mere fishing" as physician knew letters damaged appointment — Sufficient bona fides existed to justify consideration of case as whole —

Failure of hospital board to receive comprehensive and accurate information on applicants would have serious impact on public interest — Physician's right to appeal hiring decision under Public Hospitals Act to be weighed when considering correct disposal of litigation — Injury to relationship of peer review process would exceed benefit of correct disposal of litigation — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 14.05(3)(h) — Public Hospitals Act, R.S.O. 1990, c. P.40. — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

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Cases considered by *Morden J.A.*:

AXA Equity & Life Assurance plc v. National Westminster Bank plc (May 7, 1998), Doc. 98/0236 (Eng. C.A.) — considered

Bartram v. Wagner (1907), 9 O.W.R. 448 (Ont. H.C.) — considered

British Steel Corp. v. Granada Television Ltd., [1981] 1 All E.R. 417, [1981] A.C. 1096 (U.K. H.L.) — applied

General Accident Assurance Co. of Canada v. Sunnybrook Hospital (1979), 23 O.R. (2d) 513, 96 D.L.R. (3d) 335 (Ont. H.C.) — considered

Glaxo Wellcome plc v. Minister of National Revenue, 162 D.L.R. (4th) 433, 228 N.R. 164, 20 C.P.C. (4th) 243, 81 C.P.R. (3d) 372, 147 F.T.R. 309 (note), [1998] 4 F.C. 439, 7 Admin. L.R. (3d) 147 (Fed. C.A.) — applied

Glaxo Wellcome plc v. Minister of National Revenue (1998), 236 N.R. 388 (note) (S.C.C.) — referred to

Goodman v. Rossi (1995), 12 C.C.E.L. (2d) 105, 37 C.P.C. (3d) 181, 125 D.L.R. (4th) 613, 24 O.R. (3d) 359, 83 O.A.C. 38 (Ont. C.A.) — applied

Interclaim Holdings Ltd. v. Down, 16 C.B.R. (4th) 84, 80 Alta. L.R. (3d) 248, 43 C.P.C. (4th) 357, [2000] 8 W.W.R. 492, 258 A.R. 387 (Alta. Q.B.) — considered

Johnston v. Frank Johnston's Restaurants Ltd. (1980), 33 Nfld. & P.E.I.R. 341, 93 A.P.R. 341 (P.E.I. C.A.) — applied

Kenney v. Loewen (1999), 28 C.P.C. (4th) 179, 64 B.C.L.R. (3d) 346 (B.C. S.C. [In Chambers]) — considered

Leahy v. B. (A.) (1992), 8 C.P.C. (3d) 260, 113 N.S.R. (2d) 417, 309 A.P.R. 417 (N.S. T.D.) — applied

McInerney v. MacDonald, 137 N.R. 35, 126 N.B.R. (2d) 271, 317 A.P.R. 271, 93 D.L.R. (4th) 415, 7 C.P.C. (3d) 269, 12 C.C.L.T. (2d) 225, [1992] 2 S.C.R. 138 (S.C.C.) — considered

Mitchell v. St. Michael's Hospital (1980), 29 O.R. (2d) 185, 112 D.L.R. (3d) 360, 19 C.P.C. 113 (Ont. H.C.) — considered

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P. v. T. Ltd., [1997] 1 W.L.R. 1309, [1997] 4 All E.R. 200 (Eng. Ch. Div.) — considered

Post v. Toledo C. & St. L.R. Co. (1887), 11 N.E. 540 (U.S. Mass.) — applied

R. v. Fosty, [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke*) 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke*) [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108 (S.C.C.) — applied

Science Research Council v. Nassé (1979), [1980] A.C. 1028, [1979] 3 All E.R. 673, [1979] 3 W.L.R. 762 (U.K. H.L.) — considered

Slavutych v. Baker (1975), [1976] 1 S.C.R. 254, (sub nom. *Slavutch v. Board of Governors of University of Alberta*) 3 N.R. 587, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224 (S.C.C.) — applied

Société Romanaise De La Chaussure SA v. British Shoe Corp., [1991] F.S.R. 1 (Eng. Ch. Div.) — considered

Straka v. Humber River Regional Hospital (1999), 45 O.R. (3d) 414 (Ont. S.C.J.) — referred to

Strazdins v. Orthopaedic & Arthritic Hospital (Toronto) (1978), 7 C.C.L.T. 117, 22 O.R. (2d) 47, 7 C.P.C. 243, 2 L. Med. Q. 309 (Ont. H.C.) — considered

Taylor v. Anderton, [1995] 1 W.L.R. 447 (Eng. C.A.) — considered

Statutes considered:

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — considered

s. 10(1) — considered

Judicature Act, 1873 (36 & 37 Vict.), c. 66

Generally — considered

Ontario Judicature Act, 1881, S.O. 1881, c. 5

Generally — referred to

Public Hospitals Act, R.S.O. 1970, c. 378

Generally — considered

Public Hospitals Act, R.S.O. 1980, c. 410

Generally — considered

Public Hospitals Act, R.S.O. 1990, c. P.40

Generally — considered

s. 37 — considered

ss. 37-39 — referred to

s. 39(5) — referred to

ss. 41-43 — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

s. 8 — referred to

Supreme Court of Judicature Act, 1875 (38 & 39 Vict.), c. 77

Generally — considered

Rules considered:

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

Generally — considered

R. 14.05(3)(h) — considered

R. 31.10 — referred to

Regulations considered:

Public Hospitals Act, R.S.O. 1970, c. 378

Hospital Management, R.R.O. 1970, Reg. 729

Generally

Public Hospitals Act, R.S.O. 1980, c. 410

Hospital Management, R.R.O. 1980, Reg. 865

Generally

The judgment of the court was delivered by *Morden J.A.*:

1 The issues raised on this appeal are: (1) whether the applicant has a free-standing right of action for production of correspondence relating to him that is in the possession of the respondent Humber River

Regional Hospital ("Humber"); and (2), if he has such a right of action, whether it is properly answered by a claim of privilege. Pitt J., whose reasons are reported at (1999), 45 O.R. (3d) 630 (Ont. S.C.J.), decided both of these issues against the applicant. The applicant appeals from this decision. [1]

2 The following is an outline of the facts. The appellant is a certified specialist in anesthesia, is a member in good standing of the College of Physicians and Surgeons of Ontario, and had been a member of the active medical staff of the Wellesley Hospital since 1983. When the respondent St. Michael's Hospital assumed control of what became the Wellesley Central Hospital site of St. Michael's Hospital in or about April of 1998 the appellant was afforded medical staff privileges at this site.

3 The Wellesley Central Hospital was ordered to be closed at a future date. The appellant applied for active staff privileges at Humber in the fall of 1997. His application was considered in the spring of 1998. On April 22, 1998 the Chief of Anesthesia at Humber wrote to the appellant to advise that "we would like to offer you an associate position in the Department of Anesthesia." The letter went on to say that the position was contingent upon Humber receiving a reference letter from the Chief of Anesthesia at the Wellesley Hospital and from the Chief of Staff at that hospital.

4 The appellant provided Humber with the names of his former departmental chief and of certain other physicians who had been involved with the Wellesley Central Hospital's administration.

5 Written references were provided to Humber. They comprised Humber's "Reference Questionnaire," duly completed, together with letters appended to them. In his affidavit in support of his application the appellant deposed that he was advised by a member of Humber's board of trustees that the letters "were quite critical of my competence or character." In the cross-examination on his affidavit, Dr. Goluboff, the Chief of the Medical Staff at Humber, agreed with a question put to him that the reference letters were "particularly negative" with respect to the appellant. He also said that he had told the appellant that he would be obliged to indicate to the Humber board "that because of the letters, I couldn't support that application." The appellant was not appointed to the active medical staff at Humber.

6 Humber, however, permitted the appellant to practise his profession on a *locum tenens*basis. On the hearing of the appeal counsel informed us that the appellant had, just recently, been appointed to the associate medical staff at Humber. Without going into detail, it may be said that this position carries with it a lower level of rights than that of being on the active medical staff. It is agreed by all parties before us that this development does not make the appeal moot.

7 The appellant's lawyer asked Humber for the reference correspondence. In his letter the appellant's lawyer said:

> So that there can be absolutely no misunderstanding, let me take this opportunity to confirm that this inquiry has absolutely nothing whatever to do with Dr. Straka's current *locum tenens* or medical staff privileges at the Humber River Regional Hospital. Indeed, Dr. Straka has been delighted by his work there and is most desirous of continuing on with same. Moreover, Dr. Straka advises that he is particularly pleased by the positive working environment and the collegial interaction with the staff at your hospital.

Humber refused to produce the correspondence on the ground that it was privileged.

8 Later in these reasons when I consider the question of privilege, I shall set forth more of the evidence relating to the "Reference Questionnaire" and to the "peer review" process respecting appointments to the active medical staff.

9 In the appellant's notice of application that commenced this proceeding, he sought an "order for production of any correspondence in the respondent's possession which in any way relate to the applicant physician's application for medical staff privileges at the respondent hospital," and he stated that he required "production of said correspondence in order to pursue any possible action in defamation or for interference with economic relations and to pursue full active medical staff privileges at the respondent hospital."

10 The foregoing paragraph states what the object of the application was. Its object is also dealt with in the appellant's supplementary affidavit in support of the application. It contains the following:

> 2. I am seeking production of the so called "letters of reference" so that I may evaluate whether or not to commence litigation against the authors of same in order to protect my professional reputation and good name. I verily believe that such litigation would be impossible without being provided with the opportunity to review and consider these correspondence.
>
> 3. While I continue to work as a locum tenens at the respondent hospital, I have been advised by its chief of staff, Dr. Lanny Goluboff, and verily believe, that the existence of these "letters of reference" continues to act as a bar to my appointment to the active medical staff of the respondent. Therefore, it is my hope that the within application will be granted such that litigation may be commenced and a court of competent jurisdiction will be able to rule that those "letters of reference" contain material falsehoods. Additionally, should the within application be granted, those "letters of reference" may be expressly commented upon and modified by either their authors or other individuals who could comment on any events there referred to. Subsequent to such a court order or additional written comment I verily believe that I would become eligible to obtain an active medical staff appointment at the respondent hospital.

11 Before the application came on for hearing before Pitt J., St. Michael's Hospital successfully moved before Lane J. to be added as a respondent to the application. Lane J.'s reasons are reported at (1999), 45 O.R. (3d) 414 (Ont. S.C.J.).

12 I now turn to the issues of this appeal.

1. Does the appellant have a free-standing right of action to obtain an order for the production of the correspondence?

13 This issue is logically the first to be considered because, if the appellant has no legal right to claim the correspondence, *i.e.* no "cause of action," the question of whether there is a defence to the claim in the form of a privilege does not arise.

14 Pitt J. held that "a proceeding for such free-standing relief is not sustainable procedurally" (para. 13). He also said:

> I am not prepared to find nor do I need to find that there may not be circumstances in which "free-standing" relief may be granted by a Superior Court pursuant to an application in the absence of an action or proceeding. It seems to me, however, that such relief ought only to be granted, if at all, in those circumstances in which either there is no recognized avenue available for pursuing the relief, or where the conventional route is so fraught with obstacles and the damage being suffered so great that it would be an act of judicial irresponsibility to deny access to the courts to the applicant. The denial of the right to earn a living, I do not doubt, would meet the test of intolerable suffering [para. 9].
>
> [Emphasis in original]

15 By "procedurally sustainable" I take Pitt J. to mean that only in an existing action is there a procedure entitling someone to have production of documents in someone else's possession.

16 Before us the appellant made several submissions on this question. First, he relied upon rule 14.05(3)(h) in the *Rules of Civil Procedure*. This provision enables a proceeding to be brought by application where the relief claimed is "in respect of any matter where it is unlikely that there will be any material facts in dispute." This provision, in itself, is of no assistance to the appellant. It goes no further than providing for a procedural vehicle which can be used by a person who has a substantive legal right to relief in which to assert that right. It does not create any substantive legal rights in itself.

17 Next, the appellant relied upon the following decisions, in all of which a right to the production of medical records was recognized in a free-standing proceeding: *General Accident Assurance Co. of Canada v. Sunnybrook Hospital* (1979), 23 O.R. (2d) 513 (Ont. H.C.); *Strazdins v. Orthopaedic & Arthritic Hospital (Toronto)* (1978), 22 O.R. (2d) 47 (Ont. H.C.); and *Myers v. Wellesley Hospital* (1986), 57 O.R. (2d) 54 (Ont. H.C.). In each of these cases the right to production was based on a legislative provision, a regulation made under the *Public Hospitals Act*, R.S.O. 1970, c. 378 and R.S.O. 1980, c. 410, which was interpreted to confer the "cause of action." (A fourth decision, *Mitchell v. St. Michael's Hospital* (1980), 29 O.R. (2d) 185 (Ont. H.C.), held that the regulation did not confer any right to production). The existence of the legislative provision makes these cases distinguishable.

18 The appellant also relied upon the judgment of the Supreme Court of Canada in *McInerney v. MacDonald* (1992), 93 D.L.R. (4th) 415 (S.C.C.). In this case, La Forest J. began his reasons for the court as follows, at p. 417:

> The central issue in this case is whether in the absence of legislation a patient is entitled to inspect and obtain copies of his or her medical records upon request.

19 La Forest J.'s answer to the question was in the affirmative. It is not necessary to consider his reasons for this conclusion in detail. It is sufficient to note that the basis of the patient's entitlement lay in the fiduciary relationship between the patient and doctor. I refer, in particular, to p. 424: " . . . [T]he fiducial qualities of the relationship extend the physician's duty . . . to include the obligation to grant access to information the doctor uses in administering treatment"; and to p. 427: "[T]he patient's interest in his or her records is an equitable interest arising from the physician's fiduciary obligation to disclose the records upon request."

20 In the present case the appellant cannot point to any established form of legal relationship between himself and Humber, fiduciary or analogous to it, on which to base his claim for production of the correspondence. Accordingly, *McInerney v. MacDonald* is of no assistance to him.

21 Before leaving this authority, however, I would note that the court held that the right of access to information in the doctor-patient fiduciary relationship was not an absolute one. At p. 427 La Forest J. said:

> I hasten to add that, just as a relationship may be fiduciary for some purposes and not for others, this characterization of the doctor's obligation as "fiduciary" and the patient's interest in the records as an "equitable interest" does not imply a particular remedy. Equity works *in the circumstances* to enforce the duty. This foundation in equity gives the court considerable discretion to refuse access to the records where non-disclosure is appropriate.
>
> [Emphasis in original]

22 La Forest J. went on to indicate at pp. 429 and 431 that exceptions justifying non-disclosure might include cases where the interests of third parties are involved. This exception could well be applicable to

the case before us if it were established that the appellant had some form of equitable claim, similar to that in *McInerney*, against Humber.

23 There is a third possible basis of a free-standing right in the appellant to claim production of the correspondence which we should consider — that of an action for discovery, the current version of the equitable bill of discovery over which the Court of Chancery had jurisdiction in England before the Judicature Acts, 1873 and 1875 and in Ontario before the *Judicature Act, 1881*. We raised this possible basis with counsel for the parties following the completion of the oral argument and have received from them helpful written submissions on it.

24 This free-standing right to discovery was resurrected by the House of Lords in *Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.). In this case, the House of Lords held that the owners of a patent of a chemical compound, furazolidine, which was being infringed by illicit importation of the compound manufactured abroad without licence, were entitled to maintain an action against the Commissioners of Customs and Excise to obtain the names and addresses of the importers who were infringing their patent. In the Court of Appeal, the plaintiffs acknowledged that they had no other cause of action against the Commissioners. In the result, it was held by the House of Lords that the plaintiffs had a right to commence a proceeding in which the only relief sought was discovery of information.

25 Before considering the nature and scope of the right to assert a claim for discovery only, the first matter which should be addressed is whether, in light of the *Rules of Civil Procedure* and predecessor rules going back to 1881, there is any proper scope for the action for discovery. The respondent St. Michael's Hospital submits that the *Rules, of Civil Procedure* provide a complete code for the conduct of legal proceedings and that, therefore, they alone should govern the availability and scope of discovery and production. The hospital submits that, because the rules do not provide for discovery or production from persons where no action has been commenced, an action for discovery would be irreconcilable with the rules and should therefore not be held to exist.

26 With respect, I do not accept this submission. The fact that the rules provide for discovery only within the confines of actions does not convey the negative implication that the right cannot exist in the absence of an action or before an action is commenced. The submission has been expressly rejected in *Kenney v. Loewen* (1999), 28 C.P.C. (4th) 179 (B.C. S.C. [In Chambers]) and *Interclaim Holdings Ltd. v. Down* (2000), 16 C.B.R. (4th) 84 (Alta. Q.B.) and implicitly rejected in all of the post-*Judicature Act* decisions that recognize the pre-action discovery remedy. It may be noted that a right of pre-action discovery has been conferred by a rule of practice in Nova Scotia (see *Leahy v. B. (A.)* (1992), 113 N.S.R. (2d) 417 (N.S. T.D.) and at one time was in Prince Edward Island (see *Johnston v. Frank Johnston's Restaurants Ltd.* (1980), 33 Nfld. & P.E.I.R. 341 (P.E.I. C.A.).

27 Further, in Ontario there are clear indications that the equitable action for discovery co-exists with the rules of practice. In the first edition of Holmested and Langton, *The Judicature Act of Ontario and The Consolidated Rules of Practice and Procedure* (1890) which was published after the *Judicature Act, 1881* and the new consolidated rules were enacted, the following appears at p. 482:

> In general discovery is obtained by interlocutory proceedings as ancillary to the main object of an action, but an action for discovery may, in a proper case, still be brought: *Orr v. Diaper*, 4 Ch. D. 92; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644.

28 *Orr v. Diaper* (1876), 4 Ch. D. 92, 25 W.R. 23 (Eng. Ch. Div.) cited in this passage was one of the major precedents relied upon by the House of Lords in *Norwich Pharmacal Co.* in upholding the continued existence of the former equitable bill of discovery in the form of the modern action for discovery. Holmested and Langton continued this reference to the equitable action for discovery, in one form or another, through

to the final edition, the fifth in 1940, at p. 927. The reference is also in the subsequent work of Holmested and Gale, *The Judicature Act of Ontario and Rules of Practice* (1983) at p. 1693.

29 If the learned editors of these works thought that the action for discovery was at odds with the discovery scheme in the rules of practice, I do not think that they would have referred to the action without making this comment. In fact, Holmested and Gale at p. 1693 contains the following:

> Actions for discovery, corresponding to the old "bills of discovery" in Chancery, may still be brought in England, though the necessity for such actions is now of rare occurrence; see Bray on Discovery, p. 610, where he said that there had been (prior to 1885) only three reported cases since the Judicature Act, referring to *Reiner v. Salisbury* (1876) 2 Ch. D. 378; *Ainsworth v. Starkie*, [1876] W.N. 8: *Orr v. Diaper* (1876) 4 Ch. D. 92. Under the system introduced by the Judicature Act it is not necessary to bring an action merely for the purpose of obtaining discovery, since "The plaintiff in every action is entitled to discovery as ancillary to the relief which he claims in the action": per Lord Herschell, in *Ind. Coope & Co. v. Emmerson* (1887) 12 App. Cas. 300 at 311.

30 With respect to the last sentence in this quotation, I have no doubt that the bringing of an action merely for discovery, to obtain discovery for the purposes of an existing action, would not only be unnecessary but, also, not legally possible. Such an action *would* be met by the complete code answer.

31 Holmested and Gale, specifically in reference to actions for discovery in Ontario, refer at p. 1694 to the judgment of Meredith C. J. in *Bartram v. Wagner* (1907), 9 O.W.R. 448 (Ont. H.C.). This was an action for an account and delivery over of documents and property. The plaintiff was the executor under the will of the defendant's deceased husband. At pp. 449-50 Meredith C.J. said:

> It would appear that, notwithstanding the ample power to enforce discovery which the High Court possesses since the passing of the Judicature Act, an action for discovery may be brought: *Orr v. Diaper*, 4 Ch. D. 92: such actions are, however, rare, and the practice with regard to them is the same as that which was applicable to a bill for discovery before the Act. Such a bill was not brought to a hearing and on a full answer being given, no further proceedings could be taken on it, and the defendant was entitled to an order for payment of his taxed costs: Bray on Discovery, p. 611.

32 In light of the foregoing, I think that an action for discovery lies in this jurisdiction. The proceeding may be brought by way of application, if there are no material facts in dispute (rule 14.05 (3) (h)).

33 Before concluding this part of my reasons, I should say something about the bearing of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31 on the issue of a free-standing right to claim production from Humber in this case. Public hospitals are not subject to this *Act*, and Pitt J. relied on this consideration and certain provisions in the *Act*, as strongly supporting his conclusion that the appellant had no free-standing right to production. On this appeal the respondent St. Michael's Hospital asserted this argument against the right to production.

34 Pitt J.'s reasons and St. Michael's Hospital's submissions were given and made in a context that did not take into account that our law includes the modern equivalent of the former equitable bill of discovery. The *Freedom of Information and Protection of Privacy Act* in s. 10(1) confers the right of access to government information on "[e]very person." The legislation, as far as I can see, does not require that the person seeking information have some particular purpose. Openness of government is the value underlying the *Act*.

35 There is little significant overlap between the scope and purpose of the *Act* and of the equitable remedy. Accordingly, I would not regard the exclusion of public hospitals from the burdens of the *Freedom of Information and Protection of Privacy Act* as being a factor which tells against the right of a person, who

can bring his or her case within the requirements of a modern action for discovery, to assert a claim in such a proceeding.

36 The real question with respect to an action for discovery is: in what circumstances does it properly lie? We are concerned with an equitable remedy and, accordingly, the exercise of a discretion is involved. This was expressly affirmed in *British Steel Corp. v. Granada Television Ltd.*, [1981] A.C. 1096 (U.K. H.L.) at 1174, which was an action for discovery. The object of the action is to enable justice to be done. With these general observations mentioned by way of preface I turn now to more specific concerns.

37 *Norwich Pharmacal Co.* has been helpfully analyzed by Stone J.A. in *Glaxo Wellcome plc v. Minister of National Revenue* (1998), 162 D.L.R. (4th) 433 (Fed. C.A.), leave to appeal to the Supreme Court of Canada refused December 10, 1998, (1998), 236 N.R. 388 (note) (S.C.C.). At pages 448-449 Stone J.A. stated two "threshold requirements" related to the granting of an order for discovery in a proceeding seeking discovery alone. They are: (1) the person seeking discovery must have a *bona fide* claim against the alleged wrongdoers; and (2) the person seeking discovery must share some sort of relationship with the person from whom discovery is sought. This second requirement was expressed in different ways in *Norwich Pharmacal Co.*, where it was said that a person against whom discovery is sought should be "mixed up in the tortious acts of others so as to facilitate their wrongdoing" even though this is "through no fault of its own" (p. 175) — or should be "involved in the transaction" (p. 188). A person fitting these descriptions is not a "mere witness" against whom, it is clear, no right of pre-action discovery lies. A "mere witness" can, of course, be compelled to testify at the trial, but not before. In Ontario, this is subject to obtaining, in an action, leave to examine a non-party: rule 31.10 of the *Rules of Civil Procedure*.

38 Stone J.A. also said that a "basic condition" for this kind of discovery "is that the person from whom discovery is sought must be the only practical source of information available to" the person seeking discovery (at p. 449).

39 For the purpose of addressing the issues on this appeal, I accept the foregoing analysis.

40 In the present case, the respondents do not, correctly, in my view, take issue with the satisfaction of the second threshold. Humber requested the reference letters in question and, if they are defamatory, Humber is "mixed up" or "involved" in the commission of the alleged tort, albeit entirely innocently. In other words, Humber is not a "mere witness."

41 What the respondents do submit is that the appellant is not entitled to the discovery sought because he does not allege a *bona fide* claim against the reference-givers and, also, because he has not availed himself of an alternative source of information, a proceeding under s. 37 of the *Public Hospitals Act*. I shall now consider each of these submissions.

(a) Is there a bona fide claim against the reference-givers?

42 The respondents submit that the appellant has not alleged a *bona fide* claim against the reference-givers. The allegations in the notice of application do not contain any statement that the letters of reference defame the appellant or are otherwise actionable and the respondents submit that the appellant has no evidence to this effect. They submit that the equitable bill of discovery is not available in circumstances where the applicant seeks *evidence* which he or she thinks *might* assist in determining whether or not a right has been infringed or a tort committed. They refer to the following statement of Lord Cross in *Norwich Pharmacal Co.* at p. 199:

> In the course of the argument fears were expressed that to order disclosure of names in circumstances such as exist in this case might be the "thin end of the wedge," that we might be opening the door to "fishing requests" by would-be plaintiffs who want to collect evidence or the requests for names made

to persons who had no relevant connection with the person to be sued or with the events giving rise to the alleged cause of action but just happened to know the name. I think that these fears are groundless. In the first place, there is a clear distinction between simply asking for the name of a person whom you wish to make a defendant and asking for evidence.

43 The implication of this is that the principle underlying an action for discovery is confined to a case where the applicant has evidence of a legal wrong done to him or her but lacks only the name of the wrongdoer. These, of course, were the facts in *Norwich Pharmacal Co.* and in many other cases where relief was granted on a claim for discovery only. See, for example, *Moodalay v. Morton* (1785), 1 Bro. C.C. 469 (Eng. Ch. Div.); *Orr v. Diaper*, *supra*; *Post v. Toledo C. & St. L.R. Co.*, 11 N.E. 540 (U.S. Mass., 1887); and *Glaxo Wellcome plc v. Minister of National Revenue*, *supra*. In fact, a frequently quoted black letter statement of the principle in Story, Equity Jurisprudence, 12 th ed. (1877) in § 1483 reads:

> But, in general, it seems necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court, to which it should be auxiliary. *There are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party against whom the suit should be brought*. But these are of rare occurrence. [Emphasis added].

44 The principle has, however, been expressed in wider terms in *Norwich Pharmacal Co.* itself. Lord Reid said at p. 175:

> They [the authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

45 This goes beyond confining the relief to the disclosing of the identity of wrongdoers and includes the duty to assist "by giving full information." In the English text Matthews and Malek, *Discovery*, 2nd ed. (1992), the authors say at p. 22:

> It should be noted that disclosure of the wrongdoer's identity is not enough; the obligation extends to giving full information.

46 In support of this statement they cite *Société Romanaise De La Chaussure SA v. British Shoe Corp.*, [1991] F.S.R. 1 (Eng. Ch. Div.) at 5 where Millett J. said:

> The plaintiffs of course put their case on the basis of the *Norwich Pharmacal* case, under which a defendant who has *prima facie* become involved, however innocently, in wrongdoing, is under a positive duty to assist a plaintiff by giving him full information and disclosing the identity of the wrongdoer. I observe that it is not sufficient to disclose the identity of the wrongdoer; the obligation extends to giving full information. That must include all information necessary to enable the plaintiff to decide whether it is worth suing the wrongdoer or not.

47 Matthews and Malek cites, after *Société Romanaise De La Chaussure SA*, and after "cf.," *Dubai Bank Ltd. v. Galadari (No. 6)*, The Times, October 14, 1992 (C.A.) (see [1992] TLR 476). In *Dubai Bank*, the judge of first instance had made an order against two defendants that they, on or before a certain date, by all lawful means available to them, obtain and produce to the plaintiffs on discovery (a) all documents

relating to an account from or through which sums due to the plaintiffs were transferred including all bank statements; and (b) all documents relating to the payment of monies pursuant to a settlement agreement dated February 11, 1989.

48 The Court of Appeal held that this order was not within the *Norwich Pharmacal Co.* principle. The report contains the following at p. 177:

> In their Lordships' view that was not a proper analogy. The *Norwich Pharmacal* principle extended the power to order discovery of information by ordering a person who had assisted the commission of a wrong to disclose the identity the wrongdoer. In effect, it was a power to require an agent to disclose his hitherto undisclosed principal.

This statement appears to reflect a narrow view of the principle.

49 The appellant relies upon *P. v. T. Ltd.*, [1997] 4 All E.R. 200 (Eng. Ch. Div.). In this case the plaintiff was uncertain whether a tort had been committed, specifically defamation of himself by an unknown third party. By notice of motion, the plaintiff had applied to the court for an order that the defendant, his former employer, disclose to him, and state in an affidavit, whether it had in its possession any documents containing or evidencing the precise details of allegations which were made against him and formed the basis of his dismissal from employment and the identity of the complainant who made those allegations. At p. 208 Scott V-C. said:

> In that respect [this refers to the fact that the plaintiff did not know whether he had a cause of action against the informant] his [the plaintiff's] position is not the same as that of the plaintiff in the *Norwich Pharmacal* case. In the *Norwich Pharmacal* case the plaintiff was able to demonstrate that tortious infringements of patent rights were being committed. It did not know by whom. It did not know who to sue. But that there was tortious conduct against it was not in question. In the present case, it is in question whether a tort has been committed against Mr. P. He believes that it has. The purpose of any order I make, as I suppose of any order that a judge ever makes, is to try to enable justice to be done. It seems to me that in the circumstances of the present case justice demands that Mr. P. should be placed in a position to clear his name if the allegations made against him are without foundation. It seems to me intolerable that an individual in his position should be stained by serious allegations, the content of which he has no means of discovering and which he has no means of meeting otherwise than with the assistance of an order of discovery such as he seeks from me. It seems to me that the principles expressed in the *Norwich Pharmacal* case, although they have not previously been applied so far as I know to a case in which the question whether there has been a tort has not clearly been answered, ought to be applicable in a case such as the present.

50 Further, in the recent English Court of Appeal decision *AXA Equity & Life Assurance plc v. National Westminster Bank plc* (May 7, 1998), Doc. 98/0236 (Eng. C.A.) Morritt L.J. expressed the following dictum in paragraph 25:

> Counsel for the Investors also raised in the course of argument the case where, although the identity of the wrong-doer is known, one fact crucial to the proper allegation of his liability is not but is susceptible of ascertainment from a known document in the hands of a third-party. It was suggested that in such a case if the third-party had been mixed up in the relevant transaction then there was no objection to an order for discovery; the mere witness rule would not be infringed because without the ascertainment of the missing fact there would be no trial; the application would not be lacking in particularity so as to be stigmatised as mere fishing for the document constituting the piece missing from the jigsaw puzzle would be capable of identification. It is not necessary to decide the point and do not do so but I see much force in it. The consequence would be that the principle of *Norwich Pharmacal* would be

applicable in any case where, for whatever reason, the action for which the document or information was required could not in its absence proceed to trial and would not be confined to cases in which the reason why the action could not so proceed was ignorance as to the identity of the proper defendant. The establishment of such a proposition would also enable effect to be given to the reference made by Lord Reid in *Norwich Pharmacal* to the duty to provide "full information" as well as the identity of the wrong-doer without giving rise to a general obligation to give disclosure. cf *Arab Monetary Fund v. Hashim (No.5)*, [1992] 2 All E.R. 911, 914.

51 The foregoing authorities indicate that the nature and scope of the *Norwich Pharmacal Co.* principle is far from settled. There was no mention of a "fishing inquiry" in *P. v. T. Ltd.* even though the plaintiff did not know whether he had a cause of action. He did know, however, that a person, or some persons, had made serious allegations against him of gross misconduct in the way in which he had conducted himself and that this had caused his employer to dismiss him. He also had good reason to think that this had ruined his career. In the present case, all that the appellant knows is that the reference letters were "particularly negative" with respect to his character and competence and of such a nature that they stood in the way of his appointment to Humber's active medical staff. They still stand in the appellant's way to appointment to Humber's active medical staff.

52 If a narrow approach to determining the elements of an action for discovery were to govern this case, it would be difficult to say that a *bona fide* claim is asserted in this proceeding. The appellant does not know whether he has a cause of action against the reference-givers. It could be said that he is "fishing" to find out if he has a case. I do not think, however, that he is engaged in "mere fishing" (*AXA Equity & Life Assurance plc*, *supra*). He does know that the letters damaged his opportunity of being appointed to the active medical staff at Humber. Although it is nowhere expressly stated in the material, it is obviously implicit in the appellant's position that he is unaware of what facts could have given rise to these letters. He would like to find out so that he may take steps to clear his name through a legal proceedings if this should prove necessary.

53 On these facts, I do not think that the appellant should be "non-suited" because his claim is not a *bona fide* one, i.e. that his claim should fail because the threshold requirement of a *bona fide* claim has not been shown. As I have said, we are concerned with an equitable remedy the granting of which involves the exercise of a discretion. The general object is to do justice. Accordingly, I do not think that a rigid view should be taken of the elements of the claim. With this approach in mind, I think that it is reasonable to accept that sufficient *bona fides* has been shown to justify consideration of the case as a whole. The nature and apparent strength of the appellant's case is a factor to be weighed together with the other relevant factors in arriving at the final determination of the claim.

(b) Is the person from whom discovery is sought the only practical source of the information?

54 Under this heading the respondents submit that the appellant should have applied under s. 37 of the *Public Hospitals Act*, R.S.O. 1990, c. P.40 for appointment to the active medical staff at Humber. In making this submission they refer to the rights the appellant would have under s. 8 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, which reads:

> 8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

Reference may also be made to s. 39(5) of the *Public Hospitals Act*, which reads:

(5) Where a hearing by the board is required, the person requiring the hearing shall be afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing.

55 It is not clear to me that in a proceeding under the *Public Hospitals Act* the appellant would have the right to production, before or at the hearing, of the reference letters. He would have the right to be informed of the allegations against him, in which case he probably would be apprised of the essential contents of the letters.

56 Even if the appellant could obtain copies of the letters in a discovery process under the *Public Hospitals Act* it is likely that he could be restrained by the implied undertaking principle from using them for any purpose other than prosecuting his statutory claim. See *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (Ont. C.A.).

57 In view of the foregoing, I do not think that the possibility of a proceeding under the *Public Hospitals Act* should be regarded as an alternative practical source of the information the appellant seeks and, as such, defeat his claim at this stage of the analysis. As will become apparent in the next part of my reasons, I do consider the appellant's rights under the *Act* to be material to the claim for privilege asserted by the respondents.

2. If the appellant has a free-standing right of action is his claim answered by a claim of privilege?

58 Pitt J. decided this issue against the appellant on the application of *Wigmore's* four conditions for the establishment of a privilege against the disclosure of communications. The parties joined issue before us on the application of these conditions. They are set forth in §2285 in Vol. 8 of *Wigmore on Evidence* (McNaughton Rev. 1961) as follows:

> . . . [F]our fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. [Emphasis in the original text].

59 It has been long established that confidentiality alone, no matter how earnestly desired and clearly expressed, does not make a communication privileged from disclosure: Wigmore at §2286. Something more than confidentiality must exist and this something more must satisfy the Wigmore conditions: *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.); *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.); and Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999) at pp. 723-724.

60 I turn now to the Wigmore conditions. The appellant does not really contest the application of the first condition. He originally submitted that the letters appended to the reference questionnaire form, which advised those submitting references that "[y]our comments will be held in the strictest confidence," could not have been sent in the confidence that they would not be disclosed. He did not, however, pursue this point — correctly, I think, because there could not be any basis for thinking that the letters were in any sense different from the answers in the questionnaire form. They were part of them.

61 The appellant stood his ground on *Wigmore's* conditions (2) and (4) and submitted that neither these had been satisfied. He accepted that condition (3) had been satisfied — that is, that the relation between those replying to requests for reference letters and the requesting hospital is one which, in the opinion of the community, ought to be sedulously fostered. There is overlap between this condition and conditions (2) and (4) and, in dealing with them, I shall indicate why I think the appellant's response to condition (3) is right. Accordingly, I shall not deal separately with condition (3) but shall turn now to conditions (2) and (4).

62 With respect to condition (2) the appellant submits that the element of confidentiality, that is, secrecy, is *not* essential to the full and satisfactory maintenance of the relation between hospitals and reference-givers. In fact, he submits that the candour, which is rightly expected from those giving references, is better enhanced by openness and disclosure and that the view that confidentiality engenders candour has been "judicially decimated." He refers, in particular, to *Science Research Council v. Nassé*, [1979] 3 All E.R. 673 (U.K. H.L.). This case involved whether confidential reports made on employees by their superiors relating to the employees' performance suitability for promotion should be ordered to be produced in proceedings alleging discrimination in employment. The complainants sought production not only of the reports relating to themselves (as to which the employers had no objection) but also of those relating to other employees. The result of the appeal in the House of Lords was that the documents should be produced but only subject to the tribunal's first inspecting them. The appellant relies upon the following passage in the opinion of Lord Salmon at pp. 683-684:

> I cannot agree that the production of such documents could have the dire effect which has been suggested, and of which there is certainly no real evidence. I cannot accept the proposition that those whose duty it was to write reports about a candidate and his record, suitability for promotion etc. would lack in candour because the reports, or some of them, might possibly sometimes see the light of day. This proposition bears a striking resemblance to that which was accepted as sound for upwards of 20 years after the obiter dicta pronounced by Viscount Simon LC *in Duncan v. Cammell Laird & Co. Ltd.* [[1942] AC 624]. This proposition was however held to be unsound in *Re Grosvenor Hotel, London (No 2)*, [1965] Ch 1210 at 1233, and generally accepted as unsound during the three years following that decision. The obiter dicta in *Duncan v. Cammell Laird & co. Ltd.* was then temporarily revivified by a majority decision of the Court of Appeal in *Conway v. Rimmer*, [[1967 2 All E.R. 1260], but was finally put rest when that majority decision was reversed in your Lordships' House. No more than I accept the proposition relating to candour, do I accept the proposition that employees anxious for promotion or transfer would be inhibited from making the necessary applications if they knew that their application forms and the written decisions relating to them might also sometimes be allowed to see the light of day.

63 I accept that it is not difficult to find judicial pronouncements to the same effect, that is, statements against the importance of confidentiality to candour. The question of whether confidentiality leads to candour is, of course, one of fact to be determined on the evidence in the case under consideration. This is recognized by Lord Salmon in *Science Research Council* in his observation that there was "no real evidence" supporting "the dire effect" that would apparently result from breach of confidentiality.

64 On a more general plane, the importance of the evidence in the case is suggested by Lamer C.J.C. in *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) at 290 with respect to the use of the Wigmore conditions:

> This is not to say that the Wigmore criteria are now "carved in stone," but rather that these considerations provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. Nor does this preclude the identification of a new class on a principled basis.

65 In regard to the importance of fact-finding in determining the application of the conditions on a case by case basis, I refer to the decision of the English Court of Appeal in *Taylor v. Anderton*, [1995] 1 W.L.R. 447 (Eng. C.A.), which was concerned with the production, in a civil action against a former chief constable for malicious persecution, of reports prepared by investigating officers during investigations into police conduct which had taken place after the plaintiff's acquittal on criminal charges. The defendant asserted a claim to public interest immunity in respect of the reports. The Court of Appeal concluded that the reports formed a class to which public interest immunity attached but it remitted the case for ultimate determination by the judge of first instance. The judge could order production if he was satisfied that the public interest in disclosure outweighed that in preserving confidentiality.

66 In *Taylor v. Anderton* there was evidence given by the deputy chairman of the Police Complaints Authority on the importance of confidentiality to the forthright expressions by investigating officers. At p. 465 Sir Thomas Bingham M.R. said:

> I am fully alive to the existence of a current of opinion strongly flowing in favour of openness and disclosure. I am also, however, mindful of the fundamental public interest in ensuring that those responsible for maintaining law and order are themselves uncorrupt, law-abiding, honest and responsible. I do not myself find the points made by Mr. Cartwright [the deputy chairman] in his affidavit to be unconvincing, unrealistic or suggestive of self-interested special pleading. In very many cases where an investigating officer is appointed, there must be a real prospect of civil, criminal or disciplinary proceedings. I have no difficulty in accepting the need for investigating officers to feel free to report on professional colleagues or members of the public without the apprehension that their opinions may become known to such persons. I can readily accept that the prospect of disclosure in other than unusual circumstances would have an undesirably inhibiting effect on investigating officers' reports. I would therefore hold that the reports of investigating officers made in circumstances such as these form a class which is entitled to public interest immunity. That does not, of course, shut out the plaintiff if he is able to satisfy the judge, applying the familiar tests, that, on the facts of this case, the public interest in disclosure of the contents of these reports or any part of any of them, outweighs the public interest in preserving the confidentiality of these reports. That is a matter for the trial judge, and it is a judgment which he will be very well fitted to make.

67 As indicated earlier in my reasons, I shall now set forth the evidence in the present case relating to the "Reference Questionnaire" and to Humber's "peer review" process respecting appointments to the active medical staff. The letter of Dr. Goluboff, Humber's Chief of Medical Staff, which requested the references, reads as follows:

> RE: Dr. Pavel Straka
>
> The above physician has applied to join the Medical Staff of Humber River Regional Hospital and has given your name in reference. It would be greatly appreciated if you would complete and return this Reference Questionnaire which will aid our Credentials Committee in assessing his/her suitability for appointment.
>
> We appreciate your answers to these questions in an objective and forthright manner. Please offer any other comments you believe will help us to evaluate the clinical abilities and other skills of the applicant.
>
> Your comments will be held in the strictest confidence.

68 In his affidavit Dr. Goluboff said:

9. I believe that the letters of reference at issue are both confidential and privileged for the following reasons:

a. First, the letters of reference were explicitly requested in confidence and with the expectation that they would not be disclosed to anyone other than the Hospital's Credentials Committee.

b. Second, confidentiality is essential to ensuring that reference requests which are made as part of the Hospital's staff selection process will generate honest and frank peer review from the medical community. Without the assurance of confidentiality, I believe that physicians would be reluctant to provide opinions which might be honestly held but not well-received by those about whom they are given.

c. Third, there is a strong public interest in maintaining the confidentiality of letters of reference which are generated by the medical community as part of a peer review process. In particular, the experience, competence and reputation of a physician are all factors which are relevant to a proper assessment of his or her suitability for appointment to a staff position. Members of the public who rely upon hospitals are entitled to expect that staff appointments will not occur without an assessment of these factors. It would be exceedingly difficult to obtain reliable information relevant to these factors without the candid input of an applicant's peers, colleagues and/or superiors.

d. Fourth, disclosure of the letters of reference relating to Dr. Straka would tend to undermine the effectiveness of the medical staff appointment process.

69 The cross-examination on this part of the affidavit did not make any inroads on it. In the course of it, Dr. Goluboff gave further evidence why he had deposed that confidentiality was important as far as the candour of the references was concerned:

Q. . . . , and when you say in paragraph "B" that without the assurance of confidentiality, you believe the physicians would be reluctant to provide opinions, on what do you base that belief? Any discussions you had?

A. Past experience, on occasion.

Q. Past experience, on occasion? Do you want to elaborate?

A. I mean, it's not a consistent thing. There have been applicants who have — whom I have over the years — with whom I've received references on from — for example, teaching programs, which were highly complimentary, but when you actually called up colleagues involved in the teaching program whom you knew, and spoke to them, it was apparent that these references that had been requested by the candidate were far from totally revealing.

Q. I understand that, but I don't understand how —

A. So, we believe — and I think there has been experience whereby if the — if the — often in these cases, the candidate has received a copy of the reference.

Q. Right.

A. So, they actually have a copy and it has been our experience that those are always very positive. When somebody writes somebody — when they've been asked to provide a reference, they provide the candidate with the reference, and they write the reference. I have never seen one that was anything but

positive, whereas the ones that I have seen that were not positive, have tended to be where the candidate was not privy to the reference.

Q. It's clearly just based on your own experience?

A. Yes.

70 In considering this evidence I must be sensitive to the possibility that it reflects "special pleading" (see *Taylor v. Anderton*, *supra*) and that it is not necessary to accept it simply because there is no evidence to the contrary. With these cautions in mind, I do conclude, as did Pitt J., that this evidence is persuasive and that it should be accepted. The second condition in Wigmore is, therefore, satisfied.

71 I turn to Wigmore's fourth condition which, for convenience, I shall repeat:

4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. [Emphasis in the original text].

72 I shall consider first the injury that would inure to the relation by the disclosure of the communications. The relation is that between potential reference-givers and the hospital board, the hirer of the hospital's medical staff. I have concluded, with respect to the third Wigmore condition, that this is a relation which, in the opinion of the community, should be sedulously fostered. I understand the community in this context to mean the general public, i.e. all those who avail themselves of the services of public hospitals.

73 I have little difficulty concluding that the members of the public would have a vital interest in the integrity and thoroughness of the methods hospital boards use in deciding whom to appoint to what positions on their medical staffs. The lives and health of members of the public are directly affected. On the evidence in the present case, I have earlier concluded that the element of confidentiality is essential to the effective maintenance of the relation between reference-givers and hospital boards.

74 For these reasons, it is reasonable to conclude that any injury to the relationship flowing from a failure on the part of a hospital board to receive comprehensive and accurate information on applicants for appointments to the hospital staff would have a serious impact on the public interest.

75 I turn now to the other element to be weighed in the application of the fourth Wigmore condition.

76 It may be noted that this condition appears to assume that there is litigation afoot that may not be correctly determined for lack of relevant evidence, i.e. it involves the assertion of the privilege in the course of a trial. This is not quite our situation. The basic question in the present case is whether the appellant should be put in a position, as a result of a successful discovery proceeding, to commence a proceeding against the reference-givers and, then, to have a correct disposition of that proceeding.

77 I accept that access to the courts is a fundamental right in our legal system. I would not want to compare it in general terms with a litigant's right of access to evidence in existing proceedings, with a view to determining which is deserving of greater protection. On the facts of this case, I have already concluded that the appellant's claim has sufficient *bona fides* to escape being dismissed at the threshold level. Through no fault of the appellant, of course, his case is not as strong as that of the applicant in Norwich Pharmacal where it was reasonably clear that the applicant's patent rights had been infringed and that all that stood in the way of the applicant asserting its rights was lack of knowledge of the infringer's identity.

78 The present case has an additional complexity. Even if it were assumed that the letters were defamatory, there would likely be defences of justification and qualified privilege to be met and overcome before the appellant could ultimately succeed.

79 The appellant's main interest, in the correct disposal of the litigation he contemplates, is the clearing of his name and to "become eligible to obtain an active staff appointment at the respondent hospital." I have earlier in these reasons set forth a part of the appellant's affidavit in which this quotation appears. The affidavit was sworn five months after the sending of the appellant's lawyer's letter to Humber in which he said that the appellant's desire to have the reference letters produced "had absolutely nothing whatever to do with Dr. Straka's *locum tenens* or medical staff privileges at the Humber River Regional Hospital." Accordingly, it may be taken that now the appellant has an interest in the active staff appointment at Humber.

80 I think that it is at this point that the appellant's rights under *the Public Hospitals Act*, ss. 37-39 and 41-43 are a relevant consideration. Under the *Act* the appellant has the right to have his entitlement to appointment to Humber staff decided by Humber's board or, on appeal, by the Health Professions Appeal and Review Board or, on further appeal, by the Divisional Court. Appeals to the Divisional Court are wide open. They may be based on questions of law or fact, or both, and the court has all the powers of the tribunal below.

81 The statutory procedure affords the appellant a straightforward route to clearing his name with the very organization that is in possession of the critical letters. As I have indicated earlier in these reasons, it may be that in this proceeding the letters would not be produced before or at the hearings before the hospital board or the appeal board. The appellant, however, would have reasonable disclosure of the case against him before the hearing and Humber's medical advisory committee would be obliged to submit its case against the appellant at the hearing. This might necessarily involve the reference-givers being required to testify and subjected to cross-examination. This would not involve any breach of confidence or privilege respecting the correspondence but, if it should, I would think that the claim of privilege would be answered by the policy of the *Public Hospitals Act* procedure.

82 The existence of the statutory procedure, which is open to the appellant, is a relevant factor to take into account in considering what weight should be given to the benefit of the correct disposal of the litigation that the appellant contemplates in the present proceeding. This litigation is somewhat complex and necessarily involves the overriding of an asserted privilege. Its benefit, when weighed in the scales against the injury to the public interest sought to be protected by the privilege, is weakened by the fact that the contemplated litigation is not the only way in which the appellant can achieve his basic purpose. The only possible benefit which the appellant would not have by following the statutory route would be the recovery of damages.

83 When the benefit of the correct disposal of the litigation is considered in this wider context, I have little difficulty in concluding that the injury to the relation, i.e. to the peer review process, would clearly exceed the benefit of the correct disposal of the litigation.

84 Accordingly, in my view, the fourth Wigmore condition has been satisfied and, in result, the claim for privilege with respect to the letters is established.

Disposition

85 For the foregoing reasons, I would dismiss this appeal with costs.

Appeal dismissed.

Footnotes

1 The appellant submitted in his factum that Pitt J. erred in ordering the appellant to pay costs to the respondents. This submission was not made on the hearing before us. The costs issue was not mentioned in the notice of appeal

nor was leave to appeal sought with respect to costs. There is no indication that Pitt J. erred in the exercise of his discretion on this subject and I shall not deal with it in these reasons.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada v. Callidus Capital Corporation | 2017 CAF 162, 2017 FCA 162, 2017 CarswellNat 3599, 2017 CarswellNat 9496, 8 P.P.S.A.C. (4th) 1, 414 D.L.R. (4th) 132, 51 C.B.R. (6th) 15, 37 E.T.R. (4th) 177, 281 A.C.W.S. (3d) 209, [2017] G.S.T.C. 60 | (F.C.A., Jul 27, 2017)

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
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Related Abridgment Classifications
Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax
III.14 Collection and remittance
III.14.b GST held in trust
Headnote
Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both

CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner

naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by

being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.
The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.
The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.
Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.
Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.
La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.
L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.
Le créancier a formé un pourvoi.
Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes

d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, (sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario)* 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.)* 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario)* 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario)* [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility))* 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.)* 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

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

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

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

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

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

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

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

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

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

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

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

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

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

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

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

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

Generally — referred to

s. 86(2) — referred to

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

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

Generally — referred to

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

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

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

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

s. 227(4) — referred to

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

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

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered
Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23 — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

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

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

s. 37(1) — considered
Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

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

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

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

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 227(4) — considered

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

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered
Statutes considered *Abella J.* (dissenting):
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

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

s. 37(1) — considered

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

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

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered
Interpretation Act, R.S.C. 1985, c. I-21
s. 2(1)"enactment" — considered

s. 44(f) — considered
Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

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

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

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

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

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

2. Issues

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

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

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

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

3. Analysis

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

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

3.1 Purpose and Scope of Insolvency Law

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

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

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

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

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

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

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

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

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

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

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

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an

unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

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

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

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

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

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

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

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

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

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

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

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

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating

a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

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

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

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

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

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

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA.* Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA.* Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

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

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this

one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

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

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

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

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

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

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

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

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

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

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

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

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA.* Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases

simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA.* Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA.* The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA.* Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA.*

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA.* The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA.* In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA.* The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA.* That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA.* Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA.*

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA.* Accordingly, creditors' incentives to prefer

one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

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

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

3.4 Express Trust

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

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

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

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

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

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in

bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

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

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

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

I

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision.

I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

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

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

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

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

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

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

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

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

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant)*. But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

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

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

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

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

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

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

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

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

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

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

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

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

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

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

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

...

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

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

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

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

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

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

...

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

...

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

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

(i) the expiry of the order,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada*

Pension Plan, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

but it shall comprise

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

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

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

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

purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

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

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

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

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

...

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

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

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

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

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

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

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

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may,

subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

Court File Number: CV-17-11846-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

IN THE MATTER OF
Plaintiff(s)

AND

SEARS CANADA INC.
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

(1) The attached orders which are not opposed shall issue on the terms of the attached

(2) There shall be a

_____ Date

_____ Judge's Signature

☒ Additional Pages 2

Court File Number: _____

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Sealing Order on the Terms of para 17 of the Governance Protocol and Stay extension Ordered.

(3) The balance of my endorsement and attached on Consent.

Hainey J.

December 3, 2018

Judges Initials _____

On October 15, 2018, Sears Holdings Corporation ("**SHC**") filed voluntary petitions for relief pursuant to Chapter 11 of the *Bankruptcy Code* in the U.S. Bankruptcy Court for the Southern District of New York.

Counsel for the Litigation Investigator, the Monitor and SHC disagree regarding the effect of the stay of proceedings in the U.S. on the proceedings before this Court.

Notwithstanding this disagreement, counsel for SHC, the Litigation Investigator and the Monitor have agreed that:

1. neither the Litigation Investigator nor the Monitor are proposing to take any fresh step in any proceeding against SHC at this time and SHC will be advised if this changes in the future;

2. none of the orders that Litigation Investigator and/or the Monitor are seeking today are being sought against SHC in any proceeding or proposed proceeding; and

3. none of the steps that the Litigation Investigator and/or the Monitor are now taking are intended to affect the stay that was agreed to between SHC and the plaintiffs in the 129 action.

Harvey J.

December 3, 2018

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC. and 3339611 CANADA INC.

Before: **Hainey J.**

Date: **December 3, 2018**

ENDORSEMENT

[1] Counsel for the Former Directors has advised that, in response to the five actions that will be pursued, their clients will almost certainly bring claims (including crossclaims and third party claims) against other parties involved with Sears Canada, some of which claims will be asserted against parties that are currently beneficiaries of the stay. In respect of any of such claims that are to be asserted against beneficiaries of the stay, the directors or any other defendant in the actions that wishes to assert such claims may later seek to lift the CCAA stay to permit such claims to be advanced.

[2] To address the Proposed Defendants' ability to recover costs in these proceedings, the Monitor confirms that it will set aside a reserve of $12,000,000 from the funds in the Sears Canada

Estate. The reserve is intended to cover 1) the Monitor's and Litigation Trustee's fees (including fees and costs of legal counsel) and disbursements regarding their proposed claims, and 2) any and all cost awards in favour of the Proposed Defendants against the Monitor, Litigation Trustee, or the Estate, as the case may be. The Monitor acknowledges that the Proposed Defendants shall have a post-filing claim, on a dollar for dollar basis, against the Estate for any award of costs. Nothing in this Endorsement precludes the Proposed Defendants from applying to this court to seek an increase to the reserve .

[3] The ESL Parties agree to reserve their objection to the issuance of the claims on the basis of abuse of process arising from any failure to obtain a waiver of privilege from Sears Canada. The ESL Parties have reserved their rights to seek any remedy, including a motion to strike or a stay of the proposed claims, before the case management judge despite not opposing the issuance of the proposed claims at this stage.

[4] The Former Directors have raised concerns about a potential conflict of interest relating to FTI as a result of its role in these CCAA proceedings, the litigation against the Proposed Defendants, and in the Chapter 11 proceedings of Sears Holdings Corporation. The relief granted today is without prejudice to the ability of the Proposed Defendants to later raise conflict of interest issues relative to FTI and seek appropriate relief or for FTI to defend itself.

HAINEY J

FTI CONSULTING CANADA INC., in its capacity as Court-appointed monitor in proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36 Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants

Court File No. CV-18-00611219-00CL

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants

Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT
TORONTO

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