

COURT FILE NUMBER 2501-06120
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

Clerk's Stamp

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 SUNTERRA FOOD CORPORATION,
TROCHU MEAT PROCESSORS LTD., SUNTERRA
QUALITY FOOD MARKETS INC., SUNTERRA FARMS
LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF
LTD., LARIAGRA FARMS LTD., SUNTERRA FARM
ENTERPRISES LTD., and SUNTERRA ENTERPRISES
INC.

DOCUMENT **BOOK OF AUTHORITIES
TO THE BENCH BRIEF OF NATIONAL BANK OF
CANADA
FOR THE APPLICATION TO BE HEARD ON
SEPTEMBER 5, 2025 AT 2:00 P.M.**

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LIST OF AUTHORITIES

Statutes

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, at ss. 2, 121, and 135;
2. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, at ss. 11, 19, and 20;

Case Law

3. *Addison & Leyen Ltd v Fraser Milner Casgrain LLP*, 2014 ABCA 230;
4. *Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718;
5. *AMIC Mortgage Investment Corporation v. Abacus Cities Ltd.*, 1992 ABCA 57 (CanLII);
6. *Auctioneers' Assn. of Alberta v. Hunter*, 2002 ABQB 28 (CanLII);
7. *BA Energy Inc. (Re)*, 2010 ABQB 507 (CanLII);
8. *Bonner v. Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161 (C.A.);
9. *Canwest Global Communications Corp.*, 2011 ONSC 2215;
10. *Confederation Treasury Services Ltd. (Re) (In Bankruptcy)*, 1997 CanLII 3544 (ON CA);
11. *Delf v. Merit Energy Ltd.*, 2002 ABCA 5 (CanLII);
12. *FBI Foods Ltd. v. Glassner*, 2001 BCSC 151, 86 B.C.L.R. (3d) 136;
13. *Laurentian University of Sudbury*, 2021 ONSC 3885;
14. *National Bank of Canada v Merit Energy Ltd.*, 2001 ABQB 583;
15. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII), [2011] 3 SCR 45;
16. *Re SemCanada Crude Company (Orleans Energy Ltd.)*, 2012 ABQB 495 (CanLII);
17. *Re Toys "R" Us (Canada) Ltd.*, 2018 ONSC 609;
18. *RMP Energy Inc. v. SemCAMS ULC*, 2012 ABCA 312;
19. *Royal Bank of Canada v. Cow Harbour Construction Ltd.*, 2011 ABQB 223;
20. *ScoZinc Ltd. (Re)*, 2009 NSSC 136;
21. *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501;
22. *Timminco Ltd. (Re)*, 2014 ONSC 3393;
23. *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103;

- 24. *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662;
- 25. *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967;

Evidence

- 26. Compeer Statement of Claim, Action No. 2503-10998;
- 27. Excerpt of Affidavit of Arthur Price, sworn April 15, 2025;
- 28. Claims Procedure Order, pronounced on July 24, 2025;
- 29. NBC's Consent Order (Scheduling), pronounced on July 24, 2025; and,
- 30. Compeer's Consent Order (Scheduling), pronounced on July 24, 2025.

TAB 1



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to August 11, 2025

À jour au 11 août 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to August 11, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of August 11, 2025 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 11 août 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 11 août 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

bankrupt means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; (*failli*)

bankruptcy means the state of being bankrupt or the fact of becoming bankrupt; (*faillite*)

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

child [Repealed, 2000, c. 12, s. 8]

claim provable in bankruptcy, provable claim or claim provable includes any claim or liability provable in proceedings under this Act by a creditor; (*réclamation prouvable en matière de faillite ou réclamation prouvable*)

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

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

common-law partnership means the relationship between two persons who are common-law partners of each other; (*union de fait*)

corporation means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; (*personne morale*)

court, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; (*tribunal*)

creditor means a person having a claim provable as a claim under this Act; (*créancier*)

affidavit Sont assimilées à un affidavit une déclaration et une affirmation solennelles. (*affidavit*)

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

banque

a) Les banques et les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*;

b) les membres de l'Association canadienne des paiements créée par la *Loi canadienne sur les paiements*;

c) les sociétés coopératives de crédit locales définies au paragraphe 2(1) de la loi mentionnée à l'alinéa b) et affiliées à une centrale — au sens du même paragraphe — qui est elle-même membre de cette association. (*bank*)

bien Bien de toute nature, qu'il soit situé au Canada ou ailleurs. Sont compris parmi les biens les biens personnels et réels, en droit ou en equity, les sommes d'argent, marchandises, choses non possessoires et terres, ainsi que les obligations, servitudes et toute espèce de domaines, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, sur des biens, ou en provenant ou s'y rattachant. (*property*)

biens [Abrogée, 2004, ch. 25, art. 7]

biens aéronautiques [Abrogée, 2012, ch. 31, art. 414]

cession Cession déposée chez le séquestre officiel. (*assignment*)

conjoint de fait La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

conseiller juridique Toute personne qualifiée, en vertu du droit de la province, pour donner des avis juridiques. (*legal counsel*)

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

convention collective S'agissant d'une personne insolvable, s'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre elle et l'agent négociateur. (*collective agreement*)

créancier Personne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi. (*creditor*)

time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

Approval of trustee's final statement by inspectors

(4) Before approving the final statement of receipts and disbursements of the trustee, the inspectors shall satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done and shall determine whether or not the disbursements and expenses incurred are proper and have been duly authorized, and the fees and remuneration just and reasonable in the circumstances.

Inspector's expenses and fees

(5) Each inspector

(a) may be repaid actual and necessary travel expenses incurred in relation to the performance of the inspector's duties; and

(b) may be paid such fees per meeting as are prescribed.

Special services

(6) An inspector duly authorized by the creditors or by the other inspectors to perform special services for the estate may be allowed a special fee for those services, subject to approval of the court, which may vary that fee as it deems proper having regard to the nature of the services rendered in relation to the obligations of the inspector to the estate to act in good faith for the general interests of the administration of the estate.

R.S., 1985, c. B-3, s. 120; 1992, c. 27, s. 49; 2001, c. 4, s. 30; 2004, c. 25, s. 65(F); 2005, c. 47, s. 85.

Claims Provable

Claims provable

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.

de l'actif, examinent ses comptes, s'enquêtent de la suffisance de la garantie fournie par le syndic et, sous réserve du paragraphe (4), approuvent l'état définitif des recettes et des débours préparé par le syndic, le bordereau de dividende et la disposition des biens non réalisés.

Approbation par les inspecteurs de l'état définitif préparé par le syndic

(4) Avant d'approuver l'état définitif des recettes et des débours du syndic, les inspecteurs doivent s'assurer eux-mêmes qu'il a été rendu compte de tous les biens et que l'administration de l'actif a été complétée, dans la mesure où il est raisonnablement possible de le faire, et doivent établir si les débours et dépenses subis sont appropriés ou non et ont été dûment autorisés et si les honoraires et la rémunération sont justes et raisonnables en l'occurrence.

Frais et honoraires

(5) Chaque inspecteur peut être remboursé des frais de déplacement réels et nécessaires engagés dans le cadre de ses fonctions et il peut aussi recevoir les honoraires prescrits pour chaque assemblée.

Services spéciaux

(6) Un inspecteur régulièrement autorisé par les créanciers ou par les autres inspecteurs à exécuter des services spéciaux pour le compte de l'actif peut avoir droit à des honoraires spéciaux pour ces services, sous réserve de l'approbation du tribunal qui peut modifier ces honoraires comme il le juge à propos eu égard à la nature des services rendus par rapport à l'obligation qu'a l'inspecteur d'agir de bonne foi en vue de l'intérêt général de l'administration de l'actif.

L.R. (1985), ch. B-3, art. 120; 1992, ch. 27, art. 49; 2001, ch. 4, art. 30; 2004, ch. 25, art. 65(F); 2005, ch. 47, art. 85.

Réclamations prouvables

Réclamations prouvables

121 (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date à laquelle il devient failli, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

Family support claims

(4) A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

R.S., 1985, c. B-3, s. 121; 1992, c. 27, s. 50; 1997, c. 12, s. 87; 2000, c. 12, s. 14.

Claims provable in bankruptcy following proposal

122 (1) The claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, provable in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal.

Interest

(2) If interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum to the date of the bankruptcy from the time the debt or sum was payable, if evidenced by a written document, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed.

R.S., 1985, c. B-3, s. 122; 2004, c. 25, s. 66(E).

Proof in respect of distinct contracts

123 Where a bankrupt was, at the date of the bankruptcy, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals,

Décision

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

Créances payables à une date future

(3) Un créancier peut établir la preuve d'une créance qui n'est pas échue à la date de la faillite, et recevoir des dividendes tout comme les autres créanciers, en en déduisant seulement un rabais d'intérêt au taux de cinq pour cent par an calculé à compter de la déclaration d'un dividende jusqu'à la date où la créance devait échoir selon les conditions auxquelles elle a été contractée.

Réclamations alimentaires

(4) Constitue une réclamation prouvable la réclamation pour une dette ou une obligation mentionnée aux alinéas 178(1)b) ou c) découlant d'une ordonnance judiciaire rendue ou d'une entente conclue avant l'ouverture de la faillite et à un moment où l'époux, l'ex-époux ou ancien conjoint de fait ou l'enfant ne vivait pas avec le failli, que l'ordonnance ou l'entente prévoit une somme forfaitaire ou payable périodiquement.

L.R. (1985), ch. B-3, art. 121; 1992, ch. 27, art. 50; 1997, ch. 12, art. 87; 2000, ch. 12, art. 14.

Réclamations prouvables en faillite à la suite d'une proposition

122 (1) Les réclamations des créanciers aux termes d'une proposition sont, dans le cas où le débiteur deviendrait subséquemment en faillite, prouvables dans la faillite pour le plein montant des réclamations moins tout dividende payé à cet égard en conformité avec la proposition.

Intérêts

(2) Lorsque l'intérêt sur toute créance ou somme déterminée est prouvable sous le régime de la présente loi, mais qu'il n'a pas été convenu du taux d'intérêt, le créancier peut établir la preuve d'un intérêt à un taux maximal de cinq pour cent par an jusqu'à la date de la faillite à compter de la date où la créance ou somme était exigible, si elle est attestée par un document écrit, ou, si elle n'est pas ainsi attestée, à compter de la date où il a été donné au débiteur avis de la réclamation d'intérêt.

L.R. (1985), ch. B-3, art. 122; 2004, ch. 25, art. 66(A).

Preuve à l'égard de contrats distincts

123 Lorsqu'un failli était, à la date de la faillite, responsable à l'égard de contrats distincts, en qualité de membre de plusieurs firmes distinctes, ou en qualité de signataire individuel des contrats et aussi à titre de membre d'une firme, le fait que les firmes sont

Secured creditor may amend

132 (1) Where the trustee has not elected to acquire the security as provided in this Act, a creditor may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the court that the valuation and proof were made in good faith on a mistaken estimate or that the security has diminished or increased in value since its previous valuation.

Amendment at cost of creditor

(2) An amendment pursuant to subsection (1) shall be made at the cost of the creditor and on such terms as the court orders, unless the trustee allows the amendment without application to the court.

Rights and liabilities of creditor where valuation amended

(3) Where a valuation has been amended pursuant to this section, the creditor

(a) shall forthwith repay any surplus dividend that he may have received in excess of that to which he would have been entitled on the amended valuation; or

(b) is entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend that he may have failed to receive by reason of the amount of the original valuation before that money is made applicable to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before the amendment is filed with the trustee.

R.S., c. B-3, s. 103.

Exclusion for non-compliance

133 Where a secured creditor does not comply with sections 127 to 132, he shall be excluded from any dividend.

R.S., c. B-3, s. 104.

No creditor to receive more than 100 cents in dollar

134 Subject to section 130, a creditor shall in no case receive more than one hundred cents on the dollar and interest as provided by this Act.

R.S., c. B-3, s. 105.

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

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.

Le créancier garanti peut modifier l'évaluation

132 (1) Lorsque le syndic n'a pas choisi d'acquiescer la garantie dans les conditions prévues à la présente loi, un créancier peut modifier l'évaluation et la preuve en démontrant, à la satisfaction du syndic ou du tribunal, que l'évaluation et la preuve ont été faites de bonne foi sur une estimation erronée, ou que la garantie a diminué ou augmenté en valeur depuis son évaluation précédente.

Modification aux frais du créancier

(2) Une modification conforme au paragraphe (1) est faite aux frais du créancier et selon les modalités que le tribunal prescrit, à moins que le syndic ne permette la modification sans requête au tribunal.

Droits et obligations du créancier lorsque l'évaluation est modifiée

(3) Lorsqu'une évaluation a été modifiée conformément au présent article, le créancier, selon le cas :

a) doit rembourser sans retard tout surplus de dividende qu'il peut avoir reçu en sus du montant auquel il aurait eu droit sur l'évaluation modifiée;

b) a droit de recevoir, sur les deniers alors applicables à des dividendes, tout dividende ou part de dividende qu'il peut ne pas avoir reçu à cause du montant de l'évaluation primitive, avant que ces montants soient attribués au paiement d'un dividende futur; il n'a toutefois pas le droit de déranger la distribution d'un dividende déclaré avant que la modification soit déposée chez le syndic.

S.R., ch. B-3, art. 103.

Exclusion pour défaut de se conformer

133 Lorsqu'un créancier garanti ne se conforme pas aux articles 127 à 132, il est exclu de tout dividende.

S.R., ch. B-3, art. 104.

Aucun créancier ne peut recevoir plus de cent cents par dollar

134 Sous réserve de l'article 130, un créancier ne peut dans aucun cas recevoir plus de cent cents par dollar avec l'intérêt prévu par la présente loi.

S.R., ch. B-3, art. 105.

Admission et rejet des preuves de réclamation et de garantie

Examen de la preuve

135 (1) Le syndic examine chaque preuve de réclamation ou de garantie produite, ainsi que leurs motifs, et il peut exiger de nouveaux témoignages à l'appui.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(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.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

R.S., 1985, c. B-3, s. 135; 1992, c. 1, s. 20, c. 27, s. 53; 1997, c. 12, s. 89.

Scheme of Distribution

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

- (a)** in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the

Réclamations éventuelles et non liquidées

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

Rejet par le syndic

(2) Le syndic peut rejeter, en tout ou en partie, toute réclamation, tout droit à un rang prioritaire dans l'ordre de collocation applicable prévu par la présente loi ou toute garantie.

Avis de la décision

(3) S'il décide qu'une réclamation est prouvable ou s'il rejette, en tout ou en partie, une réclamation, un droit à un rang prioritaire ou une garantie, le syndic en donne sans délai, de la manière prescrite, un avis motivé, en la forme prescrite, à l'intéressé.

Effet de la décision

(4) La décision et le rejet sont définitifs et péremptoires, à moins que, dans les trente jours suivant la signification de l'avis, ou dans tel autre délai que le tribunal peut accorder, sur demande présentée dans les mêmes trente jours, le destinataire de l'avis n'interjette appel devant le tribunal, conformément aux Règles générales, de la décision du syndic.

Rejet total ou partiel d'une preuve

(5) Le tribunal peut rayer ou réduire une preuve de réclamation ou de garantie à la demande d'un créancier ou du débiteur, si le syndic refuse d'intervenir dans l'affaire.

L.R. (1985), ch. B-3, art. 135; 1992, ch. 1, art. 20, ch. 27, art. 53; 1997, ch. 12, art. 89.

Plan de répartition

Priorité des créances

136 (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant :

TAB 2



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to August 11, 2025

À jour au 11 août 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

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(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to August 11, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of August 11, 2025 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 11 août 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 11 août 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Single judge may exercise powers, subject to appeal

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

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

Form of applications

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

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

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

General power of court

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

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

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

- a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

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

Pouvoir général du tribunal

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

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

Good faith — powers of court

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

1997, c. 12, s. 125; 2005, c. 47, s. 131; 2019, c. 29, s. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

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

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

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

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

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

Exception

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

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

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

Bonne foi — pouvoirs du tribunal

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

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

Réclamations

Réclamations considérées dans le cadre des transactions ou arrangements

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

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

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

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

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

Exception

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévienne expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

a) toute ordonnance d'un tribunal imposant une amende, une pénalité, la restitution ou une autre peine semblable;

b) toute indemnité accordée en justice dans une affaire civile :

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

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

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

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

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

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

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant d'un acte visé au sous-alinéa (i);

(c) toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors que la compagnie agissait, au Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

(d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

(e) toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas a) à d).

L.R. (1985), ch. C-36, art. 19; 1996, ch. 6, art. 167; 2005, ch. 47, art. 131; 2007, ch. 36, art. 69.

Détermination du montant de la réclamation

20 (1) Pour l'application de la présente loi, le montant de la réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est celui :

(i) dans le cas d'une compagnie en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, dont la preuve a été établie en conformité avec cette loi,

(ii) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue sous le régime de la *Loi sur la faillite et l'insolvabilité*, dont la preuve a été établie en conformité avec cette loi,

(iii) dans le cas de toute autre compagnie, dont la preuve peut être établie sous le régime de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier;

b) le montant d'une réclamation garantie est celui dont la preuve pourrait être établie sous le régime de la *Loi sur la faillite et l'insolvabilité* si la réclamation n'était pas garantie, mais ce montant, s'il n'est pas admis par la compagnie, est, dans le cas où celle-ci est assujettie à une procédure pendante sous le régime de la *Loi sur les liquidations et les restructurations* ou de

under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

1997, c. 12, s. 126; 2005, c. 47, s. 131.

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

- (a) the nature of the debts, liabilities or obligations giving rise to their claims;
- (b) the nature and rank of any security in respect of their claims;
- (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie sous le régime de l'une ou l'autre de ces lois, selon le cas, et, s'il s'agit de toute autre compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier.

Admission des réclamations

(2) Malgré le paragraphe (1), la compagnie peut admettre le montant d'une réclamation aux fins de votation sous réserve du droit de contester la responsabilité quant à la réclamation pour d'autres objets, et la présente loi, la *Loi sur les liquidations et les restructurations* et la *Loi sur la faillite et l'insolvabilité* n'ont pas pour effet d'empêcher un créancier garanti de voter à une assemblée de créanciers garantis ou d'une catégorie de ces derniers à l'égard du montant total d'une réclamation ainsi admis.

L.R. (1985), ch. C-36, art. 20; 2005, ch. 47, art. 131; 2007, ch. 36, art. 70.

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131.

Catégories de créanciers

Établissement des catégories de créanciers

22 (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

- a) la nature des créances et obligations donnant lieu à leurs réclamations;
- b) la nature et le rang de toute garantie qui s'y rattache;
- c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

TAB 3

In the Court of Appeal of Alberta

Citation: Addison & Leyen Ltd v Fraser Milner Casgrain LLP, 2014 ABCA 230

Date: 20140710

Docket: 1301-0291-AC

Registry: Calgary

Between:

**Addison & Leyen Ltd., John Joseph Dietrich, Jeanette Marie Dietrich,
Wilfrid Daniel Roach and Helen Roach**

Appellants (Plaintiffs)

- and -

Fraser Milner Casgrain LLP and Wallace Y. Shaw

Respondents (Defendants)

The Court:

**The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Russell Brown**

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice J.T. McCarthy
Dated the 19th day of August, 2013
Filed on the 3rd day of October, 2014
(2013 ABQB 473, Docket: 1101 13007)

Memorandum of Judgment

The Court:

I. Introduction

[1] The narrow issue on appeal is whether the appellants' claim is one of contribution and indemnity, rather than a claim in negligence. If the former, the limitation period has not expired. If the latter, the claim is out of time.

[2] In 1989, the respondents prepared a legal opinion advising that the appellants, as shareholders and directors, would not incur income tax liability as a result of the sale of shares in a company. Twelve years later, the appellants were reassessed for the company's outstanding income tax liability for the 1989 tax year. The appellants ultimately incurred approximately \$490,000 in tax liability and \$1.25 million in additional expenses. The appellants commenced this action in September 2011.

[3] For the purposes of this appeal only, the respondents acknowledge that the opinion was negligently prepared and that the appellants relied upon the opinion. However, the ultimate limitation period for an action in negligence expired in 1999, before the appellants were even aware that they had incurred any tax liability from the 1989 sale. The appellants now seek compensation from the respondents pursuant to a claim of implied indemnity.

[4] On summary application, the trial judge concluded that the action could not be characterized as a claim for contribution and indemnity. It was a claim in negligence and was time-barred. For the reasons which follow, the appeal is dismissed.

II. Background

[5] The appellant Addison & Leyen Ltd. ("Addison") is an Alberta corporation. The other individual appellants are former directors and/or shareholders of Addison. Until September 1989, the appellants were all owners and/or directors of a Saskatchewan company called York Beverages (1968) Ltd. ("York"). In 1988, York sold the assets of its bottling business for about \$10 million cash and \$3 million in assumed indebtedness. After dividends were distributed and other payments made, York's only remaining asset was \$2.8 million cash, which was retained to pay York's estimated income tax liability for the 1989 taxation year ending September 30, 1989.

[6] In September 1989, the appellants sold their shares in York for \$1,115,000.00 and resigned positions on the Board of Directors. Unbeknownst to the appellants, the purchaser wanted to acquire these shares because it intended to use York's available cash to buy seismic data, which it believed would enable it to claim a tax deduction of approximately \$6.5 million, sufficient to offset the company's remaining income tax liability for the 1989 tax year.

[7] As a condition of closing the share purchase transaction, the purchaser was required to provide a legal opinion to the appellants concerning their potential tax liability as former directors and/or shareholders of York. The purchaser retained the law firm Fenerty, Robertson, Fraser & Hatch, a predecessor to the respondent Fraser Milner Casgrain LLP, and Mr. Wallace Shaw to provide this legal opinion. The retainer agreement did not provide any express indemnity. The tax opinion stated:

It is reasonable to conclude, having regard to the Sellers Warranties and the Transactions that the Corporation will be able to pay its liabilities, if any, for income tax under the Income Tax Act (Canada) and any provincial income tax statute in respect of the taxation year ending immediately prior to the Closing Date [that is, the 1989 Tax Year].

Neither the Sellers nor the Old Directors [that is, all of the Plaintiffs] will be liable for any income, sales or other tax, withholdings, remittances, interest, penalties or fines under the Income Tax Act (Canada), any provincial taxing statute (whether of an income, sales or other nature), [...] arising out of the Transactions or (except as a direct result of any gains of the Sellers arising on the sale of their shares) arising in respect of the Corporation and which are attributable to any act or omission occurring or omitted after the Financial Statement Date [that is, 11:00 pm on September 26, 1989] other than any liability which may arise by reason of a breach of a Seller Warranty.

[8] The individual appellants completed the share purchase transaction as planned.

[9] Unknown to the appellants, in December 1992, the Minister of National Revenue reassessed York for the 1989 tax year in the amount of \$3,247,074, including penalties and interest, based on the purchaser's over-valuation of the seismic data it had acquired. Contrary to the purchaser's estimate, the Minister found that the seismic data was worth only \$1,696,500 and, as a result, did not offset York's remaining tax liability during that period.

[10] By 1998, the purchaser remained unable to pay the reassessed taxes on behalf of York, and the Minister began to look for others to satisfy this liability. Finally, in February 2001, the Minister issued notices of assessment to the appellants and others regarding York's outstanding tax liability, pursuant to section 160 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp). By this time, with the accrual of interest and penalties, York's tax liability had increased to \$6.7 million.

[11] The Minister took the position that the appellants were statutorily liable for York's income tax debt, up to the amount that each of the appellants had received from York. The appellants opposed the Minister's assessments and commenced litigation. In February 2003, in light of the Minister's assessments and the appellants' objections, the appellants and the respondents agreed to suspend the running of any applicable unexpired limitation period in the event of a further claim regarding the tax opinion.

[12] In October 2010, the appellants and the Minister entered into a settlement agreement whereby the Minister agreed to increase the valuation of the seismic data to about \$5.15 million. York was left with a reduced tax liability of \$492,676, which was paid by the appellant Addison.

The costs and legal expenses incurred during the litigation and negotiation with the Minister amounted to approximately \$1.25 million.

[13] In September 2011, the appellants commenced this action against the respondents seeking \$1.75 million for recovery of the amount of the settlement and the costs they had incurred. The material facts alleged by the appellants support a claim in negligence against the respondents in their preparation of the tax opinion. However, by this time, even with the benefit of the 2003 agreement to suspend any unexpired limitation period, the 10-year ultimate limitations period had expired. As a result, the appellants frame their action based on a common law implied contract of indemnity.

[14] Under their theory of liability, the appellants argue that the claim is one for indemnity and contribution within the meaning of section 3(3)(b) of the *Limitations Act*, RSA 2000, c L-12. As a result, the 10-year ultimate limitation period in section 3(1)(b) is extended because time did not begin to run until the appellants incurred liability through their settlement agreement with the Minister in October 2010, or alternatively, when they learned of the Minister's assessments in February 2001.

[15] The respondents argue that the appellants have improperly characterized their claim as a claim for indemnity when their cause of action is only in negligence. For the purposes of the *Limitations Act*, the respondents submit that the appellants' cause of action arose when the respondents' alleged act or omission occurred, in providing the tax opinion in September 1989. The 10-year limitation period having long expired on this allegedly negligent act, the appellants' action is statute-barred.

[16] The parties agreed to have the matter determined by summary application on a single question of law: Is the Plaintiffs' claim barred by the operation of the 10-year limitation period in section 3(1)(b) of the *Limitations Act*? The application proceeded on the basis of an Agreed Statement of Facts and with the admission that the appellants would not have incurred the tax liability or the additional expenses, but for their reliance on the respondents' negligent tax opinion.

III. Decision Below *Addison & Leyen Ltd v Fraser Milner Casgrain LLP*, 2013 ABQB 473

[17] The trial judge recognized that a claim for contribution and indemnity may be established under the common law in circumstances where one of the potential defendants owes a duty recognized by the common law to indemnify or contribute to other potential defendants. However, based on his reading of the jurisprudence, the trial judge found that a claim for implied indemnity at common law can exist only where the party against whom indemnification was sought could independently be found liable for the damages suffered by the third party. As the respondents could have never been found liable to the Minister for the tax liability or for the appellants' subsequent expenses, the respondents could have no common law obligation to contribute to or indemnify the appellants.

[18] Moreover, the trial judge noted that the respondents did not cause the appellants' liability to the Minister. For the purposes of an implied indemnity, the trial judge held that there must be some connection between the actions of the party from whom the indemnity is sought and the

cause of the liability to the third party. While the appellants admittedly relied on the tax opinion in taking steps that led to the tax liability, the allegedly negligent opinion did not cause the liability pursued by the Minister. Therefore, while the appellants did suffer a significant loss, their action was one in negligence for damages and was time-barred by operation of the 10-year limitation period.

IV. Grounds of Appeal

[19] The appellants submit that the trial judge erred in law by incorrectly concluding that the common law doctrine of implied indemnity required that (1) the party against whom indemnity is sought caused the liability of the party seeking the indemnity; and (2) the party against whom indemnity is sought must be independently liable for the amounts sought by the complainant in the first instance.

V. Standard of Review

[20] The grounds of appeal raise both questions of law and fact relating to the recognition of a common law right of implied indemnity in favour of the appellants.

[21] Extricable questions of law are reviewed on a standard of correctness, meaning the appellate court can replace the trial judge's view with its own: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 8. In applying a legal test or standard to a set of facts, the applicable standard of review is palpable and overriding error: *Housen* at para 36. Finding palpable and overriding error is equivalent to finding that factual findings or inferences are "clearly wrong", "unreasonable", or "unsupported by the evidence": *HL v Canada (A-G)*, 2005 SCC 25, [2005] 1 SCR 401, 333 NR 1 at paras 55-56.

VI. Analysis

[22] The leading authority on the common law of contribution and indemnity is *Birmingham and District Land Co v London and Northwestern Railway Co* (1886), 34 Ch D 261 (CA). In that early decision, the English Court of Appeal broadly defined the right to indemnity under the common law as a direct right to reimbursement which may arise: (1) by express contract, if provided in the terms of a contract between the parties; (2) by implied contract, if the parties intended such indemnity; or (3) by implication, if the circumstances demand a legal or equitable duty to indemnify, by which the law recognizes an assumed promise by a person to do what, under the circumstances, he ought to do (at 274). The court identified certain circumstances where the law may imply a contract to indemnify, such as relationships of principal and agent and of co-trustees.

[23] However, a right to indemnity, recognized at law or in equity, must be distinguished from the common law right to "damages" for breach of contract or tort. Bowen L.J. explained (at 274-275):

But it is quite clear to my mind that a right to damages, which is all that the Defendants have here if they are entitled to anything, is not a right to indemnity as

such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.

[24] In concurring reasons, Fry L.J. further noted (at 276):

In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do a wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everybody has to damages for a wrong which has been done to him.

[25] In *Eastern Shipping Company Limited v Quah Beng Kee*, [1924] AC 177 (PC), the Privy Council adopted these principles and held that a common law indemnity may be implied “where the relation between the parties is such that either in law or in equity, [express or implied], there is an obligation on one party to indemnify the other” (at 182).

[26] The common law right of indemnity has long been recognized in Alberta and across Canada (see: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45; *Trans-Canada Forest Products Ltd v Heaps, Waterous Ltd*, [1954] SCR 240, [1954] 2 DLR 545; *McFee v Joss* (1925), 56 OLR 578, [1925] 2 DLR 1059 (Ont CA); *Ryan v Dew Enterprises Ltd*, 2014 NLCA 11, 28 CLR (4th) 1; *Dilcon Constructors Ltd v ANC Developments Inc* (1994), 155 AR 314, 117 DLR (4th) 156 (CA); *Fidelity Trust Company v 98956 Investments Ltd*, 1988 ABCA 267, 89 AR 151; *Dean v Kociniak*, 2001 ABQB 412, 289 AR 201; *Doucette v Hasegawa and Associates Ltd*, 2009 ABQB 502, 486 AR 124).

[27] Both parties highlight *McFee v Joss*, a decision of the Court of Appeal for Ontario, as an early statement of the law in Canada (at para 24):

...[A]n implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tort-feasors in such a sense as to prevent recover; that is where the act is not clearly illegal itself. This right of indemnity is based upon the principle that everyone is responsible for his own negligence, and if another is by a judgment of a Court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer. I am also of the opinion that such right of indemnity exists independently of the statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular duty not to be negligent.

[28] More recently, in *Ryan v Dew Enterprises Ltd*, the Newfoundland Court of Appeal summarized the applicable legal principles in implying a right of indemnity at common law (at para 54):

A claim for indemnity is a claim that another party save the indemnity-claimant harmless against loss or damage which the indemnity-claimant has incurred or suffered or will incur or suffer at the hands of another, and to reimburse the claimant in respect of such loss or damage. The claim may arise from an express contract, by implication of law or from statute. An example of a claim to indemnity arising from implication of law is where an act is done at the request of another, the act turns out to be injurious to a third party and in consequence of doing the act the doer incurs liability to the third party (*Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261 (C.A.)). Other diverse examples include: (i) where an agent incurs loss while lawfully carrying out the mandate of his or her principal; (ii) where a principal suffers loss by incurring liability to a third party as a result of the wrongful actions of his or her agent or employee; (iii) where a trustee causes a co-trustee to incur costs through the trustee's negligent management of the trust; and (iv) where an obligation arises in equity from the relationship between the parties, such as between trustee and beneficiary.

[29] While these cases provide diverse factual examples giving rise to a right of implied indemnity, courts have cautioned against the unprincipled expansion of these claims. In *R v Imperial Tobacco Canada Ltd*, the Supreme Court of Canada stated (at para 147):

Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity “proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so” (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.)

[30] A narrow approach was also encouraged in *Ryan v Dew Enterprises Ltd*, where the court noted (at para 54):

While the circumstances where an obligation to indemnify arises by implication of law are diverse, they are not open-ended. The obligation cannot be imposed simply by the exercise of *ad hoc* discretion. As noted by Goodridge J. in *Collavino*, at paragraphs 18-21, just because a party may have a claim for damages over against a third party does not entitle him or her to a claim in indemnity or contribution. This was the traditional English position as enunciated in *Birmingham and District Land Co. v. London and North Western Railway Co.*, *supra.*, at pages 272 and 274-275, which was cited and relied on by Goodridge J. in *Collavino* at paragraphs 15-16 and *Lundrigan* at paragraphs 18-19.

[31] The trial judge reviewed these cases and concluded that the appellants' claim did not fall within the circumstances necessary to imply a promise to indemnify, principally because the party against whom the indemnification was sought, (the respondents), could not have been responsible in law to the Minister for the appellant's tax liability. Rather, given that the

respondents' alleged negligence had only caused damage to the appellants, and not the Minister, the appropriate cause of action was in negligence alone, and was time-barred.

[32] The appellants submit that the case law supports the recognition of a common law right of indemnity in any case where a party, without fault of its own, is exposed to liability or loss for the wrongful act of another. They propose a three-part test:

- a) An act done by B at the request of A;
- b) Without any fault of A, A is exposed to liability to a third party, C; and
- c) The liability of A to C arises in connection with the negligence of B.

[33] According to the appellants, their claim satisfied this test: (a) there was a request made by Addison to the respondents to prepare the tax opinion; (b) Addison, without any fault of its own, was exposed to liability to the Minister; and (c) the liability of Addison to the Minister arose in connection with its reliance on the negligent opinion.

[34] There are several problems with the appellants' approach. First, the common law of implied indemnity is rooted in the principles of restitution and unjust enrichment. An indemnity permits the reimbursement of damages paid by an innocent party to a third party on behalf of the true wrongdoer, where that wrongdoer should otherwise have been liable to pay. A right to reimbursement through an implied indemnity does not arise in every situation in which A becomes liable to C in connection with the negligence of B. That connection must be supported by a theory of legal or equitable liability between the third party and the party against whom the indemnity is sought (*Ryan v Dew Enterprises Ltd* at para 54).

[35] A simple statement of this requirement is provided by Professor Charles Mitchell in his text, *The Law of Contribution and Reimbursement* (New York: Oxford University Press, 2003) at 5: "Claims for contribution and reimbursement lie between two parties who *both* initially owe legal liabilities to a third party" (emphasis added). Put another way, the circumstances must be such that the putative party against whom the indemnity was sought could have been liable to the third party for all or part of the claim against the party seeking the indemnity.

[36] The point is best illustrated by the circumstances which led to recognition of an implied indemnity in *McFee*. The defendant leased the plaintiff's car and negligently crashed into another vehicle owned and driven by a third party. By operation of the relevant statute, the plaintiff owner was liable to pay damages to the third party. The court applied *Eastern Shipping* and held that the plaintiff was entitled to claim an indemnity from the defendant for the damages paid to the injured third party.

[37] If, by contrast, the defendant in *McFee* had borrowed the plaintiff's car and negligently injured the plaintiff in an accident, the plaintiff could not generally rely on a common law right of implied indemnity against the defendant for reimbursement of his out-of-pocket expenses. Although those expenses may have been incurred by the plaintiff as a liability to a third party (for example, payment to a health care provider) and were as a result of the defendant's negligence, without more, the defendant is not initially liable to the third party for that cost. Rather, the basis for the plaintiff's claim for compensation is a claim in negligence for damages.

[38] The circumstances of the appellants' claim are analogous to the latter example. The amounts paid by the appellants to the Minister, and their associated expenses, were never

amounts paid by the appellants on behalf of the respondents as the negligent party. Under no circumstances could the respondents have been liable to the Minister for any part of York's tax liability. Therefore, there is no basis on which to require restitution of the appellants' loss through an implied indemnity.

[39] Secondly, the appellants' approach does not distinguish between the availability of a claim for implied indemnity and a claim for damages in tort or contract. A common law right to damages for a wrong is not an implied contract that the defendant will indemnify the plaintiff in connection with the wrongdoing (*Birmingham* at 276; *Ryan v Dew Enterprises Ltd* at para 54). The trial judge recognized this issue as a question of causation and the relationships among the parties.

[40] An implied indemnity may arise where the wrongdoer's negligence causes damage to a third party for which the party seeking the indemnity is held liable. However, there must be a connection between the wrongdoer, the third party, and the damage.

[41] For example, in *Edmonton (City) v Lovat Tunnel Equipment Inc*, 2000 ABQB 882, 279 AR 1, the court concluded that a right of indemnity could have been implied had the party who was not at fault (the seller of defective equipment) been held liable for damage suffered by the City of Edmonton as a result of using the defective equipment manufactured by the negligent party (at para 385). By contrast, where a plaintiff is liable for damages or expenses to a third party, and that liability is, at law, independent of the wrongdoer and his negligent act, no implied indemnity can follow. The plaintiff's common law right is only in damages.

[42] In this case, the appellants have admittedly suffered losses as a result of relying on the respondents' tax opinion. The respondents' negligent act, however, had no impact on the Minister as the third party to which the tax liability was owed. That liability flowed from the Minister's assessment of the appellants for York's outstanding tax liability and the appellants' obligations under the *Income Tax Act*.

[43] Finally, the policy implications of such an extension of the common law are significant. Anyone who gives advice could be considered to provide an implied indemnity to their clients, covering any loss incurred in relying on that advice. Under the *Limitations Act*, those professionals would be subject to indeterminate litigation under a never-ending limitations period. It is, of course, open to the parties to negotiate for and include a specific promise of indemnity in a retainer agreement. The agreement at issue in this case did not include a specific indemnity clause.

[44] We acknowledge the unfortunate position in which the appellants find themselves in this case. The Minister was not precluded from assessing the appellants years after the transaction; yet the appellants have no claim against the respondents due to the expiration of the ultimate limitation period. However, in our view, for the reasons we have expressed, the implied right to indemnity does not arise in this case.

VII. Conclusion

[45] The trial judge identified the appropriate concerns and correctly applied the law in finding that the appellants were not entitled to claim a right of implied indemnity against the respondents. Their claim is solely in negligence and the limitation period has expired. The appeal is dismissed.

Appeal heard on June 11, 2014

Memorandum filed at Calgary, Alberta
this 10th day of July, 2014

Authorized to sign for: Paperny J.A.

Rowbotham J.A.

Authorized to sign for: Brown J.A.

Appearances:

D. J. McDonald Q.C.

A.F. Sunter

for the Appellants

J.P. Peacock Q.C.

M.L. Vernon

for the Respondents

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Alderbridge Way GP Ltd. (Re)*,
2023 BCSC 1718

Date: 20231003
Docket: S222758
Registry: Vancouver

**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 and Arrangement of 0989705 B.C. Ltd.,
Alderbridge Way GP Ltd. and Alderbridge Way Limited Partnership**

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment (re Procedural Orders)

Counsel for the Petitioners:

H. Shapray, K.C.
S.D. Coblin

Counsel for The Bowra Group Inc, Monitor:

K. Jackson
M. Gill

Counsel for Romspen Investment Corp.:

P. Rubin
P. Bychawski
R. Lou

Counsel for GEC (Richmond) GP Inc. and
GEC (Richmond) Limited Partnership:

J.P. Sullivan
S.Y. Bhura

Place and Date of Hearing:

Vancouver, B.C.
August 3-4, 2023

Place and Date of Judgment:

Vancouver, B.C.
October 3, 2023

INTRODUCTION

[1] This is a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 [CCAA]. The subject matter of this proceeding is a development property undertaken by the petitioners (the "CCAA Debtors"). In April 2022, I granted an Initial Order in these proceedings. To date, efforts toward arranging a sale of the development property have been stalled.

[2] The backdrop to today's application is that significant disputes have arisen between the CCAA Debtors and a secured creditor, on the one hand, and another secured creditor, Romspen Investment Corporation ("Romspen"), on the other. Those disputes have crystallized in various actions filed in this Court against Romspen and an action by Romspen against the CCAA Debtors and guarantors of that debt (collectively, the "Related Actions").

[3] Romspen seeks procedural orders with respect to the Related Actions. In summary, the order sought would: (a) provide that the Related Actions would be tried together in the context of the CCAA proceedings; and (b) set various deadlines for the filing of pleadings, listing of documents and examinations for discovery, consistent with case plan orders that have been regularly granted in this Court.

[4] The respondents to this application oppose the relief sought, arguing that the Court has no jurisdiction under the CCAA to grant the relief sought; alternatively, they contend that such orders are inappropriate. In the main, the respondents wish to have the Related Actions resolved in the fullness of time and in the usual civil trial process outside of these CCAA proceeding without the CCAA court imposing any case management deadlines at any time.

[5] For the reasons set out below, I agree with Romspen on all of the issues and grant the orders sought.

BACKGROUND

[6] The development in question, which was to be known as "The Atmosphere", was an ambitious large-scale real estate project that included seven residential and

commercial office towers spanning an entire city block in Richmond, BC (the “Development”). Romspen was the construction lender providing financing for the initial stages of the Development.

[7] The debt owed to Romspen by the CCAA Debtors is guaranteed by Gatland Development Corporation, REV Holdings Ltd., REV Investments Inc., South Street Development Managers Ltd., South Street (Alderbridge) Limited Partnership, Samuel David Hanson and Brent Taylor Hanson (collectively, the “Guarantors”). The Guarantors are either shareholders of the general partner or limited partners who are in the CCAA Debtors group. The CCAA Debtors and Guarantors are represented by the same counsel and argue identical positions.

[8] In March 2020, Romspen declined to advance any further funds to the CCAA Debtors under its credit facility. The CCAA Debtors managed to continue with their development efforts for some time after, albeit under significant financial strain. However, some two years later, the CCAA Debtors could no longer avoid undertaking a formal restructuring of their substantial debt.

[9] On April 1, 2022, I granted an Initial Order in favour of the CCAA Debtors under the CCAA: *Alderbridge Way GP Ltd. (Re)*, 2022 BCSC 1436. In the Initial Order, I granted enhanced powers to the Monitor to conduct a sales and investment solicitation process (“SISP”) to move reasonably quickly to secure a sale of the Development.

[10] As of early 2022, the major creditors secured against the Development were as follows and, presently, have the following order of priority:

- a) Romspen owed approximately \$176 million under a construction loan facility (the “Romspen Security”);
- b) A group of lenders (the “2ML Lenders”) owed approximately \$76 million; and

- c) GEC Education City (Richmond) Limited Partnership (via its general partner, GEC (Richmond) GP Ltd.) (“GEC”), owed approximately \$94 million arising from a deposit for the purchase of towers in the Development.

[11] No secured creditor, including Romspen, the 2ML Lenders or GEC, objected to the granting of the Initial Order or the granting of enhanced powers to the Monitor to conduct the SISP on jurisdictional grounds or any other basis.

[12] Unfortunately, the hoped-for resolution through the SISP did not materialize. By August 2022, the Monitor had not received any compliant bid to purchase the Development. At that time, a Second Amended and Restated Initial Order was granted to further extend the stay and expand the Monitor’s powers to control the Development and continue the SISP: *Alderbridge Way GP Ltd. (Re)*, 2022 BCSC 1694 at paras. 27–28.

[13] Also by August 2022, the Monitor had identified another significant factor relevant to the marketing of the Development in that the building permit had expired. The Monitor took the view, one shared by all stakeholders, that obtaining a new building permit was critical toward preserving the Development’s value while sale efforts continued.

[14] By December 2022, the Monitor had still not received any bids under the SISP. Accordingly, the Monitor terminated the SISP until the issue relating to the building permit was resolved. Throughout 2023, the Monitor has continued its efforts to obtain a new building permit.

[15] For the purposes of this application, the Monitor has filed its Ninth Report dated July 31, 2023 (the “Report”). The Monitor understandably takes no position on the application itself but it has expressed its views as to what it expects to be the impact of the Related Actions on this CCAA proceeding, particularly as to how this proceeding may be impacted by the timing of the resolution of the Related Actions.

[16] The Monitor believes that an expeditious resolution of the claims between the CCAA Debtors/Guarantors, GEC and Romspen is important in relation to the future marketing and sale the Development. The Monitor states that it is important, if not essential, for the Monitor, who has conduct of the sales process, to have clarity on the relative priorities and amounts of the secured claims when the SISP is re-started or, at least, shortly thereafter.

[17] In particular, the Monitor is of the view that it will need to know which secured creditor(s) are “in the money” or the “fulcrum creditor(s)”, in terms of who is affected by a potential sale. The Monitor points out that a transaction may be other than entirely cash or may involve different structures that will require negotiations with the secured creditors who have a financial stake in the transaction. Finally, the Monitor states that a credit bid from secured creditor(s) is very possible and that, without knowing the relative amounts and priorities of the secured claims, any full or partial credit bid would be impossible.

[18] The Monitor anticipates filing an application for the new building permit by November 1, 2023 and the expectation is that it will be issued within a few months or by March 2024. Shortly thereafter, the Monitor anticipates re-starting the SISP which will hopefully garner bids toward a transaction.

[19] For the above reasons, the Monitor states that it would be preferable if the outstanding claims in the Related Actions were resolved by spring 2024 or shortly after the SISP is re-started.

LITIGATION HISTORY

[20] The well-spring from which all claims in the Related Actions arose was Romspen’s decision, in March 2020, to suspend all further draws and advances under its construction lending facility.

[21] The CCAA Debtors/Guarantors, the 2ML Lenders and GEC alleged that Romspen improperly failed to advance monies to the CCAA Debtors under the

construction lending facility to allow the Development to be completed, thus causing the CCAA Debtors' insolvency and later losses, loss of value or exposure to losses.

[22] The following claims were filed:

Action	Commencement Date	Plaintiff(s) / Defendant(s) by Counterclaim	Defendant(s) / Plaintiff(s) by Counterclaim
S228019 ("GEC Action")	October 6, 2022	GEC	Romspen
S231106 ("Romspen Action")	February 15, 2023	Romspen	CCAA Debtors / Guarantors
S248773 ("2ML Action")	March 24, 2023	2MLs	Romspen
S232583 ("CCAA Debtors/Guarantors Action")	March 28, 2023	CCAA Debtors / Guarantors	Romspen

[23] In July 2023, the 2ML Lenders discontinued the 2ML Action.

[24] In the Romspen Action, Romspen seeks judgment against the CCAA Debtors/Guarantors for the outstanding debt owed to it. The CCAA Debtors/Guarantors Action was filed as a separate action and not as a defence/counterclaim to the Romspen Action because Romspen's notice of civil claim had not yet been formally served. As such, the Romspen Action and the CCAA Debtors/Guarantors Action are two sides of the same coin and essentially join the same issues.

[25] The Related Actions are interrelated and significantly overlap in many, if not most, respects. I accept Romspen's characterization of the interplay between the Related Actions, as follows (with slight editing for definitions):

- (a) each of the parties to the Related Actions has an ownership or security interest in the Development lands and a contractual nexus to the other parties to the Related Actions;
- (b) each of the Related Actions involves claims by or against Romspen and concerns the validity and/or priority of the Romspen Security;
- (c) each of the Related Actions centers on Romspen's rights and obligations under the Credit Agreement;
- (d) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen breached its obligations under the Credit Agreement in suspending draws and advances under the Credit Agreement;
- (e) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen elected to fund other projects in preference to the Development during the COVID-19 pandemic notwithstanding its alleged obligations to continue to make draws and advances available to the CCAA Debtors for the purpose of funding the Development;
- (f) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen's alleged conduct in suspending the CCAA Debtors' access to draws and advances under the Credit Agreement resulted in the CCAA Debtors' liquidity crisis and that each of the 2MLs, GEC, the CCAA Debtors and Guarantors have suffered as a result; and,
- (g) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen's alleged conduct in suspending the CCAA Debtors' access to draws and advances under the Credit Agreement warrants extraordinary relief.

[26] The relief sought against Romspen in the Related Actions is:

- a) In the GEC Action, GEC seeks a declaration of priority over the Romspen Security, or alternatively, damages, including aggravated and punitive damages. The stated legal basis for the claim is grounded in: a failure of consideration, breach of contract (including the duty of good faith), equitable subordination and the tort of unlawful means. GEC's claim and Romspen's counterclaim involve a consideration of various priority or subordination agreements entered into between GEC and Romspen; and
- b) In the CCAA Debtors/Guarantors Action, the plaintiffs seek: damages for breach of contract (including the duty of good faith and honest

performance); a declaration that the Romspen Security, including the Guarantees, are unenforceable; a declaration that no interest is payable to Romspen; damages for the tort of unlawful means; aggravated and punitive damages; and, set off.

[27] As at the date of this application, the Related Actions were at a very early procedural stage:

- a) In the GEC Action, the pleadings were closed in December 2022. On March 2, 2023, Romspen filed a notice of trial scheduling the trial of the GEC Action for 19 days commencing January 29, 2024, with the agreement of GEC. In doing so, Romspen's counsel asserted the need to resolve the issues as soon as possible to limit the damages and prejudice to Romspen. As of the date of this application, GEC had only recently delivered its list of documents. Romspen has yet to do so;
- b) In the Romspen Action, the CCAA Debtors/Guarantors filed their response to civil claim just days earlier—on August 2, 2023. That pleading essentially tracks their notice of civil claim in the CCAA Debtors/Guarantors Action; and
- c) In the CCAA Debtor/Guarantor Action, Romspen had yet to file a response to civil claim, although it is expected to track Romspen's response to civil claim filed in the GEC Action.

THE CCAA FRAMEWORK

[28] The jurisdictional basis for the relief sought by Romspen is two-fold: ss. 20 and 11 of the CCAA.

[29] Section 20 of the CCAA is a specific provision for the determination of claims, including secured claims, in CCAA proceedings:

20(1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

- (a) the amount of an unsecured claim is the amount

- (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,
 - (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or
 - (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and
- (b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

[Emphasis added.]

[30] Accordingly, the CCAA specifically mandates that Romspen's secured claim against the CCAA Debtors *must* be determined by the Court in these proceedings and on a summary basis.

[31] In addition, to the extent that the relief is not specifically provided for in s. 20, s. 11 of the CCAA endows the CCAA court with broad jurisdiction to advance the purposes of the statute by making any order that it considers "appropriate."

[32] In *1057863 B.C. Ltd. (Re)*, 2022 BCSC 759, I discussed s. 11 and the extensive judicial commentary on how the court's powers under that provision are to be exercised:

[46] The broad scope of this statutory jurisdiction as to what is "appropriate" has been the subject of substantial discussion in various Supreme Court of Canada decisions: *Century Services Inc v. Canada (Attorney General)*, 2010 SCC 60 at paras. 61-62 [*Century Services*]; 9354-

9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 65 [*Callidus*]; and most recently, *Canada v. Canada North Group Inc.*, 2021 SCC 30 at paras. 21 and 31 [*Canada North*].

[47] In *Canada North*, Justice Côté, writing for the majority, synthesized the previous two decisions of the Court and stated:

[21] The most important feature of the CCAA - and the feature that enables it to be adapted so readily to each reorganization - is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the CCAA confers jurisdiction on the supervising court to “make any order that it considers appropriate in the circumstances”. This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, “On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be ‘appropriate in the circumstances’” (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the CCAA regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the CCAA (para. 70). ...

[Emphasis added.]

[48] Similarly, in *Canada North*, Justice Karakatsanis, in concurring reasons, stated:

[138] Due to its remedial nature, the CCAA is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not “contain a comprehensive code that lays out all that is permitted or barred” (para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as “the engine that drives this broad and flexible statutory scheme” (*Stelco Inc. (Re)* (2005), 2005 CanLII 8671 (ON CA), 75 O.R. (3d) 5 (C.A.), at para. 36; see also 9354-9186 *Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the CCAA to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the CCAA’s remedial purpose, it takes many forms and has

proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

[Emphasis added.]

[49] Accordingly, this Court has broad statutory jurisdiction to grant the Mediation Order under the CCAA, if it is “appropriate”. A determination in that respect will depend on the unique factual landscape in the restructuring which can be, as it is here, complex: *Callidus* at para. 76.

[50] The CCAA has long been considered an example of judicial adaptation, innovation and evolution, particularly when the statute was even more “skeletal” than it is now: *Century Services* at para. 57-58.

[51] While that broad statutory jurisdiction or power is “vast”, as described by Côté J. in *Canada North*, there are constraints. The Petitioners must be acting in good faith and with due diligence. In addition, any relief granted must be consistent with the statutory objectives of the CCAA and in furtherance of its remedial purposes. In considering the relevant factual circumstances, the overarching question is whether both the purpose of the order sought and the means it seeks to employ advance the remedial purpose of the CCAA : *Century Services* at paras. 59 and 70; *Callidus* at paras. 49, 50 and 70.

[Emphasis added.]

DISCUSSION

[33] As stated above, both GEC and the CCAA Debtors/Guarantors strenuously object to any case management by this Court in these CCAA proceedings in relation to the Related Actions, both on jurisdictional and other grounds.

Does the CCAA Court Have Jurisdiction?

[34] In my view, a plain reading of s. 20 of the CCAA leads to the conclusion that this Court has jurisdiction to adjudicate the issue as to whether Romspen has a valid debt and security against the Development and, if so, in what priority. In that event, the substantive issues raised in the Romspen Action, as defended by the CCAA Debtors or as asserted by the CCAA Debtors in the CCAA Debtors/Guarantors Action, are to be determined in this proceeding in accordance with the dictates of s. 20 of the CCAA.

[35] Romspen concedes that s. 20 does not apply to the issues relating to the Guarantors and GEC. In that event, Romspen relies on s. 11 of the CCAA.

[36] Romspen and the respondents have made substantive submissions on the application of s. 11 of the CCAA, in terms of whether it would provide a basis upon which this Court could assume jurisdiction toward determining the issues in: (1) the GEC Action; and (2) the Romspen Action regarding the Guarantors and the CCAA Debtors/Guarantors Action by the Guarantors.

[37] In that regard, Romspen cites *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103 [*U.S. Steel SC*]; aff'd *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 [*U.S. Steel CA*]. Romspen asserts that those decisions stand for the proposition that the court in CCAA proceedings has authority under s. 11 of the CCAA to order that inter-creditor claims and other claims be determined in the context of CCAA proceedings, if it is established that, on balance, such determination is likely to further the remedial purposes of the CCAA.

[38] In *U.S. Steel SC*, Justice Wilton-Siegel was addressing a complex scenario in a CCAA proceeding where claims against the debtor by a creditor (USS) were subject to various objections by other creditors and stakeholders (USW and the Milbournes). The objections were based on characterization of USS' claim, allegations of breach of fiduciary duty, oppression and equitable subordination. If those objections against USS' claims were successful, it could result in a dismissal or subordination of USS' claims. The issues addressed by the Ontario court were how those claims would be determined and in what proceeding.

[39] In *U.S. Steel SC*, Wilton-Siegel J. held that:

- a) the debt-to-equity recharacterization claims of one group of creditors of a debtor company can be the proper subject matter of a CCAA claims process implemented pursuant to s. 20 of the CCAA: paras. 42–44;
- b) neither the claims process underway in that proceeding nor the CCAA contemplate that inter-creditor claims will be addressed within a CCAA proceeding: paras. 58–61; and

- c) the court did not have authority under the CCAA to apply the doctrine of equitable subordination, if that doctrine exists in Canadian law: paras. 38–53.

[40] As such, the remaining issue to be determined in *U.S. Steel/ SC* was: what would be the forum for the adjudication of the USW and the Milbournes' objections to USS' claims and whether the CCAA court had jurisdiction to address those issues?

[41] Justice Wilton-Siegel concluded that the CCAA court did have jurisdiction under s. 11 to address the other claims *if* it was in furtherance of the CCAA's remedial purposes. He stated:

[72] I acknowledge that the purpose of the CCAA is to facilitate a compromise or arrangement between an insolvent debtor corporation and its creditors to allow the business to continue as a going concern. Accordingly, in most situations, it would be expected that the resolution of inter-creditor disputes would not further such process and may, in fact, delay and possibly hinder such process. In such circumstances, there is no reasonable basis for a determination of such claims within the CCAA process.

[73] The issue for the Court, however, is whether the broad jurisdiction of a court granted under section 11 of the CCAA permits a court to exercise its discretion to determine inter-creditor claims within a CCAA process if it determines that, in its judgment, such action would further the purposes of the CCAA. USS argues, in effect, for an inflexible rule that excludes such a possibility. I am not persuaded, however, that this is correct as a matter of the statutory interpretation of section 11 of the CCAA. I am also not persuaded that the case law relied upon by USS precludes such an approach.

[74] On its face, section 11 of the CCAA confers broad authority on a court. As mentioned above, it provides that, subject to the restrictions set out in the CCAA, a court may make "any order that it considers appropriate in the circumstances". It is not suggested that there is any express restriction in the CCAA that prevents a court from ordering that inter-creditor claims, such as the Subordination Claims, shall be heard under the CCAA proceeding outside the process contemplated by the Claims Process Order.

...

[80] All of these considerations argue in favour of a broad authority under section 11 that does not preclude the determination of inter-creditor claims within CCAA proceedings in appropriate circumstances. I do not suggest that such circumstances are presented in most circumstances before the courts. I do, however, think that the discretion or authority of a court under section 11 of the CCAA extends to the determination of inter-creditor matters within a

CCAA proceeding if, on balance, such action would appear to further the remedial purpose of the CCAA.

...

[84] Based on the foregoing, I conclude that the Court has authority under section 11 of the CCAA to order that the Subordination Claims be determined by a process within the CCAA proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely to further the remedial purpose of the CCAA. [Emphasis added.]

[42] GEC and the CCAA Debtors/Guarantors take the position that the decision in *U.S. Steel CA* did not endorse Wilton-Siegel J.'s conclusions on jurisdiction. They point to the appeal court's statement:

[82] There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

[43] For the reasons stated by Romsphen's counsel, I disagree that the Ontario Court of Appeal's decision calls into question the lower court's decision, as relevant here.

[44] The sole issue on appeal in *U.S. Steel CA* was whether the court below erred in finding that a CCAA court did not have the jurisdiction to apply the doctrine of equitable subordination so as to subordinate USS' claims to those of USW and the Milbournes. Ultimately, the court in *U.S. Steel CA* agreed with Wilton-Siegel J. that the CCAA court had no jurisdiction to apply the doctrine of equitable subordination, but for different reasons, namely that the doctrine would not further the remedial purposes of the CCAA: *U.S. Steel CA* at paras. 100–102.

[45] As relevant to the arguments here, Wilton-Siegel J.'s conclusion that the inter-creditor claims could be determined in the CCAA proceedings under s. 11, if appropriate, was noted in *U.S. Steel CA* at para. 18. The conclusion in the court below was not the issue under appeal in the *U.S. Steel CA* decision and was not overturned.

[46] All of the parties have also made substantial submissions on the issue of jurisdiction having regard to the “single proceeding model” in insolvency proceedings (including under the CCAA) that has been endorsed in the past. While the respondents have addressed the “single proceeding model” as a separate jurisdictional basis for Romspen’s application, I agree that the only jurisdictional basis is s. 11 of the CCAA, which is informed by this concept.

[47] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 22, the Court endorsed that the purpose of the model was to provide a “collective proceeding” that “supersedes the usual civil process available to creditors to enforce their claims,” so as to avoid a “free-for-all” among creditors in enforcing remedies against the debtor and its assets.

[48] GEC and the CCAA Debtors/Guarantors assert that the single proceeding model requires that the proceeding focus on claims against the debtor and the debtor’s assets only, and not claims by the debtor or connected in some fashion to either.

[49] The case authorities, however, do not support the narrow scope of the single proceeding model asserted by GEC and the CCAA Debtors/Guarantors.

[50] The model has been applied to prevent fragmentation of proceedings in relation to arbitration proceedings.

[51] In *Mundo Media Ltd. (Re)*, 2022 ONCA 607 [*Mundo*], the court stated:

[6] The single proceeding model applies to insolvency proceedings. This model favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings. A creditor “who cannot claim to be a ‘stranger to the bankruptcy,’ has the burden of demonstrating ‘sufficient cause’ to have the proceedings fragmented across multiple jurisdictions.”

[52] At para. 24 in *Mundo*, the court noted that the motion judge had held that, where a third party was not a stranger to the bankruptcy, the model was not limited

to claims against a debtor, but could also support addressing claims by a debtor in the insolvency proceeding. At para. 52, the appeal court agreed, stating:

... the single proceeding model is typically used as a ‘shield’ to protect debtors from having to defend claims in multiple proceedings or jurisdictions, rather than as a ‘sword’ to enable receivers to pursue claims against a third party. However, I see nothing in the jurisprudence precluding this result. ...

[53] The single proceeding model was also discussed in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, again in the context of arbitration proceedings versus insolvency proceedings. At paras. 54-55, the Court stated that the model protects the “clear ‘[p]ublic interest in the expeditious, efficient and economical clean-up of the aftermath of financial collapse’”.

[54] Finally, Romspen refers to *Tron Construction & Mining Limited Partnership & Tron Construction & Mining Inc.*, 2022 SKKB 203 [*Tron*] where the court exercised its jurisdiction under s. 183(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] to impose a claims process for determining liens against certain lands, rather than have those claims adjudicated in other civil proceedings in the usual fashion. At para. 51, the court stated, after citing *Century Services* and *Mundo*, that the single proceeding model, which has “long been applied in bankruptcies, receiverships and CCAA proceedings, is extremely well-established”.

[55] In my view, the conclusions of Wilton-Siegel J. in *U.S. Steel SC* are entirely consistent with the single proceeding model and the benefits that are intended by that model. It is undeniably the case that the CCAA court is attuned to providing a means by which claims can be adjudicated, as they relate to the restructuring proceeding, in an efficient manner and in a manner that is fair to all stakeholders.

[56] I agree that it will not always be the case that other claims are appropriately brought into the CCAA umbrella for adjudication. However, I adopt the reasoning and result in *U.S. Steel SC* in concluding that, if the circumstances are such that bringing other claims into the CCAA proceeding will assist in the restructuring process and further the remedial purposes of the CCAA, that may ground the exercise of the court’s jurisdiction to grant such an order under s. 11 of the CCAA.

[57] I conclude that this Court in these CCAA proceedings does have the jurisdiction to grant the order sought by Romspen pursuant to s. 11 of the CCAA. It remains to be determined whether it is appropriate to exercise that jurisdiction in these circumstances, as I will discuss below.

Is the Procedural Order Appropriate?

[58] The CCAA Debtors/Guarantors have advanced various arguments against the proposed Order.

[59] As a preliminary point, GEC and the CCAA Debtors/Guarantors contend that the single proceeding model has no application here since the Related Actions are just inter-creditor disputes or disputes towards determining the amount of the debt, matters that are not central to the CCAA proceedings at all, which is simply focussed on a sales or liquidating process.

[60] GEC states that no party to its dispute is under CCAA protection. GEC further says that it does not seek relief against the CCAA Debtors or their assets (the Development), just as Romspen does not in its counterclaim in the GEC Action.

[61] Further, the CCAA Debtors/Guarantors say that the dispute between Romspen and GEC is entirely separate and distinct from the issues raised in the Romspen Action and the CCAA Debtors/Guarantors Action and that the GEC Action is purely an inter-creditor dispute.

[62] In substance, the respondents say that the single proceeding model is simply focussed on stopping a “free-for-all” by creditors against a debtor’s assets so as to bring all claims within the ambit of the insolvency proceeding. In the context of this CCAA, they say that the only focus here is the sales process. They say that, once the issues in the Related Actions are determined, only then should the stakeholders’ rights to enforce any claims against the Development be “collectivised” in the CCAA proceeding. In the meantime, they say that the Related Actions do not impact the prospects for any sale or prejudice any other stakeholder or impair the CCAA

proceedings in any way. They say that Romspen is attempting to turn this liquidating CCAA proceeding into a “litigation forum” under the guise of a CCAA proceeding.

[63] With all due respect, I agree with Romspen that this approach is in error to the extent that it narrows the focus of these CCAA proceedings to the one singular point of allowing the Development to be sold through the SISP. That said, as I will discuss below, even that prospect is fraught with issues arising from the Related Actions.

[64] I start from the point that liquidating CCAAs have been endorsed as achieving the remedial objectives of the CCAA, even when no plan of arrangement will ever be presented by the debtor company so as to allow the debtor to continue in business: 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*] at paras. 39-45. In *Callidus*, the Court emphasized that different objectives may come into play depending on the circumstances:

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

[Emphasis added.]

[65] No stakeholder here—let alone GEC and the Guarantors—objected to the CCAA proceedings being commenced and continued toward the objective of selling

the Development. Needless to say, it was the CCAA Debtors that commenced the proceedings in the first place.

[66] The objectives in the CCAA proceeding are clear and they have been clear from the outset. The stakeholders are seeking to monetize the Development as soon as possible. That goal will achieve many purposes. Firstly, it will stem the significant and ongoing costs of maintaining the Development in its current state, a cost that is currently being borne by Romspen. Secondly, it will achieve a financial result for the stakeholders depending on how the respective secured claims are determined and ranked. More general social benefits will be achieved by a completion of the Development in the community.

[67] In *U.S. Steel CA*, the court stated:

[69] The scheme of the CCAA focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a compromise or arrangement. Except as contemplated by ss. 2(1), 6(8), 22.1 and 36.1, the statute does not address either conflicts between creditors or the order of priorities of creditors. Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated.

[Emphasis added.]

[68] Similarly, priorities are the background against which a sale of the Development is to be negotiated. However, here, the priority issues have moved from the background to the forefront of this restructuring proceeding in light of the Related Actions.

[69] I would emphasize again the Monitor's comments in the Report at paras. 9 and 15, which I have summarized above, about how the priority issue is expected to negatively impact the Monitor's ability to arrange a sale of the Development if the disputes in the Related Actions are not resolved beforehand. The Monitor does not describe the resolution of the Related Actions as merely "desirable"; rather it is described as "important" and "essential" to achieving the objectives that are before the stakeholders in this insolvency proceeding.

[70] It cannot be seriously questioned that, in these unique circumstances, it is critical and necessary to determine who holds debt and security against the Development and, if security is held, what is its priority.

[71] As was noted in *Tron*, an exception to the single proceeding model is where the claim involves a “stranger” to the insolvency proceeding (similarly, it might be said that bringing claims within CCAA proceedings that involve a “stranger” would not further the remedial purposes of the CCAA). In *Tron*, the court stated:

[53] ...Where a party is genuinely a stranger to the insolvency proceeding, there is room for that party to make a case that it should not be swept into the proceeding. Similarly, an insolvent party could argue that there is no relationship between its insolvency proceeding and another party, such that any dispute concerning that party should be resolved outside of the insolvency proceeding...

[72] I am not persuaded by the respondent’s arguments that attempt to distance themselves and their claims from this CCAA proceeding. There is a manifest relationship between the Related Actions, GEC, Romspen, the CCAA Debtors/Guarantors and these CCAA proceedings. None of GEC, Romspen or the CCAA Debtors/Guarantors can be characterized as “strangers” to these CCAA proceedings.

[73] These CCAA proceedings are an insolvency proceeding involving the CCAA Debtors and each of the Related Actions concerns the CCAA Debtors. The Guarantors are in each case either the economic stakeholders of the CCAA Debtors, their controlling minds, or were otherwise involved in their business operations leading up to the commencement of these CCAA proceedings.

[74] The Romspen Action is a claim against the CCAA Debtors/Guarantors. It is a claim that is required to be resolved pursuant to s. 20 of the CCAA. The CCAA Debtors/Guarantors Action is in substance a cross claim to, and a denial of, the claims asserted in the Romspen Action. The Romspen Action cannot be adjudicated in accordance with s. 20 of the CCAA apart from the CCAA Debtors/Guarantors Action.

[75] The GEC Action also concerns the CCAA Debtors. GEC's claims against Romspen in the GEC Action relate to and arise from the affairs of the CCAA Debtors and their insolvency. GEC is a major secured creditor of the CCAA Debtors. The contractual relationship between GEC and Romspen pertains solely to the CCAA Debtors. GEC hopes, through the GEC Action, to elevate its secured claim against the Development in relation to the Romspen Security.

[76] I conclude that there is considerable interconnection between the Related Actions and the conduct of these CCAA proceedings, as the Monitor notes in its Report.

[77] In addition, this is not a case where the stakeholders enjoy the luxury of taking their time to have the litigation unfold in the Related Actions to resolve those claims in the fulness of time. As the saying goes, this is real-time litigation and the clock is ticking in terms of the need to achieve a resolution as soon as possible for an asset that is expensive to maintain and where further delay may seriously compromise the outcome.

[78] The CCAA Debtors/Guarantors say that Romspen is guilty of inordinate delay in filing the Romspen Action, which I do not accept. Clearly, Romspen was hoping for a result through the SISF by late 2022—a result that may have fully repaid its debts. That result may also have avoided some or all of the substantive issues that arise in the CCAA Debtors/Guarantors Action. When no bid arose, Romspen acted. I also accept Romspen's submission that the Romspen Action was filed in order to avoid any limitation issues, a step that was expressly allowed under para. 13 of the Initial Order.

[79] Other arguments raised by GEC and the CCAA Debtors/Guarantors can only be described as hyperbole and inflated concerns in terms of the prejudice said by them to arise from the Procedural Order.

[80] GEC and the CCAA Debtors/Guarantors say that Romspen is seeking to "impose an arbitrary, 'fast track' schedule" that is "impossible to meet without

compromising [their] full rights to gather evidence” in defence of Romspen’s claims. They say that Romspen is hoping to benefit from an “unreasonably truncated schedule”. They say that Romspen is attempting to deny their rights to natural justice and a fair hearing of their claims on the merits. Finally, they say that Romspen is attempting to have its “preferred judge appointed case management and trial judge”.

[81] GEC’s initial objection to the Procedural Order was that it was entitled to the “full panoply of procedural rights that an action entails”. Similarly, the CCAA Debtors/Guarantors stressed the importance of their rights to “discovery and other procedural rights”.

[82] However, notwithstanding s. 20 of the CCAA, by which there is a statutory presumption that the Romspen Action and certain defences raised in the CCAA Debtors/Guarantors Action be determined on a summary basis, Romspen does not seek an order from this Court that these actions be determined summarily.

[83] Counsel for the CCAA Debtors/Guarantors suggests that document discovery will be fraught with issues and that significant time and “intense investigations” will be required even before the parties could consider proceeding to examinations for discovery. Graham Thom, a representative of the CCAA Debtors, says that he is searching for documents and he is aware that there are more than 10,000 pages of documents relevant to the issues. His counsel says that he expects “vast amounts” of expert evidence, suggestive of lengthy delays. He suggests that his client’s action would not be ready for trial in less than 18 months. Finally, he suggests that the granting of the Procedural Order, to bring the Related Actions into the CCAA proceedings, could entail “chaos” that will delay the proceeding for years.

[84] The Procedural Order sought allows for the usual civil litigation process with which counsel are very much aware. It includes the filing of the outstanding pleadings, delivery of lists of documents, potential demands for further documents, potential applications to the court to resolve document issues, examinations for discovery and case planning conferences. The Procedural Order does not address the question of the process for determining the claims asserted in the Related

Actions after those pre-trial procedures are completed. Romspen states that this approach is intended to fully preserve the parties' rights to argue that the proper procedure for the determination should be a summary trial, a full trial, or a hybrid hearing. Romspen's counsel also states that this defers the determination of the appropriate mode of dispute resolution procedure to a time when there is a proper basis for assessing what procedure is both just and appropriate in the circumstances, including the ongoing dynamics of this CCAA proceedings.

[85] In my view, this approach fully preserves the rights asserted by GEC and the CCAA Debtors/Guarantors and also allows the parties to have time after the pre-trial procedures to formulate next steps: see *U.S. Steel SC* at paras. 87 and 101.

[86] Further, as stated in *U.S. Steel SC* at para. 102, adjudication within the ambit of these CCAA proceedings does not do away with the need to assert claims based on recognized legal or equitable principles, or avoid a costs award or preclude any procedural rights, such as appeal rights. On this point, I do not agree with the CCAA Debtors/Guarantors' counsel that their Action involves, "new and still evolving legal theories"; in any event, even assuming that is the case, I see no difficulty in resolving those in the context of the CCAA proceeding.

[87] In addition, Romspen is not seeking to formally consolidate the Related Actions. The Procedural Order sought by Romspen is not substantively different that what could have been sought outside of the CCAA proceedings.

[88] Under R. 22-5(8) of the *Supreme Court Civil Rules [Rules]*, a party may seek an order that certain actions be tried at the same time. Romspen refers to the usual test applied by this Court, as set out in *Raymond James Investment Counsel Ltd. v. Clyne*, 2018 BCSC 720 at para. 36, citing *Hui v. Hoa*, 2012 BCSC 1045 at paras. 33-35. I need not set those factors out in detail, other than to highlight that they echo the factors before me in terms of: the degree of commonality and intertwining of issues; savings in pre-trial procedures and costs; potential reductions in trial time; inconvenience to a party; delays affecting the different actions given differing stages of the litigation; possibility of inconsistent findings on the same issue and judicial

economy. In my view, all of these factors are present here and support the granting of the Procedural Order.

[89] As was noted in *Raymond James Investment* at para. 39, the disposition in one action will not necessary dispose of the issues in the other. Therefore, GEC need not be concerned since any specific issues in the GEC Action will not necessary be dictated by the determination of the issues in the CCAA Debtors/Guarantors Action.

[90] CCAA Debtors/Guarantors' counsel asserts that Romspen is avoiding making an application under R. 22-5(8) and also, this Court's Practice Direction-4 regarding Case Planning and Judicial Management of Civil and Family Actions. I do not agree that is the case as those procedures are not necessary engaged under the CCAA. In any event, it is difficult to see that his clients would be in any different situation or have any different procedural arguments even if that Rule and Practice Direction had been the impetus to make this application.

[91] There is an interesting dynamic between GEC and the CCAA Debtors/Guarantors in that the former wishes to proceed to trial in January 2024 and the latter complains about being rushed to a summary determination.

[92] I acknowledge that the granting of the Procedural Order will inevitably mean that the current trial dates for the GEC Action will no longer be viable. However, again, it was Romspen who set those trial dates.

[93] At the time of this application, GEC's counsel asserted that his client was ready to proceed to trial and wished to have the claim determined in early 2024. Looking at the overall circumstances, I do not see that scenario as being truly representative of GEC's trial readiness. GEC really only began completing some pre-trial procedures *after* receiving Romspen's request for the Procedural Order, by preparing its list and documents and requesting examination dates. On May 19, 2023, Romspen raised the issue with other counsel. On July 7, 2023, GEC served Romspen with an appointment for examination for discovery for September 8, 2023.

GEC's list of documents was completed on July 28, 2023, on the eve of this application, a step that I consider was rushed by GEC only so as to position itself to argue that it was ready to proceed at the scheduled trial dates.

[94] Although Romspen may have finished its list of documents by the time of delivery of these reasons, I have no basis to believe that examinations for discovery have taken place in the GEC Action. The deadline for any expert reports cannot realistically be met for the trial dates. I see no basis upon which to conclude that the parties are in a position to proceed to trial in the GEC Action.

[95] On the issue of prejudice, GEC also argues that the granting of the Procedural Order would also amount to a dismissal of its equitable subordination claim in the GEC Action. They point to the *U.S. Steel CA* decision as supporting that equitable subordination is not available under the CCAA, if it exists in Canadian law.

[96] Romspen's position is that equitable subordination is not part of Canadian law and, even if that is the case, the facts do not support that relief.

[97] Romspen acknowledges the decision in *U.S. Steel CA*, but says that it is far from certain whether that reasoning remains valid and, even if so, whether it will be applied in this jurisdiction. Other Canadian cases have discussed and/or applied equitable subordination. The Supreme Court of Canada has not yet decided whether it even applies in Canada, despite many opportunities to have done so. Romspen also points to more recent comments from the Supreme Court of Canada (such as in *Callidus* at para. 74) that the *BIA* and CCAA are to be read and applied in a harmonious fashion. In *U.S. Steel CA* at para. 104, the court stated that s. 183 of the *BIA* gives the bankruptcy court jurisdiction as a court of equity.

[98] As a result, Romspen suggests that it is an "open question" whether this Court will follow *U.S. Steel CA* or come to a contrary conclusion as to the availability of the doctrine of equitable subordination under the CCAA.

[99] As is noted, the issue is not before me and, if the Procedural Order is granted, GEC could later argue that, assuming the doctrine applies in Canada, the

equitable subordination claim was determinable under the CCAA or, if not, the claim should be determined outside of these proceedings as was done in *U.S. Steel*. In either scenario, GEC remains able to assert such a claim. In addition, Romspen has confirmed that it is not taking the position that equitable subordination is not available in these CCAA proceedings.

[100] In light of the above, I agree that GEC's equitable subordination claim does pose a potential complication to these proceedings and the GEC Action. However, at this stage, I consider that the benefits from the Procedural Order outweigh any such potential issues down the road relating to GEC's equitable subordination claim. At the very least, the claim is before the Court and, one way or the other, it will be determined, again assuming that it is a valid concept under Canadian law.

[101] I confess to being mystified by the intransigence of GEC and the CCAA Debtors/Guarantors to proceeding in the manner proposed by Romspen. This is particularly so since Romspen has made it clear from the outset that it is not proposing that any summary procedure be imposed on the parties, at least for now. Many counsel would be pleased to have a judge for active pre-trial management to ensure that the proceedings move along at an appropriate pace toward what they hope will be a successful outcome of their clients' claim.

[102] Contrary to the suggestion of the CCAA Debtors/Guarantors' counsel, the CCAA court is not unfamiliar with the resolution of complex claims. It is obvious that the same judges who preside in CCAA proceedings also deal with regular civil litigation matters, some involving complex issues and claims.

[103] My sense is that GEC and the CCAA Debtors/Guarantors fear the unknown of the insolvency proceedings and wish to retreat to the comfort of the well-known and well-worn procedures under the *Rules* that dictate the course of civil litigation. They do not want to worry about any "summary" procedures potentially being imposed on them in the future.

[104] Yet, even in regular civil litigation, there remains the prospect that a summary trial or determination of some or all of the issues may result under R. 9-7. As counsel are no doubt aware, litigants and the courts have increasingly come to the realization that the “old ways” of litigation are not necessary ones that should be considered. All stakeholders in the justice system must now rethink what is truly required to come to a just result given the circumstances that exist in any case, on the basis of proportionality and access to justice: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1-3, 23-33. Rule 1-3 now incorporates this objective by emphasizing proportionality in civil litigation matters.

[105] A knee jerk default position to the “usual” civil litigation process is no longer appropriate or justified.

[106] The CCAA court will usually proceed from a “default” position that any claim will be resolved by a summary determination. This is an approach largely driven by the exigencies of insolvency and the usual need to resolve matters as soon as possible given the “real time” nature of the litigation, as the statutory objectives dictate. However, that does not foreclose other means of resolving claims where appropriate, whether under the CCAA or the BIA. In that event, what CCAA courts have done is encourage, if not require, the litigants to bring a practical and creative mindset to the problem to fashion a process that makes sense, as suggested in *Hryniak*.

[107] I do not see Romspen’s approach to require GEC and the CCAA Debtors/Guarantors to do anything more. It is not unheard of in CCAA proceedings that procedures are implemented to allow litigants more procedural rights and protections than the statute provides for and also preserves the parties’ rights to make future submissions as to the appropriate procedure for determining claims.

[108] The parties here are aware of examples of this approach. They are also very familiar with a fairly recent example of that approach in the CCAA proceedings in *Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 709 [*Walter Energy*]. In that proceeding, I rejected that a full trial was required to decide the issues. I resolved

what were undoubtedly very complex claims in a manner that was far more expedited than in usual civil litigation by way of a “hybrid trial”. I stated:

[19] There are examples where the courts in CCAA proceedings have fashioned a process that was “summary” in the sense of not requiring full pre-trial and trial procedures, but still allowed for certain appropriate pre-hearing steps.

...

[23] Accordingly, although the CCAA requires that, presumptively, claims be determined on a summary basis, the court has the discretion to order another procedure where it is appropriate. That other procedure may, but will not usually, involve a full trial procedure. One possible approach is to conduct a hybrid hearing, such as occurred here.

[24] Needless to say, the exercise of the court’s discretion will be guided by the statutory objectives of the CCAA toward a timely and inexpensive resolution of claims and distribution to creditors, while also ensuring that the determination of claims is made in a manner that is just and fair to all the stakeholders, including the debtor company, the claimant and other creditors: *0487826 B.C. Ltd. (Re)*, 2012 BCSC 1501 at para. 38. These objectives are consistent with Rule 1-3(1) which states that the object of the *Rules* is to secure the “just, speedy and inexpensive determination of every proceeding on its merits”. These objectives are also consistent with the Supreme Court of Canada’s recent exhortation to the legal profession and the courts to embrace more summary forms of adjudication where appropriate, as found in *Hryniak v. Mauldin*, 2014 SCC 7.

[25] In exercising the court’s discretion to move beyond a pure summary determination in accordance with s. 20 of the CCAA, factors to be considered by the court will vary from case to case depending on the circumstances, but may include: the nature and complexity of the claim or issues arising; the amount in issue; the nature of the evidence (including whether credibility is in issue); the importance of the claim to the creditor and the estate; the cost and delay of further procedures; and what prejudice, if any, may arise from a summary hearing.

[26] There is no “one size fits all” solution as to how any claim can be determined; ideally, the answer will no doubt be driven by the willingness of the parties to streamline the process and the creativity of the parties, and their counsel, in fashioning an efficient and expeditious means of obtaining the necessary evidence to put before the court. If agreement can’t be reached, then it will fall to the court to consider the issue.

[27] Procedural issues that may be considered include:

- a) whether pre-trial oral or document discovery is truly necessary and if so, whether limits can be put on such discovery;
- b) whether affidavits should be filed as opposed to *viva voce* evidence at a full trial;

- c) whether cross-examinations on affidavits or expert reports are necessary and whether that can be done ahead of the hearing or at the hearing itself;
- d) whether timelines for delivery of materials, such as affidavits, or any pre-hearing procedures, can be fixed so to expedite the determination of the issues;
- e) whether other means of establishing the evidentiary record can be ordered, such as through notices to admit, agreed statement of facts and common documents so as to minimize or eliminate any conflict as to the facts; and
- f) whether written arguments can be exchanged in advance of the hearing.

[109] At present, there is no reason why the same approach cannot possibly be employed here. I am not, of course, deciding whether the same procedures set out in para. 27 of *Walter Energy* should or will be employed. The Procedural Order simply moves the matter along, per the usual civil litigation process, in a fairly expedited manner to get the parties to a point where the question of how the claims will be resolved can be considered properly.

[110] I return to GEC and the CCAA Debtors/Guarantors' opposition to this relief. I have already discussed that the fear of the Monitor is that, if a bid should arise through the SISP, there is the very real prospect that the restructuring will be stalled by reason of the outstanding claims in the Related Actions. The very real prospect that emerges from the present scenario is that a bid might arise that requires the "fulcrum creditor" to decide how to respond. The critical difficulty that arises is—who is the "fulcrum creditor"?

[111] As the Monitor states, the results from any future reinvigorated SISP are obviously unknown. However, a credit bid remains a very real prospect, as every stakeholder here knows, including GEC and the CCAA Debtors/Guarantors. They also know that Romspen is the creditor most likely to make that credit bid.

[112] Counsel for the CCAA Debtors/Guarantors states that it will be "many years" before a final determination can be made of Romspen's "net position" given their counterclaims against Romspen. Counsel has bluntly submitted to the Court that, if

Romspen is going to make a credit bid to own the Development, which he agrees is likely, “it can’t be done”. In other words, the CCAA Debtors/Guarantors will oppose any credit bid.

[113] Similarly, GEC has signaled that they would also oppose any credit bid. GEC says that, if there is a sale, there is:

... the possibility that GEC may apply to have some portion of the sales proceeds held in court or in trust pending the resolution of the [GEC Action]. That application should be dealt with as and when it arises, on the facts that prevail at that time.

[114] The practical effect of the above positions in respect of any credit bid is that Romspen would either: 1) have to advance new money in order to trust up the purchase price pending the resolution of the Related Actions; or 2) take an inferior bid from a third party and then place the sale proceeds into trust.

[115] I agree with Romspen’s counsel that these positions as to any credit bid amply demonstrate that the claims in the Related Actions are inextricably linked to this CCAA proceeding. The goal of this proceeding from the outset has been toward a sale of the Development, a result that is undoubtedly one that is consistent with the statutory objectives and remedial purpose of the CCAA. As counsel puts it, the whole point is to salvage this project and allow it to be completed for the benefit of all stakeholders and the larger community.

[116] In normal civil litigation, the process is from a backward-looking perspective. In the usual case, a fact scenario has taken place and the objective is to resolve the issues that have arisen from that vantage point. In the Related Actions, that perspective is certainly there given that the issues relate to events that took place years ago when Romspen refused to advance further funds under its credit facility.

[117] However, litigation under the CCAA is more immediate and present—hence, the well-worn phrase, “real time litigation”. It is against those “real time” present circumstances that the Related Actions have been commenced. In those circumstances, there is an urgent need to resolve the claims in the Related Actions

as soon as reasonably possible and, of course, in a manner that is fair to all of the litigants. Rather than the “chaos” that counsel for the CCAA Debtors/Guarantors predicts would arise from the Procedural Order, there is the distinct possibility that this CCAA proceeding will be paralyzed by the outstanding claims in the Related Actions. I see a very possible scenario, as does the Monitor, where the parties are deadlocked in their positions in relation to any sale that might be available, as each seeks to exercise the leverage that they hold.

[118] It remains to be seen what will be the course of the Related Actions. It may be the case that it is impossible to resolve the claims prior to any result arising in the SISF. However, the Procedural Order that Romspen seeks does not foreclose any ability of the CCAA court to consider the means by which the claims in the Related Actions will be resolved.

CONCLUSION

[119] I conclude that the circumstances here dictate that the granting of the Procedural Order is appropriate as it will further the remedial purposes of this CCAA proceeding. I conclude that the Related Actions ought to be determined within the context of these CCAA proceedings, as provided for in the proposed Procedural Order.

[120] While I have discussed many aspects for my conclusion above, I would emphasize:

- a) the Romspen Action concerns disputed claims against the CCAA Debtors and, as such, s. 20 of the CCAA mandates that this claim be determined by this Court on summary application in these CCAA proceedings;
- b) the CCAA Debtors/Guarantors Action is, in substance, a crossclaim to the Romspen Action that disputes the quantum of Romspen’s claim and the validity of the Romspen Security asserted in the Romspen Action. It defies common sense to try this Action separately from the

Romspen Action. As it was with USS in the *U.S. Steel/ SC*, Romspen is, at least presently, the predominate creditor of the CCAA Debtors. If Romspen is to be toppled from that position, a determination in that respect will have a material impact on a consideration of any bids obtained under the SISP: *U.S. Steel/ SC* at para. 98;

- c) the GEC Action similarly directly concerns whether the Romspen Security is indeed in first secured position;
- d) the various claims and defences in the Related Actions share a sufficient commonality of facts, claims, and issues which overlap to such a degree that any determination of the issues will inevitably be decided on similar factual, legal, and evidentiary grounds. I expect that the pre-trial discovery process will involve many common elements, which will be addressed at any trial;
- e) as Wilton-Siegel J. noted in *U.S. Steel/ SC* at paras. 99-100, there is a distinct possibility that a determination of the Related Actions in the CCAA proceeding could result in a more expeditious process that would avoid protracted and expensive litigation and avoid inconsistent findings on the same issues. As he stated:

[105] ... In these circumstances, considerations of efficient and the avoidance of a multiplicity of actions, with the possibility of conflicting judgments by different courts, argue for determination of all of these claims within the CCAA proceedings so long as the corresponding USW claim is also being determined within the CCAA proceeding. In my view, these latter considerations should be determinative in the present circumstances.

- f) fashioning a process and deadlines for pre-trial procedures in this CCAA proceeding is no different than the usual situation that this Court addresses in similar situations which call for active judicial case management to shepherd the matters through to a conclusion in a

timely manner and with a view to not only the interests of the litigants, but the concerns of the Court in terms of judicial economy;

- g) a determination of the Related Actions in the CCAA proceedings provides a flexible and dynamic proceeding that can address the determination of the claims and defences in the Related Actions with a view towards the interests of the stakeholders, which include Romspen, GEC and the CCAA Debtors/Guarantors;
- h) while there are presently some differences in status between the GEC Action, the Romspen Action, and the CCAA Debtors/Guarantors Action, I do not consider that granting the Procedural Order will necessarily delay the trial of any of the Related Actions. Further, to the extent that any procedural delay is caused, the resulting prejudice is outweighed by the procedural benefits associated with the Procedural Order;
- i) the litigation process established by the Procedural Order substantially reflects the normal litigation process contemplated by the *Rules*, thereby preserving the "full panoply" of procedural rights that a litigant would otherwise have; and
- j) no party to the Related Actions will be prejudiced or gain any tactical advantage given the approach set out in the Procedural Order.

[121] I agree with Romspen's counsel that the granting of the Procedural Order and the adjudication of issues in the Related Actions in the context of these CCAA proceedings have the likely potential of assisting this Court in addressing issues that may arise with respect to: (a) consideration of any bids for the Development that require lender consent and approval; (b) the appropriateness and timing of any final or interim distributions of proceeds of sale, including under a potential plan of arrangement; and (c) other matters that may require that the stakeholders have certainty as to the priority of creditors and, more critically, the identity of the "fulcrum

creditor(s)”, who will no doubt dictate the outcome if they have the only remaining financial stake in the Development.

[122] The proposed completion dates under the Procedural Order before me on the application were set as of August 2, 2023. I am going to presume that the pleadings in the Related Actions are now finalized given the time that has passed.

[123] The deadlines in the Procedural Order will follow from the delivery of lists of documents in accordance with R. 7-1(1). The remaining completion dates regarding document issues, as set out in the proposed Order, will be resolved by the intervals set out in that proposed Order (for example, three weeks from the delivery of the lists of documents to the delivery of any demands under R. 7-1(10) or (11) and so on). As proposed, examinations for discovery will take place within one month of the completion of the document production and resolution of any issues. A case planning conference will be also be scheduled one month after completion of examinations for discovery.

[124] I appreciate that the circumstances may have changed since this hearing in terms of the state of play in the Related Actions. Therefore, the parties have liberty to apply for such directions as may be required, including to resolve or resolve any deadlines for the pre-trial procedures as I have ordered.

[125] As requested by Romspen, I am also staying any further Court applications in the Related Actions save as might be brought forward for determination in this proceeding. The litigants may take any steps under the *Rules* as may be available to them and as may be necessary, again subject to any directions from this Court as may be required. In that respect, this Court seeks the aid and recognition of this Court outside of the CCAA proceedings as may be appropriate in carrying out the terms of this Order.

“Fitzpatrick J.”

TAB 5

In the Court of Appeal of Alberta

Citation: AMIC Mortgage Investment Corporation v. Abacus Cities Ltd., 1992 ABCA 57

Date: 19920310

Docket: 12132, 12135 & 12138

Registry: Calgary

Between:

AMIC Mortgage Investment Corporation in Liquidation

Appellant
(Cross-Respondent)

- and -

Thorne Riddell Inc., Trustee of the Estate of Abacus Cities Ltd., a Bankrupt

Respondent
(Cross-Appellant)

And Between:

**Paramount Life Insurance Company, by its Administrator
Touche Ross Limited and Touche Ross Limited**

Appellants
(Cross-Respondents)

- and -

Thorne Riddell Inc., Trustee of the Estate of Abacus Cities Ltd., a Bankrupt

Respondent
(Cross-Appellant)

And Between:

**AMIC Mortgage Investment Corporation, in Liquidation
Paramount Life Insurance Company, by its Administrator
Touche Ross Limited, and the Fidelity Trust Company**

Appellants
(Cross-Respondents)

- and -

Thorn Riddell Inc., Trustee of the Estate of Abacus Cities Ltd., a Bankrupt

The Court:

**The Honourable Mr. Justice McClung
The Honourable Mr. Justice Kerans
The Honourable Mr. Justice Dixon**

**Reasons for Judgment of The Honourable Mr. Justice Kerans
Concurred in by The Honourable Mr. Justice McClung
And Concurred in by The Honourable Mr. Justice Dixon**

**APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE FORSYTH OF
THE COURT OF QUEEN'S BENCH DATED 12TH DAY OF OCTOBER, 1990**

COUNSEL:

D. T. Gallagher, for appellant, AMIC Mortgage Investment Corporation, In Liquidation

L. Robinson, for respondent, Thorne Riddell Inc., Trustee of the Estate of Abacus Cities Ltd.,
A Bankrupt

G. M. Meagher, Q.C. (Paramount Life Insurance) for appellants, Paramount Life Insurance
Company, by its Administrator Touche Ross Limited and Touche Ross Limited

J. Shea, for the Fidelity Trust Company, In Liquidation

**REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE KERANS**

[1] The Bankruptcy Court, when approving a Proposal under the Bankruptcy Act, R.S.C. 1985, c. B-3, may freeze interest owing on debts from the date of the proposal. Without such an order, the freeze is not automatic. Also, no rule of law forbids simpliciter the enforcement, for costs incurred by the creditor after bankruptcy, of a pre-bankruptcy cost indemnity given by the bankrupt. But a Bankruptcy Court may refuse to enforce that indemnity by a creditor who incurred costs other than in a commercially reasonable fashion or whose position otherwise amounts to an abuse of the bankruptcy process.

[2] In 1979, the Bankruptcy Court approved a Proposal filed by the bankrupt, Abacus Cities Ltd.

[3] In 1981, the Court held that the bankrupt had breached the Proposal, and deemed that to be an assignment in bankruptcy. The respondent and cross-appellant trustee, Thorne Riddell, Inc., became its trustee and proceeded with administration. A decade later, that task nears completion.

[4] Because a distribution looms, attention has turned to the valuation of claims. The three appellant mortgagees, AMIC Mortgage Investment Corporation, Paramount Life Insurance Company and Fidelity Trust Company realized their securities and filed demands for deficiencies. The trustee accepted these except the interest and costs portions.

[5] The trustee disputed any claim for interest or costs after the date of the original Proposal, and sought directions as a means to resolve the matter. The mortgagees intervened. They acknowledged before us that they cannot exact interest after the date of bankruptcy, but resisted an earlier termination date. They pointed to their security instruments, which contain a full right of recovery from the borrower of all collection costs. They say the trustee must honour this without regard to when the creditor incurred the expenses.

[6] We do not know the details of these expenses. But the mortgagees demand reimbursement of huge sums, and I suspect that they cover participation in many disputes involving this infamous bankruptcy over the past decade. That raises the problem whether one creditor shall, despite results, participate in litigation after bankruptcy at the expense of the other creditors.

[7] The learned Queen's Bench judge, sitting in Bankruptcy chambers, excluded interest after the date of proposal and costs after the date of bankruptcy. See (1990), 110 A.R. 295; 2 C.B.R. (3d) 196. The mortgagees appeal from both orders. The trustee also appeals because the order permitted costs after the date of the Proposal.

[8] It is common ground that no term in the statute clearly and unequivocally resolves either dispute, and no authority has yet reached precisely these topics. In my view, I stated the correct rules for this case at the start, and for the reasons that follow.

[9] Because the mortgagees conceded that they could not expect interest after the date of bankruptcy, the remaining dispute relates to interest from the date of the proposal to the date of the bankruptcy. Consequently, the argument turned upon whether the Act applied the after-bankruptcy rule to proposals.

[10] The starting point, then, must be the rule about interest after bankruptcy. Under the scheme of the Act, the only entitlement of a claimant to share in the realized assets of the bankrupt arises under s.121(1), (or because of an obligation incurred by the trustee during administration, which did not arise in this case). S. 121(1) provides:

All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

[11] The trustee correctly said that the mortgagees fall within the scope of this rule. The mortgagees correctly responded that they can charge for an obligation that arises after bankruptcy provided that it must arise from a pre-bankruptcy obligation. And, of course, the mortgagees founded their claims both to interest and costs on a pre-bankruptcy agreement.

[12] The trustee pointed to s. 122(2) as offering yet another limit on post-bankruptcy interest. It provides:

Where interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum to the date of bankruptcy from the time the debt or sum was payable, if evidenced by a written instrument, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed.

[13] I agree that this rule assumes that interest is not payable after bankruptcy. It does not, however, make the rule.

[14] The trustee also argued that s. 121(2), discussed below, further limits the scope of future claims. I agree, but this limit does not apply to interest. I therefore will deal with that provision in greater detail when I come to the costs topic.

[15] In the end, the trustee could not point to any provision in the Act that forbids interest after bankruptcy. It must rely on common law.

[16] Several Canadian cases say that the trustee need not pay interest after bankruptcy even if in the face of a deficiency on realization of a security. See Re Levesque Auto Inc. (1978) 26 C.B.R. (N.S.) 234 (Que. S.C.), Re J.A. Gosselin Ltée. (1979) 30 C.B.R. (N.S.) 306

(Que. S.C.). They follow an old English case, Re Savin (1872) 7 Ch. App. 760. James, L.J. there followed the rule through several cases to a decision by Lord Loughborough in 1794. After first saying that he would apply the rule "whether a right and reasonable rule or not", James, L.J. offered this explanation for it at p.764:

I believe, however, that if the question now arose for the first time I should agree with the rule, seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

[17] I accept that bankruptcy aims to freeze the affairs of debtors and, quickly and summarily, liquidate and distribute their assets. It is not entirely clear to me, however, why those who prudently bargained for interest in that event should lose that benefit. But the Court of Appeal in Savin overruled the Vice-Chancellor. He had contended that the rule did not apply in the case of an express agreement to pay interest on a secured debt. And that rule has persisted for more than a century.

[18] I suppose one also might view interest as somehow not having the same right to equality of treatment as the demands of other creditors. The chambers judge took that approach. But the ranking of contractual rights in terms of moral priorities offers difficulties. I fear we distinguish them more by their accidents than their essence. For example, interest to a moneylender represents profit. Suppliers of goods, on the other hand, build profit into price. Why should one be preferred? Here, we might more accurately speak of a hedge against loss from delayed payment rather than a profit. I suspect few firms profit when a debtor becomes bankrupt. But the distinction remains dubious. Interest on overdue debt (as well as the rate) depicts the moneylender's hedge; a reserve for doubtful accounts built into the price portrays the supplier's hedge.

[19] Nevertheless, I accept that Savin expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy. I would be loath, however, to extend it in a cause where the apparent rationale does not need it.

[20] The trustee, having gained acceptance of the rule, then relied upon s. 121(4) to date that rule back to the date of a Proposal. It provides:

Where a proposal is made before bankruptcy, the claims provable shall be determined as of the date of the filing of the proposal.

[21] The trustee argued that this rule is "plain and unambiguous". That it is, but it does not plainly deal with the interest rule. The trustee must argue that s.121(4) also extends to

proposals the restrictions on future interest that exist in common law for bankruptcies. That is not so clear. Mr. Robinson for the trustee acknowledged that its view required one, to borrow his metaphor, to "massage" the words in the Act.

[22] Not surprisingly, each party applied, if I may continue the metaphor, a selection of magic oils from the cupboard we call the canons of interpretation. As usual, that resourceful collection offered solace to both, and led to yet another example of the game of "thrust and parry". See: K. N. Llewellyn, *The Common Law Tradition: Deciding Appeals*, Boston, 1960, Little Brown, Appendix C. The canons claim to corral a chimera: an expression of legislative intent where none is present.

[23] The mortgagees first parried that s. 121(4) speaks to claims provable on a proposal, not those provable on a bankruptcy. They correctly argued that, on the making of a Proposal, creditors must prove claims in a way like bankruptcy. See s. 62(1). Moreover, the statutory rules governing proposals adopt, changing what ought to be changed, the rules governing bankruptcy. See s.66(1). S. 121(4), they said, must be read in that context. It merely confirms that, while the Act borrows some bankruptcy procedure for proposals, the cut-off date for proposals is the date of a proposal not the date of bankruptcy. Finally, they argued, many proposals contemplate that the debtor will continue in business, and incur new debt. The view taken by the trustee would deprive those new creditors of the hope of payment on a later bankruptcy, and thus destroy the proposal scheme.

[24] The counter-thrust of the trustee suggested that, if the provision means no more than what the mortgagees assert, then it is redundant. S. 62(1) already provides that the date of proposal "... shall constitute the time for determination of the claims of the creditors and for all other purposes of this Act". Indeed, the learned chambers judge viewed the closing words of that term as decisive. The mortgagees parried that s. 121(4) merely confirms what will occur if a Court rejects a proposal and a bankruptcy automatically follows. They added that, as a matter of law, the date of the proposal is not decisive for "all other purposes". They pointed to the rule that one counts from the date of bankruptcy for suits about fraudulent preferences where a bankruptcy follows a collapsed proposal. See Employers' Liability Assurance Corporation Limited v. Ideal Petroleum (1959) Ltd. (1976), 26 C.B.R. (N.S.) 84 at 92-93 (S.C.C.). Nothing in Re Gavex, a Resource Corporation (1989), 75 C.B.R. (N.S.) 178 (B.C.S.C.) supports the trustee's view. They in turn cited Re Crown Royal Clothing Co.

(1969), 15 C.B.R. (N.S.) 203, at 205 (Que. S.C.), but I find nothing of great help in that decision.

[25] The trustee emphasized that Parliament placed the disputed rule in a section dealing with bankruptcy, not proposals. We should therefore understand that it deals with bankruptcy. The mortgagees relied upon the turgid legislative history of this very old and oft-amended Act. They contended that one should not much rely upon placement as an interpretive aid. And they conceded that perhaps s. 121 (4) merely confirms that a creditor need not re-file claims when a proposal fails and a bankruptcy follows.

[26] In my view, the interest rule, which might make sense in one context, might make no sense at all in another. Proposals can include on-going commercial activity by the debtor, not a sell-off. They might permit insolvent persons to hold creditors at bay and continue in business. That amounts to the opposite of a brief freeze to divide the "wreck of a man's property". I therefore would not extend an interest freeze, automatically and necessarily, to all proposals.

[27] Moreover, the rule proposed by the trustee offends the public interest. Proposals serve the public good because they keep businesses alive and preserve jobs and investment. Why should I encourage creditors to oppose them with a rule like this?

[28] Nor am I persuaded that Parliament has. I suppose someone might argue that s.121(4) deprives a creditor of interest during the life of a proposal only if it fails and a bankruptcy follows. If the proposal succeeds, and the debtor avoids bankruptcy, then the debtor pays interest. But this is an impossible rule that might encourage a debtor to fail, and that might lead to a creditor having to return monies earlier received. In any event, I would not read all that into this little section.

[29] The learned chambers judge said that, in this case, the proposal amounted to an assignment in bankruptcy. He said that "the fact of bankruptcy" was evident to all at that time. (I think he meant the fact of insolvency. Bankruptcy is a legal status, which the debtor did not have under the proposal.) I acknowledge that the Proposal here collapsed soon after approval. To a creditor, the difference must seem pointlessly technical. But I am dealing with a legal rule that would govern both successful and failed proposals.

[30] The powers of a Court hearing a request for approval of a Proposal might well include the power to freeze interest in the right case. I will not rule out consideration of

arguments based upon the fairness of return of principal to all before the award of profit to some. Perhaps also the approving order might deal with the effect of an immediate collapse of some desperate attempt to preserve an enterprise. But no judge here exercised the power to deny interest during the life of a proposal. On the contrary, the Proposal approved by the Court had contemplated interest continuing.

[31] I would allow the appeal on the first point and direct the trustee not to reject interest to the date of bankruptcy.

III

[32] In my view, the costs rule proposed by the trustee offers even greater difficulties.

[33] Again, the trustee relied upon s. 121(1) as prohibiting future claims. Again, it had to acknowledge that a demand for costs incurred after bankruptcy that invokes an agreement made before bankruptcy falls within the scope of entitlement under that section. The precise point came before Baron Pollock and Viscount Cave in 1886. See In Re Smith, (1886) 3 Morrell 179, at 183-185 (Eng. Div. Ct.).

[34] In its factum, the trustee offered only an argument based upon the limit on future charges implied by operation of the valuation procedure in s. 121(2). In oral argument, Mr. Robinson expanded this by relying upon an analogy to the common law rule about post-bankruptcy interest.

[35] I will first deal with the argument based upon s. 121(2). It provides:

The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value the claim, and the claim shall after that valuation be deemed a proved claim to the amount of its valuation.

[36] The trustee argued that this rule limits future exactions to those that can be valued before they arise. Future costs, unlike future interest, cannot readily be calculated in advance.

[37] I agree that this rule can limit future claims that otherwise fall within the scope of entitlement. In fact, some may not be provable when the trustee calls for proof. The trustee cites two examples: Re Carling Acceptance Limited (1976) 22 C.B.R. (N.S.) 258 (Ont. S.C.) and Re Stone (1980) 34 C.B.R. (N.S.) 87 (Ont. S.C.). Both offer difficulties. In Carling, the Court first found that the challenged demand was, by its terms, conditional. It then found that the condition, in fact, would never be met during the bankruptcy. The condition required that the bankrupt have a large surplus! One might dismiss the decision as merely one where the

claimant failed to prove its case. In *Stone*, the bankrupt had guaranteed a debt payable by instalment. The primary debtor had defaulted, but, on the date of bankruptcy, only a portion of the debt had become due and payable. The claim of the primary creditor against the estate of the guarantor bankrupt was limited to what was due. That decision might be doubted because some contingent future liability existed to be valued. See, contra, *In Re Froment*, [1925] 2 W.W.R. 415, at 423 (Alta. S.C.T.D.). Ironically, in that case the Court did not discount the award for the contingency that the primary debtor might pay.

[38] One must take care not to over-state the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process. See *In re Elliot Lake Ready-Mix Limited; Smith v. Elliot Lake Ready-Mix Limited* (1961), 2 C.B.R. (N.S.) 187, at 190 (Reg. Ont. H.C.) and *Re Wallace; Manitoba Public Insurance Corporation v. Wallace* (1988), 69 C.B.R. (N.S.) 56, at 59 (Man. Q.B.).

[39] The trustee asserted that all must be valued as at the date of bankruptcy. As this case can be decided without challenge to this assertion, I accept it for that purpose. But I note that judicial valuation occurs only when the trustee asks for it. The valuing Court can have regard to events after bankruptcy, and before the hearing, to help it decide. I see nothing in the cases, or in common sense, to the opposite effect. The learned chambers judge here accepted the impossibility of valuation at the date of bankruptcy. I see no evidence to support that finding.

[40] Indeed, I doubt the fairness of reliance on s. 121(2) in this case because the trustee here has yet to make an application and the Court has yet to hear the evidence. If we treat this motion for directions as such an application, then the mortgagees can fairly say that, today, they can prove the sums they claim. The situation might have been very different had the trustee brought an application years ago. Of course, the mortgagees did not file a specific claim until 1989, after all securities were realized and a final deficiency calculation available.

[41] Delayed proof of a claim seems to be common and sensible practice. See *Alberta v. Bank of Canada* 82 Alta. L.R. (2d) 392 (C.A.). Indeed, s. 127(1) of the Act provides that a creditor must acknowledge only the "net" amount realized on a security, which implies a delayed valuation. Reasonable costs of sale, including legal fees, may be chargeable in any event by all secured creditors. See *Royal Bank v. Sefel Geophysical Ltd.* (1989), 76 C.B.R. (N.S.) 29 (Alta. Q.B.) and *Re I. Shaffran Ltd.; M. Miller & Associates Ltd. v. Banque Royale Du Canada et al.* (1982), 42 C.B.R. (N.S.) 66 (Que. S.C.).

[42] This case may be different because the mortgagees may charge for costs for some events other than realization efforts, and the indemnity agreements may be sufficiently wide to permit them. One before us offers indemnity for:

... all sums which the mortgagee may and does from time to time ... incur ... in exercising ... or in pursuance of any ... purpose ...

[43] It remains at least possible that the mortgagee might seek reimbursement for more than straightforward realization expenses. I think of cost awards made against it in earlier proceedings in this bankruptcy. Or expenses incurred in pursuit of some hare-brained notion rightly opposed by the trustee and all other creditors. All the more reason for a hearing under s. 121(2) to settle the facts.

[44] In the result, I do not accept that s. 121(2) necessarily defeats the mortgagees in this case.

[45] During oral argument, Mr. Robinson suggested a public policy reason to refuse to enforce a costs indemnity: enforcement might produce the anomalous result that other creditors fund litigation begun by the holder of the indemnity.

[46] This is an argument for equality of creditors not unlike the argument for the interest rule. Again, one can object that the courts should not refuse to enforce the reasonable exercise of fair bargains won by prudent creditors. We see the ancient argument about the enforcement of "unfair" contracts with a new twist: it is said that the bargain is unfair to other creditors, not the debtor.

[47] I agree that bankruptcy law aims to discourage litigation, and that to enforce an indemnity might have the opposite effect. One can imagine cases where invocation of the indemnity should not be permitted. It is not necessary to deal here with the rule outside bankruptcy. But bankruptcy involves special control of the affairs of the debtor and the creditors and includes the power to approve or deny claims for costs. See C.M.H.C. v. Conaty et al (1967) 61 D.L.R. (2d) 97 at 105 (Alta. C.A.). See also s. 197(4) of the Act. The late MacPherson, J. succinctly stated the correct view in Sefel [supra] at p.33:

161179 Canada Inc. also complained that the costs of realization for payment to the Royal Bank fell on the junior secured creditor and the unsecured. However, it has always been so. Courts in Canada have always upheld the right of a creditor to enforce the contract between it and the debtor so long as that contract was enforced in a commercially reasonable fashion.

[48] In conclusion, no rule of law forbids simpliciter the enforcement of a pre-bankruptcy cost indemnity given by the bankrupt to a creditor for expenses incurred after bankruptcy. But a Bankruptcy Court may refuse to enforce that indemnity. It might refuse when enforcement would countenance abuse of the bankruptcy process. Or where a creditor incurred costs other than in a "commercially reasonable fashion".

[49] In the result, I would allow the appeal and dismiss the cross-appeal. I would direct the trustee that it cannot simply reject costs claims arising during the proposal period or indeed the bankruptcy. It can, however, challenge specific items as beyond the scope of the indemnity or for other reasons.

DATED at CALGARY, Alberta
this 10th day of March,
A.D. 1992

TAB 6

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

AUCTIONEERS' ASSOCIATION OF ALBERTA

Plaintiff

- and -

RICHARD SCOTT HUNTER

Defendant

REASONS FOR DECISION
of
M. FUNDUK, Master in Chambers

APPEARANCES:

K. G. Heintz
Venture Law Group
Counsel for the Plaintiff

Ms. J. V. Roy
Kobewka Stadnyk
Counsel for the Defendant

[1] These are competing applications for summary judgment.

[2] The Defendant was a member of the Plaintiff. He was also the sole principal of Scott Hunter Auction Service Ltd. ("company"). The company was a public auctioneer. At the relevant times the Public Auctions Act (later repealed and rolled into Part 12 of the Fair Trading Act S.A. 1998, c. F-1.05) applied.

[3] Section 5 requires a public auctioneer to be licensed by the Director. Section 6 requires the auctioneer to “deliver to” the Director a bond, which of course must be by someone other than the auctioneer.

[4] The Plaintiff agreed to be the bondsman for the company and it gave a bond for \$25,000 to the Director. In May, 1994 the company entered into an indemnity agreement with the Plaintiff agreeing to hold the Plaintiff harmless for all loss that it might incur if the bond was called.

[5] In March 1998 the Defendant gave a guarantee to the Plaintiff. It recites that the Plaintiff is a surety for the company pursuant to the Public Auctions Act, that the company had entered into an indemnity agreement with the Plaintiff and that the Defendant was a shareholder of the company. The Defendant then:

“... unconditionally guarantees payment to the [Plaintiff] of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the [company] to the [Plaintiff] now or hereafter incurred or arising from the said Agreement of Indemnity or any other agreement or obligation ... and ... agrees to indemnify and save harmless the [Plaintiff] from and in respect of any and all liability ... by reason of the said Bond ...”

[6] The guarantee is under seal and there is the mandatory compliance with the Guarantees Acknowledgment Act. The validity of the guarantee is not questioned.

[7] The Defendant assigned himself into bankruptcy on June 24, 1999. He did not list the Plaintiff as a contingent creditor. The Plaintiff was not aware of the bankruptcy. On May 12, 2000 the Defendant got an absolute order of discharge from his bankruptcy. The Plaintiff learned of the bankruptcy sometime after July, 2000 when it hired a lawyer to collect on the guarantee.

[8] The requirements of a license and a bond are for the public’s protection, in particular the client of the auctioneer who gives it a chattel to sell and in limited situations the purchaser of a chattel at an auction.

[9] Section 6 Public Auctions Act deals with the forfeiture of a bond. It says:

6 (3) If

- (a) a judgment is obtained by any person against a licensee who is a principal under a bond referred to in subsection (1) or against an auctioneer acting for him.
- (b) the judgment arises out of the failure of the licensee or his auctioneer to perform his obligations in accordance with the terms and conditions of the bond to the person who recovered the judgment, and
- (c) the person who recovered the judgment delivers to the Director
 - (i) a certified copy of the judgment
 - (ii) notice that the judgment has become final by reason of lapse of time or of being confirmed by the highest court to which it may be appealed and has not been satisfied within 30 days after it became final, and
 - (iii) a statutory declaration setting out the particulars of the failure of the licensee or auctioneer to perform his obligations to the person who recovered the judgment.

the bond is forfeited on the Director notifying the surety in writing that the judgment remains unsatisfied 30 days after the date that it became final.

(4) If a bond is forfeited under subsection (3), the surety shall, within 30 days after receiving the notice from the Director under that subsection, pay to the Minister the principal sum of the bond.

(5) If the Minister receives money under subsection (4), he shall pay that money into the Court of Queen's Bench in trust for those persons who obtain judgments against the licensee or auctioneer and comply with this section, and the Court shall, not less than 1 year after the forfeiture of the bond, pay out that money to those persons.

(6) If the amount of money paid into Court under subsection (5) is insufficient to satisfy the judgments referred to in that subsection the Court shall pay out the money on a pro rata basis.

(7) If, after paying out all judgments under subsection (5), there is a surplus of money, the Court shall pay that surplus to the surety.

(8) A licence terminates if the bond provided by the licensee under this Act

- (a) is forfeited, or
- (b) terminates, unless prior to the termination of the bond the licensee provides a new bond in accordance with this Act.

[10] Section 10 gives a measure of protection to purchasers at an auction in limited circumstances. It says:

10(1) If a person causes any goods valued at more than \$500 to be offered for sale by public auction, the auction sales business shall, before the sale is held, obtain from that person a statutory declaration in writing made or signed by him or by some other person authorized by him and who has knowledge of the facts, setting out whether or not the goods offered for sale are subject to a mortgage, charge, lien or encumbrance and, if so, full particulars of the mortgage, charge, lien or encumbrance.

(2) No auction sales business shall sell by public auction any goods in respect of which it must obtain a statutory declaration under subsection (1) without first obtaining the statutory declaration.

(3) If an auction sales business

- (a) sells by public auction goods valued at more than \$500 without first obtaining the statutory declaration required under subsection (1), or
- (b) sells by public auction goods valued at \$500 or less without first obtaining a statutory declaration that complies with subsection (1).

it is liable to the purchaser of the goods for the losses sustained by the purchaser resulting from any mortgage, charge, lien or encumbrance to which the goods were subject at the time of sale.

[11] If an auctioneer sells a chattel he is supposed to give the net sale proceeds to his client and if he does not sell the chattel he is supposed to return it to the client. The bond provides some protection to clients from the occasional unscrupulous auctioneer.

[12] By letter dated December 17, 1999 to the Plaintiff the Director “forfeited” the bond because a claim for \$1,970.24 was filed with the Director. At that time the Defendant was in bankruptcy. The demand by the Director does not identify the claimant or how the claim arose and when it arose.

[13] The Plaintiff paid the Director \$25,000.

[14] On February 22, 2000 the Director told the Plaintiff of a second claim for \$2,719.72. On March 24, 2000 the Director told the Plaintiff of a third claim for \$440. On April 6, 2000 the Director told the Plaintiff of two more claims for \$2,014.74 and \$4,707. On April 17, 2000 the Director told the Plaintiff of a sixth claim for \$12,584. During this time the Defendant was still in bankruptcy.

[15] On July 24, 2000 the Director told the Plaintiff of yet another claim for \$726 and on January 2, 2001 he told the Plaintiff of a final claim for \$14,468.12. These two claims were after the bankrupt got his discharge.

[16] The details of the claims are not before me. I conclude that all the claims are covered by the bond. There is no good reason for the Director to tell the Plaintiff of claims other than those covered by the bond. If it becomes necessary the details can be gotten either from the Director or the Court file of the Clerk to whom the Director paid the \$25,000 pursuant to s. 6(5). There has to be a lawsuit by each claimant against the company and a judgment in favour of each claimant: s. 6(3) Public Auctions Act.

Issue

[17] The lawsuit was started January 31, 2001, which is after the date that the Defendant got his absolute discharge from bankruptcy.

[18] The sole issue is whether the Defendant’s liability on the guarantee was released by the order of discharge: s. 178(2) BIA. The answer to that depends on whether the Plaintiff’s claim is a claim “provable in bankruptcy”. If it is not a claim provable in bankruptcy the BIA gives no protection to the Defendant.

[19] The relevant section is s. 121. It provides in part:

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.

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[20] The Defendant's position is that because the guarantee was given before the date of bankruptcy his liability on it is a liability within the scope of s. 121(1).

[21] At the outset it must be emphasized that this is not the usual situation of a lender (creditor), a borrower (debtor) and a guarantor. In that situation the debtor must do a positive act, pay the debt, and if he does not do so the guarantor is obligated to do so.

[22] In the present lawsuit those are not the facts. The company's obligation is to reimburse the Plaintiff if the Director forfeits the bond and only to the extent that the Plaintiff suffers a loss, which is capped at \$25,000.

[23] If the bond is not forfeited there is no loss by the Plaintiff. If the bond is forfeited but the total claims are less than \$25,000 the Plaintiff's loss is just the total amount of the claims because what is left is paid by the Clerk to the Plaintiff.

[24] Whether the bond is forfeited depends on certain facts.

[25] In the usual guarantee situation there are three certain facts:

- (a) there is a debt,
- (b) the debt must be paid,
- (c) the amount of the debt is certain.

The only uncertainty, for a guarantor, is whether the debtor will pay the debt.

[26] In the present lawsuit the uncertainties, for the Defendant as guarantor, are greater:

- (a) will the company commit acts of default which would give claimants access to the bond,
- (b) will claimants sue the company and get judgments against it,
- (c) will claimants then give notice to the Director,
- (d) will the Director forfeit the bond,
- (e) what will the claims total,

(f) will the company reimburse the Plaintiff.

[27] If facts (a) and (b) do exist fact (c) will probably exist and facts (d) and (e) will then certainly exist. But facts (a) to (c) are sequential. Facts (a) and (b) must exist before facts (c) exists. If facts (a) and (b) do exist fact (c) is a high probability and fact (d) is a certainty because the legislation requires the Director to forfeit the bond.

[28] The point of all this is that the uncertainties for the Defendant, as guarantor, are greater than in the usual situation. The contingencies are greater.

[29] Section 121(1) BIA refers to "claims provable". ***Farm Credit Corp. v. Holowach (Bankrupts)***, (1988) 86 A.R. 304 (C.A.) says that a provable claim must be one recoverable by legal process, para. 7. That is not to be taken as meaning that the creditor must have a cause of action at the date of bankruptcy. That was not the issue before the Court so of course the question remains whether a claim which is contingent at the date of bankruptcy is a claim provable in the bankruptcy.

[30] There is no evidence that anything happened prior to the date of bankruptcy that would have given the Plaintiff a cause of action at the date of bankruptcy. What is clear is that the bond was forfeited after the Defendant went into bankruptcy. Prior to the forfeiture the Plaintiff would not have had a cause of action against either the company or the Defendant.

[31] There is also no evidence before me of any facts prior to the date of bankruptcy to assist me in valuing the Plaintiff's claim if it is a provable claim. I refer here to the problem in applying s. 121(2).

[32] The Plaintiff's claim against the Defendant would be a contingent liability because of the six facts I have earlier identified.

[33] The indemnity agreement between the Plaintiff and the company provides that:

... the [company] does hereby agree to indemnify and save harmless the
[Plaintiff] from and in respect of any and all liability, claims or demands to
which the [Plaintiff] may be exposed or subject and all loss, costs, damages and
expenses whatsoever or liability thereunder, which the [Plaintiff] may be called

upon to sustain or incur, or does sustain or incur by any reason of the said Bond ... and to immediately upon the demand of the [Plaintiff], pay to the [Plaintiff] a sufficient amount to meet the payment of any loss damage, costs, charges or expenses, that the [Plaintiff] may be called upon to sustain, or has sustained, by reason of the said Bond.

[34] The indemnity agreement also says:

AND IT IS FURTHER AGREED THAT:

.....

(e) The [company's] liability to the [Plaintiff] hereunder shall arise immediately when the [Plaintiff] has made any payment or has undertaken to incur any loss or expense in connection with the said Bond, or has been served with notice by the Director requiring payment under the said Bond pursuant to provisions of the said Public Auction Act.

[35] In this case the Defendant's liability to the Plaintiff is co-extensive to the company's liability to the Plaintiff: ***Meridian Developments Ltd. v. Nu-West Group Ltd.***, (1984) 52 A.R. 248 (C.A.), para. 27:

Prima facie a guarantor's obligations are co-extensive with those of the principal debtor but the starting point must always be to analyze the nature of the guarantor's undertaking. . . . It is also important to an analysis of the problem to remember that though the obligations of surety and principal debtor are often co-extensive they are, nevertheless, separate and distinct obligations.

[36] I have earlier identified the relevant provision in the guarantee. For convenience I set it out again. The Defendant:

"... unconditionally guarantees payment to the [Plaintiff] of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the [company] to the [Plaintiff] now or hereafter incurred or arising from the said Agreement of Indemnity or any other agreement or obligation ... and ... agrees to indemnify and save harmless the [Plaintiff] from and in respect of any and all liability ... by reason of the said Bond ..."

[37] I am satisfied that the Defendant's liability is co-extensive to that of the company's liability.

[38] [At this point I will deal with a submission made by a prior counsel who appeared for the Plaintiff on the initial applications.] The guarantee also says in part:

10. No suit based on this guarantee and agreement shall be instituted until demand for payment has been made ...

The submission was that there is no liability by the Defendant until a demand is made.

[39] I do not agree. Clause 10 does not say that. The answer to that submission is found in ***Alberta Agricultural Development Corp. v. Smith***, 13 Alta. L.R. (3d) 338 (C.A.), paras. 44-46.

[40] I do not know if Mr. Heinz, who now appears for the Plaintiff, also supports that submission.

[41] Although clause (e) of the indemnity agreement says that the company's liability to the Plaintiff "shall arise immediately" when the Plaintiff has paid to the Director or has been served with a demand for payment by the Director that does not mean that there is no liability until one of those facts happens. That would confuse formation of a contract with performance of obligations under a contract. There is a liability by the company but it must perform its obligation to the Plaintiff only on the happening of certain facts. Performance is contingent on the happening of certain facts.

[42] Those facts are:

- (a) the company commits acts of default which give claimants access to the bond,
- (b) claimants sue the company and get judgments against it,
- (c) claimants give claims to the Director.

If those facts occur the Director will demand that the Plaintiff pay \$25,000 under the bond. The company's obligation to pay the Plaintiff is contingent on those facts happening and, as the Defendant's obligation to pay the Plaintiff is co-extensive to the company's obligation to pay, the Defendant's obligation to pay the Plaintiff is also contingent on those facts happening.

[43] In deciding if the Defendant's liability on the guarantee is a claim provable in the bankruptcy the relevant point in time is the date of the bankruptcy. Section 121(1) BIA also encompasses claims that might arise before the Defendant gets his discharge. However, the later forfeiture of the bond does not change the fact that at the date of bankruptcy the

Plaintiff's claim would still be a contingent claim. That then brings s. 121(2) into play. I set out the sub-section again:

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[44] In this case that is little assistance. Section 135 deals with the case where a claimant submits a claim in the bankruptcy. The section says in part:

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.

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[45] Because s. 135 never came into play I am now asked to decide if the Plaintiff's claim on the guarantee is a contingent claim, which it is, and whether it can be valued, and if so what is its value. I must decide whether the claim can be valued because, if it cannot, it is not a provable claim in the bankruptcy and so the order of discharge is not a defence.

[46] *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.*, [1992] 4 W.W.R. 309 (Alta. C.A.) holds that facts occurring after the date of bankruptcy based on a pre-bankruptcy contract can give rise to a claim provable in the bankruptcy. The issue was whether mortgagees could claim in the bankruptcy for costs incurred after the date of bankruptcy, where the claims for costs were based on indemnities by the bankrupt found in pre-bankruptcy mortgages. The trustee's position was that these costs were not provable claims.

[47] The Court starts out:

... Also, no rule of law forbids simpliciter the enforcement, for costs incurred by the creditor after bankruptcy, of a pre-bankruptcy cost indemnity given by the bankrupt.

(p. 311)

.....

It is common ground that no term in the statute clearly and unequivocally resolves either dispute, and no authority has yet reached precisely these topics. In my view, I stated the correct rules for the case at the start, and for the reasons that follow.

[48] In discussing the issue the Court says, pp. 316-319:

In my view, the costs rule proposed by the trustee offers even greater difficulties.

Again, the trustee relied upon s. 121(1) as prohibiting future claims. Again, it had to acknowledge that a demand for costs incurred after bankruptcy that invokes an agreement made before bankruptcy falls within the scope of entitlement under that section. The precise point came before Baron Pollock and Viscount Cave in 1886: see *Re Smith; Ex parte Edwards* (1886), 3 Morr. 179 (Div. Ct.), at pp. 183-85.

In its factum, the trustee offered only an argument based upon the limit on future charges implied by operation of the valuation procedure in s. 121(2). In oral argument, Mr. Robinson expanded this by relying upon an analogy to the common law about post-bankruptcy interest.

I will first deal with the argument based upon s. 121(2). It provides:

(2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value the claim, and the claim shall after that valuation be deemed a proved claim to the amount of its valuation.

The trustee argued that this rule limits future exactions to those that can be valued before they arise. Future costs, unlike future interest, cannot readily be calculated in advance.

I agree that this rule can limit future claims that otherwise fall within the scope of entitlement. In fact, some may not be provable when the trustee calls for proof. The trustee cites two examples: *Re Carling Acceptance Ltd.* (1976), 22 C.B.R. (N.S.) 258 (Ont. S.C.), and *Re Stone* (1980), 34 C.B.R. (N.S.) 87 (Ont. S.C.). Both offer difficulties. In *Carling*, the court first found that the challenged demand was, by its terms, conditional. It then found that the condition, in fact, would never be met during the bankruptcy. The condition required that the bankrupt have a large surplus! One might dismiss the decision as merely one where the claimant failed to prove its case. In *Stone*, the bankrupt had guaranteed a debt payable by instalment. The primary debtor had defaulted, but, on the date of bankruptcy, only a portion of the debt had become due and payable. The claim of the primary creditor against the estate of the guarantor bankrupt was limited to what was due. That decision might be doubted because

some contingent future liability existed to be valued: See, contra, **Re Froment**, [1925] 2 W.W.R. 415, 5 C.B.R. 765, [1925] 3 D.L.R. 377 (Alta. T.D.), at p. 423 [W.W.R.]. Ironically, in that case the court did not discount the award for the contingency that the primary debtor might pay.

One must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process: see **Smith v. Elliot Lake Ready-Mix Ltd.**, [1961] O.W.N. 285, 2 C.B.R. (N.S.) 187 (H.C.), at p. 190 [C.B.R.] and **Manitoba Public Insurance Corp. v. Wallace** (1988), 69 C.B.R. (N.S.) 56 (Man, Q.B.), at p.59:

The trustee asserted that all must be valued as at the date of bankruptcy. As this case can be decided without challenge to this assertion, I accept it for that purpose. But I note that judicial valuation occurs only when the trustee asks for it. The valuing court can have regard to events after bankruptcy, and before the hearing, to help it decide. I see nothing in the cases, or in common sense, to the opposite effect. The learned chambers judge here accepted the impossibility of valuation of the date of bankruptcy. I see no evidence to support that finding.

Indeed, I doubt the fairness of reliance on s. 121(2) in this case because the trustee here has yet to make an application and the court has yet to hear the evidence. If we treat this motion for directions as such an application, then the mortgagees can fairly say that, today, they can prove the sums they claim. The situation might have been very different had the trustee brought an application years ago. Of course, the mortgagees did not file a specific claim until 1989, after all securities were realized and a final deficiency calculation available.

.....

In the result, I do not accept that s. 121(2) necessarily defeats the mortgagees in this case.

.....

In conclusion, no rule of law forbids simpliciter the enforcement of a pre-bankruptcy cost indemnity given by the bankrupt to a creditor for expenses incurred after bankruptcy. But a bankruptcy court may refuse to enforce that indemnity. It might refuse when enforcement would countenance abuse of the bankruptcy process; or where a creditor incurred costs other than in a “commercially reasonable fashion.”

[49] **Re Carling Acceptance Ltd.**, referred to in **Abacus Cities Ltd. (Trustee of)**, was affirmed on appeal, 23 C.B.R. (N.S.) 245 (Ont. C.A.).

[50] The issue in *In Re Froment*, referred to in *Abacus Cities Ltd. (Trustee of)*, was whether a surety who had not been called on to pay by the creditor could still prove in the bankruptcy of the debtor. The Court says, p. 423:

. . . given by *The Bankruptcy Act*. That Act extends the rights of persons who are subject to a contingent liability.

Under subsec. (2) of sec. 44 of that Act “all debts and liabilities present and future, to which the debtor is subject at the date of the receiving order or the making of an authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment, if the claim is based upon a contract or promise as provided for in subsec. (1) of the same section. The provisions of these subsections are similar to those contained in *The Bankruptcy Acts* (Imp.) 46 & 47 Vict. ch. 52, sec. 37, and 4 & 5 George V., ch. 59, sec. 30, under which sections the right of proof on the part of a surety has arisen in numerous cases as a result of which “it is now established, notwithstanding the doubts expressed in *In re Parrott; ex parte Whittaker*, 8 Morr. 49, 63 L.T. 777, that the contingent liability of a surety who has not been called upon to pay, or has not in fact paid, forms a debt provable in the bankruptcy of the principal debtor (*In re Paine; Ex parte Read*, [1897] 1 Q.B. 122, 66 L.J. Q.B. 71; *In Herepath and Delamr; Ex parte Delmar*, 7 Morr. 129; *In re Blackpool Motor Car Co. Ltd.* [1901] a Ch. 77, 70 L.J. Ch. 61) and that one surety can prove in the bankruptcy of a co-surety for contribution, although the proving surety has not paid the creditor anything (*Wolmershausen v. Gullick* [1893] 2 Ch. 514, 62 L.J. Ch. 773” [*Williams on Bankruptcy*, 10th ed., p. 161; 12th ed., p. 153.]

[51] As *Re Abacus Cities Ltd. (Trustee of)* points out, *In re Froment* did not discount the surety’s claim.

[52] *In re Froment* was referred to and accepted as sound law in *Cuchuran v. Dubitz* [1945] 3 W.W.R. 541 (Alta. D.C.).

[53] *Re Abacus Cities Ltd. (Trustee of)* was referred to in *Re Abacuas Cities Ltd. (Trustee of) v. Fidelity Trust Co.*, 63 Alta. L.R. (3d) 390 (Q.B.). It says, p. 392:

I agree with an accept the obiter of Kerans J. in determining how to value these claims. The valuation in this case will be a two step process. First, pursuant to s. 121 the claim is to be fixed on the date of bankruptcy and , in this case, the measure will be the undischarged accumulated second mortgages at the date of bankruptcy. Secondly, the Court will take into consideration those

acts by the trustee which result in a decreased in the amounts owed to Fidelity which occur after the date of bankruptcy, and it will also take into consideration any acts by the claimant which would result in the mitigation of the claimant's own losses.

(emphasis mine)

[54] ***Claude Resources Inc. (Trustee of) v. Dutton***, 22 C.B.R. (3d) 56, (Sask. Q.B.) says that if there are too many "ifs" to a contingent claim the claim is not a provable claim. It also says that if valuation is "speculative in the extreme" the claim is not provable under s. 121(2).

[55] ***Re Wiebe***, 30 C.B.R. (3d) 109 (Ont. S.C.) applies ***Claude Resources Inc. (Trustee of)*** and valued the contingent claim at 10% of its face value.

[56] ***Re Confederation Treasury Services Ltd.*** 43 C.B.R. (3d) 4 (Ont. C.A.) casts some doubt on ***Re Wiebe*** and ***Claude Resources Inc. (Trustee of)***. It says, pp. 6-7:

We turn to the appeal itself. Section 121 of the BIA deems 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 to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E&Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rehabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.

In so far as the case of ***Claude Resources Inc. (Trustee of) v. Dutton*** (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.), and ***Re Wiebe*** (1995), 30 C.B.R. (3d) 109 (Ont. Bkcty.), relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the BIA.

Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the BIA, the matter is remitted to the Ontario Court (General Division) to value E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E& Y's claim shall be deemed a proved claim to the amount of its valuation.

[57] Counsel referred to only one decision, *Ontario New Home Warranty Program v. Jiordan Homes Limited*, 43 O.R.(3d) 756 (S.C.J.). The facts are these.

[58] The bankrupt was a shareholder of a house building company. He gave a guarantee to the plaintiff to indemnify it if it had to make good any obligations of the company under the new home warranty program. Some time later the bankrupt assigned himself into bankruptcy. The bankrupt was later discharged. A day later a claimant made a claim against the plaintiff and the plaintiff paid the claim. It then sued the bankrupt on the guarantee.

[59] The Court says: p. 758:

The plaintiff is claiming the \$8,000 from the defendant under his personal guarantee.

There are two issues: first, did the bankruptcy terminate the guarantee? Second, if not, is the claim barred because of the defendant's bankruptcy?

Counsel advise me there are no cases on point.

(emphasis mine)

[60] This is the Court's analysis and decision, pp. 758-59:

Section 69 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, states that a creditor has no remedy against an insolvent for a claim provable in bankruptcy.

Section 121(1) states:

121(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Subsection (2) provides that the court shall on application by the trustee determine whether any contingent claim is a provable claim. No such application was made.

It appears to me that when the defendant went bankrupt, the claim by the plaintiff against the defendant was a future liability to which the defendant might theoretically become subject before his discharge by reason of an obligation incurred before the date of the bankruptcy. The obligation was the indemnity agreement.

The theoretical risk was this: before the defendant's discharge, Jiordan had failed to close the sale, and if it did not repay the deposits, Ramos might claim the amount from the plaintiff, and the plaintiff might pay and claim the amount from the defendant. However, s. 121(1) makes the claim a provable claim only if the defendant "is subject" to a liability before his discharge; that is, it is a provable claim only if the defendant actually becomes liable before his discharge. While the section includes liabilities which may become due at a future time after discharge, it appears to me that it does not include liabilities which do not arise until after discharge.

Here, the defendant did not become subject to a liability until the plaintiff made the payment for which it claims indemnity and that payment was made after discharge.

Consequently, I conclude that the claim in this action was not a provable claim in the defendant's bankruptcy and this action is not barred by s. 69 of the *Bankruptcy and Insolvency Act*, as amended.

Did the Bankruptcy Terminate the Guarantee?

There appears to be no provision in the Act which governs this issue.

It may seem anomalous that where a person's wealth is erased by bankruptcy, and that wealth is the reason why he was asked for and gave a guarantee, that he should continue to be liable on the guarantee after bankruptcy for claims which were not provable in bankruptcy and therefore not erased by it. However, I can see no indication in the Act that the guarantee should somehow evaporate in the bankruptcy. If the bankrupt were a party to other kinds of contracts which imposes obligation on him then these would not evaporate because of the bankruptcy.

I conclude that the guarantee here survives the bankruptcy and that the Act does not bar this action.

[61] First, on the facts, those are not the facts before me. The Director made the demand on the Plaintiff while the Defendant was in bankruptcy and the Plaintiff paid the Director \$25,000 while the Defendant was still in bankruptcy.

[62] Second, I question the statement that the bankrupt is not “subject to a liability” until and unless the plaintiff paid a claim. That overlooks the fact that the bankrupt’s liability is a contingent liability and s. 121 recognizes contingent liabilities.

[63] Third, the statement that counsel did not provide any “cases on point” invites the comments of McCardie J. in **Abrahams v. Buckley**. [1924] 1 K.B. 903, p. 907:

Half the bulk and much of the confusion of English case law springs from the fact that many decisions are given without adequate reference to the particular authorities which bear on the point at issue. If those authorities are before the Court then a decision, be it right or wrong, is, at all events, given with knowledge of the appropriate cases. If not before the Court, then obscurity and inconsistency take a new birth.

It is counsel’s responsibility to research the law.

[64] Each party applies for summary judgment.

[65] On a summary judgment application the test is whether there is a genuine issue of material fact requiring a trial: **Guarantee Co. of North America v. Gordon Capital Corp.**, (2000) 247 N.R. 97 (S.C.C.), para. 27; **Kruetner v. Waterloo Oxford Co-operative Inc.**, 50 O.R. (3d) 140 (C.A.); **Blackburn v. Lapkin**, 28 O.R. (3d) 292 (Ont. C.J.). That also applies when there is a genuine issue of law.

[66] Where a defendant applies for summary judgment the test is set out in **Huet v. Lynch**, 184 D.L.R. (4th) 658 (Alta. C.A.), para. 20:

The standard of proof applicable to a defendant under Rule 159 is high. It is not enough that the defendant shows a strong likelihood of success. There must be no reasonable prospect of success.

See **Ghermezian v. Corey Developments Inc.**, Q.B. 9903 22832 and 0003 09356, Oct. 29, 2001 (Q.B.) for a more comprehensive analysis of the law on summary judgment applications.

[67] Each party adopts a position which ignores all the case law I have referred to except the one case cited by counsel, **Ontario Home Warranty Program**. That case has no precedential value.

[68] Where a surety (regardless of the form that the suretyship take) goes bankrupt before the protected party claims on the suretyship contract the case law does treat the bankrupt’s

liability on the suretyship contract as a contingent liability. Section 121 BIA does give recognition to contingent liabilities. The issues then are whether that contingent liability can be valued and if so what value should be given to that liability.

[69] *In Re Froment* did not “discount” the surety’s liability. That is, the contingent liability was valued for its full face value. I do not read the case as saying that as a matter of law a surety’s contingent liability must be valued at its full face value. That would be contrary to s. 121(2), which requires a valuation. The full face valuation in *In Re Froment* is just a decision on the facts on what value should be given to the surety’s contingent liability.

Decision

[70] I consider the present applications can be properly disposed of based on *Abacus Cities Ltd. (Trustee of)* and *Re Confederation Treasury Services Ltd.*

[71] First, I conclude that the Defendant’s liability is a contingent claim within s. 121 BIA.

[72] Second, I conclude that the only issue is the value of the liability. If the liability can be valued the amount of the value is caught by the order of discharge and the Defendant is released from liability to the extent of the valuation: s. 178(2) BIA. If the liability is valued at less than \$25,000 the Defendant is not released from liability for the difference. If the liability cannot be valued the Defendant is not released from any liability based on the guarantee.

[73] I follow the thrust of *Re Confederation Treasury Services Ltd.* and direct that this lawsuit go to trial solely to determine amount: Rule 159(5).

[74] Costs of both applications will be in the cause.

HEARD on the 26th day of October, 2001.

DATED at Edmonton, Alberta this 9th day of January, 2002.

M. FUNDUK
M.C. C.Q.B.A.

TAB 7

Court of Queen's Bench of Alberta

Citation: BA Energy Inc. (Re) 2010 ABQB 507

Date: 20100805
Docket: 0801 16292
Registry: Calgary

2010 ABQB 507 (CanLII)

In the Matter of Section 193 of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended; and in the matter of the *Judicature Act*, R.S.A. 2000, c. J-2, as amended,

And in the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc.

And in the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended; and in the Matter of BA Energy Inc.

Corrected judgment: A corrigendum was issued on August 13, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine**

Introduction

[1] Dresser-Rand Canada, Inc. ("Dresser-Rand") applies for acceptance of its late amended proof of claim so that it may participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. ("BA Energy") under the *Companies' Creditors Arrangement Act*.

[2] The issue is whether Dresser-Rand, having initially filed a claim which it characterized as fully secured on the basis of holding assets that it described as having a value equal to its claim,

is entitled to file a late amended claim that now alleges that a large portion of the claim is unsecured.

Facts

[3] In 2006, BA Energy had entered into an agreement of sale with Dresser-Rand for the purchase of a wet-gas compressor and ancillary equipment for use at the proposed Heartland Upgrader, a heavy oil upgrader that BA Energy was in the process of constructing at a site near Fort Saskatchewan, Alberta. The total purchase price for this compressor was USD \$8,577,942.39.

[4] On December 30, 2008, BA Energy was granted an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA").

[5] At the time of the filing under the CCAA, BA Energy had paid USD \$7,021,918 pursuant to the purchase agreement, leaving a balance owing of USD \$1,651,543.63. The compressor was still in the possession of Dresser-Rand at its premises in Edmonton, with the exception of some of the ancillary equipment which had been delivered to the proposed site of the Heartland Upgrader.

[6] On March 9, 2009, counsel to Dresser-Rand enquired of counsel to BA Energy and counsel to the Monitor whether the balance of the purchase price would be paid, "failing which Dresser-Rand will be free to exercise its right of sale pursuant to the *Sale of Goods Act*." On May 15, 2009, Dresser-Rand sent a Proof of Claim to the Monitor, signed by Dresser-Rand's General Manager in Canada, indicating that it had a secured claim for USD \$1,655,477.95 and that "in respect of the said debt, we hold assets of the CCAA Debtor valued at \$1,655,477.95 US as security". Under the Claims Procedure Order, claims were to be filed by June 15, 2009.

[7] On August 26, 2009, BA Energy repudiated the purchase agreement and advised Dresser-Rand that it had a duty to mitigate its losses with respect to the terminated agreement.

[8] In an email dated August 31, 2009, counsel to Dresser-Rand asked counsel to BA Energy to confirm that Dresser-Rand was free to deal with the compressor equipment in its possession and enquired whether BA Energy would return the parts in its possession. On the same day, counsel to BA Energy responded that Dresser-Rand could deal with the equipment subject to any requirement to act reasonably in performing its duty to mitigate and said that he would ask his client about the equipment in its possession.

[9] On September 18, 2009, the Monitor advised counsel to Dresser-Rand that, in light of the repudiation, Dresser-Rand's previous claim may have been stayed and that Dresser-Rand may have the right to file "Subsequent Claim" as set out in the Claims Procedure Order. The Monitor also told Dresser-Rand that BA Energy believed that the ancillary equipment in its possession was worth about \$1 million. Counsel to Dresser-Rand responded that he did not believe his client would be interested in the equipment at that price.

[10] On September 22, 2009, Dresser-Rand submitted a Subsequent Claim for USD \$1,651,543.63 (taking into account a further invoice paid by BA Energy). Again, Dresser-Rand in its claim form characterized the claim as secured and, again, the claim form states that Dresser-Rand held assets of the CCAA Debtor valued at USD \$1,651.543.63.

[11] On December 16, 2009, the Monitor issued a Notice of Revision or Disallowance of the claim. This notice indicates that the Proof of Claim as submitted in the amount of USD \$1,651,543.53 was revised and accepted at nil. The Monitor noted as follows:

Retained Assets

[Dresser-Rand] retained possession of certain assets as a result of the termination of the Purchase Order. In the Termination Letter the Applicant directed [Dresser-Rand] to mitigate its losses in respect of the termination of the Purchase Order. The Applicant noted in its review of [Dresser-Rand]'s Claim that the retained assets have a value in excess of the amount of [Dresser-Rand]'s Claim. Accordingly, the Applicant has revised [Dresser-Rand]'s claim to \$0.00.

[12] On December 18, 2009, counsel to Dresser-Rand asked to meet with counsel to BA Energy and the Monitor to discuss the reasoning behind the Notice of Revision, commenting that “(p)reviously you did not dispute our priority to the extent of what we could realize from the equipment we have in our possession.” The email also notes that the compressor is custom-made equipment and that its sale may take some time.

[13] On December 20, 2009, counsel to Dresser-Rand delivered a Notice of Dispute to the Monitor, with a covering letter that noted as follows:

With respect to the enclosed Notice of Dispute, in reviewing the documentation you forwarded to Dresser-Rand Canada, Inc. in this regard, this simply may be a situation where there is misunderstanding of terminology between us. Looking at your statement about the “retained assets”, you do not appear to be disputing Dresser-Rand Canada, Inc.’s right to retain the assets in question (being compressor equipment) and deal with it as it wishes. To this stage, we have always valued the retained assets as being worth as much or more than the debt that is owed by BA Energy Inc. to Dresser-Rand Canada, Inc. We do not believe that you should have put \$0.00 beside the secured aspect of this claim in the Notice of Revision or Disallowance dated December 16, 2009.

[14] The Notice of Dispute lists \$1,651.543.63 under the designation “Reviewed Claim or Subsequent Claim as Disputed” and characterizes this amount as “Secured”. It makes no claim on an unsecured basis. The Notice stipulates that “(t)his claim is fully secured. The Notice of Revision or Disallowance did not reflect this fact.”

[15] A without-prejudice conference call was held on January 6, 2010 among counsel to BA Energy, the Monitor and counsel to Dresser-Rand.

[16] In an email dated January 11, 2010, the Monitor asked Dresser-Rand's counsel whether he had been able to determine the appropriate person for the Monitor to speak to with respect to the equipment in the possession of BA Energy. Counsel to Dresser-Rand responded that he had not and that he was "awaiting the letter [counsel to BA Energy] indicated last week you would be sending on the other point that deals more generally with the claim, etc."

[17] On January 14, 2010, the Monitor sent counsel to Dresser Rand an email that attached a letter that he was asked to review, commenting: ... "let me know if it meets your needs before I finalize it."

[18] The letter, marked "draft", reads as follows:

As Court Appointed Monitor of BA Energy Inc. I am sending this letter to you as a follow-up to our teleconference of January 5, 2010 and to provide more clarity with respect to the Notice of Revision and Notice of Dispute between BA Energy Inc. ("BA Energy") and Dresser Rand Canada, Inc. ("DRC").

As agreed on our teleconference, BA Energy does not dispute DRC's rights to retain the assets in question and deal with them as it wishes. This right means DRC shall have no claim against BA Energy given that the value of the assets are at least as much or more than the claim amount. Furthermore, I must note that DRC will accept all potential risks and rewards of its actions in dealing with the assets. For further clarity, should DRC sell the assets for an amount greater than the amount of the claim filed against BA Energy, then this excess amount benefits DRC. Should DRC sell the assets for an amount less than DRC's claim against BA Energy, DRC will not be able to claim the difference against BA Energy.

I trust this clarifies any misunderstanding between the parties. (emphasis added)

[19] Counsel to Dresser-Rand responded saying that the letter would be reviewed internally and by his client and that he would get back to the Monitor. Numerous emails ensued between counsel to Dresser-Rand and the Monitor. On January 25, 2010, counsel to Dresser-Rand advised the Monitor that "I am told that I should hear from someone in the US part of the organization tomorrow. Unfortunately, many people have become involved within my client and has made it more complex for me to get instructions."

[20] In an email dated January 27, 2010, counsel to Dresser Rand advised the Monitor that:

...my people as of yesterday were still assessing their position, including what can be done with the part of the compressor they have and those parts which BA has in its position. Unfortunately, these machines are very custom made for a

particular customer and are not readily saleable or useable for anyone else. They [sic] inquiries out to see what they can do and hope to get back to me this week.

[21] On February 19, 2010 counsel to Dresser-Rand left a voice mail for the Monitor. The recording was not preserved. Counsel to Dresser-Rand in an email to his client said that in the voice mail, he enquired if BA Energy was interested in making an offer to Dresser-Rand for the compressor “with the concept being that if an acceptable cash offer was made to [Dresser-Rand] for that equipment, [Dresser Rand] would forego any further claim against [BA Energy] for the balance owing.” The Monitor in an email to BA Energy said that in the voice mail, counsel to Dresser-Rand was enquiring whether BA Energy would like to acquire the compressor for an unnamed price and that “if [BA Energy] acquired this equipment then Dresser-Rand would withdraw their claim”.

[22] On February 23, 2010, BA Energy advised the Monitor that it did not wish to purchase the compressor. On the same day, the Monitor filed its Ninth Report with the Court and served it on the parties on the service list. The report states that BA Energy anticipated filing a plan of arrangement which would result in a recovery that would be better than a liquidation, and that it was expected that the plan would be brought to the Court for approval in mid to late March, 2010. During this time period, the Monitor and BA Energy were finalizing the sale of a key asset necessary to fund the plan and were in the course of structuring the plan.

[23] On March 15, 2010, BA Energy filed and served its Notice of Motion for approval to circulate a plan of arrangement and hold a meeting of creditors. Dresser-Rand was not listed either as an affected or unaffected creditor nor was it mentioned on the list of disputed claims.

[24] Apparently, counsel to Dresser-Rand had not yet been added to the service list at this time and did not receive a copy of the Ninth Report until it was posted on the Monitor’s web-site on March 16, 2010. Counsel to Dresser-Rand received a copy of the plan motion materials on March 17, 2010 and requested to be put on the service list on that date. The Monitor also informed counsel to Dresser-Rand on March 17, 2010 that BA Energy was not interested in purchasing the compressor from Dresser-Rand and that it took the position that the Dresser-Rand claim had been satisfied.

[25] On March 18, 2010, the Court approved the circulation of the plan of arrangement to creditors.

[26] On March 26, 2010, Dresser-Rand submitted a late amended proof of claim in which it stated it had an unsecured claim of USD \$1,474,161.63 and a secured claim of USD \$177,382.

[27] On April 5, 2010, the Monitor issued a Notice of Revision or Disallowance relating to Dresser-Rand’s amended proof of claim, with a revised claim amount of zero. The Monitor set out the following as reasons for disallowance:

Dresser-Rand's Late Amended proof of claim dated March 26, 2010, claiming an unsecured claim in the amount of \$1,474,161.63 USD and a secured claim in the amount of \$177,382.00 USD (the "Late Amended Claim") is barred and extinguished pursuant to the claims procedure order dated April 29, 2009 (the "Claims Procedure Order"). The Late Amended Claim is in essence the same as the Initial Claim (as defined below) submitted by Dresser-Rand, which claim has been resolved as described below.

Dresser-Rand was aware of and participated in the claims process established under the Claims Procedure Order. Dresser-Rand's initial proof of claim was received by the Monitor on or about May 15, 2009, as amended to a Subsequent Claim (as defined in the Claims Procedure Order) on September 22, 2009 (the "Initial Claim") following BA Energy's repudiation of the purchase order. The Initial Claim by Dresser-Rand was for \$0.00 unsecured and Dresser-Rand acknowledged it held equipment or collateral of a value equal to its claim.

On December 16, 2009, the Monitor issued a notice of revision or disallowance thereby disallowing the total claim amount listed by Dresser-Rand in its Initial Claim (the "NOR"). The reason for the disallowance in the NOR was that Dresser-Rand acknowledged that it retained possession of the collateral equipment that it held in full satisfaction of the Initial Claim amounts (the "POC Satisfaction"), therefore, Dresser-Rand had no claim against BA Energy. Dresser-Rand did respond by issuing a notice of dispute on December 21, 2009 (the "NOD"); however, the NOD served to only address a "misunderstanding of terminology" on the part of Dresser-Rand regarding the classification of the claim amounts and not a dispute as to or the rejection of the POC Satisfaction. After further discussions between the parties, the Monitor sent draft correspondence to Dresser-Rand's solicitors dated January 13, 2010 affirming the POC Satisfaction, that Dresser-Rand was retaining the equipment in full satisfaction of its claim and that it had the risk and benefit of any potential recovery. Throughout the process leading up to the Late Amended Claim, Dresser-Rand valued the collateral equipment as being worth as much or more than the debt owed by the Applicant.

BA Energy and the Monitor relied upon the proofs of claim as filed in the claims process, including the Initial Claim, in calculating the dividend in the BA Energy Plan of Arrangement filed March 10, 2010 (the "Plan"). The inclusion of the Late Amended Claim would have significantly affected BA Energy's/the Monitor's calculations and provisions contained in the Plan, and the subsequent BA Energy creditor review, consideration and implementation of the Plan.

The Dresser-Rand filing of the Late Amended Claim occurred only after distribution of the Plan proposing a 55% dividend. Allowance of the Amended Proof of Claim would: (i) circumvent the *Companies' Creditor Arrangement Act* (Canada) process, the Claims Procedure Order and provide Dresser-Rand an

unjustified and improper advantage, and (ii) prejudice BA Energy and/or BA Energy's creditors generally in the pro rata or total distribution under the Plan.

[28] Dresser-Rand filed a Notice of Dispute on April 8, 2010, submitting that there was no resolution of its claim as asserted by the Monitor, that it was "prudent and reasonable" for it to amend its claim on March 26, 2010 and that not accepting the claim would be prejudicial to Dresser-Rand and not prejudicial to BA Energy or its creditors. Dresser-Rand filed a Notice of Motion with respect to its claim on April 12, 2010 and served the service list.

[29] The meeting of creditors was held on April 15, 2010. Only one creditor appeared in person: the rest voted by proxy. No-one voted against the plan. Counsel to Dresser-Rand read a prepared statement indicating that it had filed an amended proof of claim that may impact the other creditors if ultimately validated.

Analysis

[30] Dresser-Rand submits that the amended proof of claim it filed on March 26, 2010 is not a "late claim", but merely an amendment to the September, 2009 proof of claim which was filed in a timely manner in compliance with the Claims Procedure Order. I cannot agree with this submission. The amended proof of claim purports to assert an unsecured claim for the first time, a claim that would qualify as an affected claim under the plan as opposed to the fully-secured claim previously asserted. It changes the nature of the original claim to such a degree that it must be considered a new claim and not a mere amendment.

[31] Dresser-Rand initially filed its claim on the basis that it was in possession of assets of such a value as to satisfy its claim and that it was secured by its possession of such assets. It maintained that position for approximately eight months, leading the debtor and the Monitor to believe, not unreasonably, that Dresser-Rand would not be an affected creditor in a plan of arrangement. BA Energy structured its plan on that assumption. Dresser-Rand changed its approach and amended its claim to file in large part as an affected unsecured creditor at a time when it would have been clear to creditors that the distribution to unsecured creditors under a plan would be substantial, albeit prior to a formal vote by unsecured creditors on the plan.

[32] While this application involves a determination of whether Dresser-Rand's late amended claim should be accepted, it is neither a clear case of a creditor "lying in the weeds" nor is it clearly the kind of late claim reviewed by Wittmann, J. A. (as he then was) in *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Alta. C.A.), ("Re: Blue Range Resource Corp."), the leading authority on the assessment of late claims. However, the principles set out in *Blue Range* are relevant to the application.

[33] Wittmann, J. A. set out the following as appropriate criteria for a court to apply to the assessment of late claims:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[34] In identifying these criteria and applying them to specific late claims, Wittmann, J. A. favoured a “blended approach”, taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act*. and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

A. *Inadvertence and Good Faith*

[35] Wittmann, J.A. noted that “inadvertence” in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

[36] BA Energy submits that Dresser-Rand’s conduct in this case cannot be described as careless, negligent or accidental, but arose from a deliberate intent to reframe its claim as an unsecured claim when it became apparent that there would be a distribution to unsecured creditors of approximately \$0.55 per dollar of claim.

[37] It is clear that Dresser-Rand was aware of BA Energy’s process under the CCAA from shortly after the initial order and had retained counsel active on its behalf as early as March, 2009. It filed its initial proof of claim in a timely manner in May, 2009. It was aware from August, 2009 that BA Energy had repudiated the agreement but it was also clear that from March, 2009, Dresser-Rand took the position that it was free to exercise a right of sale of the equipment in its possession. I agree that it cannot be said that Dresser-Rand’s amended proof of claim arose from inadvertence.

[38] BA Energy alleges that Dresser-Rand has acted in bad faith in putting forth its recharacterized and amended claim only when it became apparent that it may do better as an unsecured creditor, given the level of distribution to unsecured creditors anticipated by the successful monetization of assets.

[39] While there is insufficient evidence to reach the conclusion that Dresser-Rand acted in bad faith, it is true that it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. At

the least, Dresser-Rand delayed approximately eight months before taking any substantial or meaningful steps to value the assets in its possession in order to come to a valuation of its security. While Scott Kaffka, an employee of a U.S. affiliate of Dresser-Rand, suggests in his affidavits that Dresser-Rand was investigating the possibility of remarketing the equipment before January, 2010, it is also clear from the affidavits and cross-examination on them that relatively little was done in that regard until Mr. Kaffka became involved and contacted an equipment dealer to obtain an estimate of value for the compressor on January 28, 2010, some eleven months after counsel for Dresser-Rand first stated that it took the position that it was entitled to sell the equipment. It is noteworthy that on January 27, 2010, counsel to Dresser-Rand advised the Monitor that Dresser-Rand was still assessing its position, and that the opinion as to of value that Dresser-Rand relies upon was not formally prepared until March 19, 2010.

[40] The consequences of the delay in adequately investigating the value of the assets it held as security for its claim, which accounts for most of the delay in filing the amended claim, must be borne by Dresser-Rand. The question of the resale value of the compressor was a question within the reasonable control of Dresser-Rand to determine.

[41] The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

[42] The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

[43] Dresser-Rand was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and did so on September 22, 2010, confirming its initial claim with only a slight variation in amount claimed. As late as December 21, 2009, Dresser-Rand characterized its claim as a fully-secured claim its Notice of Dispute and concedes that it believed at least to this point in time that the compressor was worth at least as much as its claim. Dresser-Rand submits that there was delay by the Monitor in responding to the amended claim, but a three-month delay in the circumstances of a large restructuring with many claims is not unusual. Dresser-Rand also submits that the Monitor should have reacted more quickly to its February 19, 2010 suggestion that it was open to accepting an unspecified cash offer from BA Energy to settle its claim. While the Monitor did not respond for roughly a month, it is clear that

the Monitor was involved in preparing and filing a key report on the restructuring with the Court and also involved in a major monetization of BA Energy's assets that would subsequently fund the plan.

B. Prejudice Caused by the Delay

[44] BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from Dresser-Rand. Given what had been communicated among the parties with respect to Dresser-Rand's claim at this point of time, this was not unreasonable.

[45] It is difficult to determine what the effect Dresser-Rand's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted on the plan by proxy, and some of those proxies were authorized before Dresser-Rand served other creditors with a Notice of Motion with respect to its revised claim on April 12, 2010. Dresser-Rand states in its brief that 16 out of 30 proxies were submitted after April 7, 2010. Therefore, roughly half of the creditors in number had already voted on the plan several days prior to receiving notice of Dresser-Rand's late claim.

[46] With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claims accepted by the Court in *Blue Range*.

[47] As noted in *Blue Range* at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

[48] During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's late claim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.

[49] Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: *Blue Range* at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: *Blue Range* at para. 36.

[50] The parties prejudiced by this late amended claim are BA Energy and its parent Value Creation, BA Energy's largest secured creditor. Value Creation refrained from requiring BA Energy to pay all of the proceeds of the assets it had monetized on Value Creation's secured claim and allowed BA Energy to use a portion of those proceeds to distribute to other creditors under the plan. While there is no doubt that Value Creation benefits from BA Energy's restructuring under the CCAA as a continuing entity with surviving assets, the postponement of a portion of Value Creation's secured claim was arrived at in consideration of the status of creditor claims as they had been filed, without Dresser-Rand's late amended claim.

[51] It is not surprising that BA Energy did not attempt to alter its plan after having received notice of Dresser-Rand's amended proof of claim. Given the negotiations that necessarily proceed a vote on the plan, the status of proxy voting and the limited time to the creditors' meeting, BA Energy did not have a realistic opportunity to amend its plan to include Dresser-Rand without the risk of losing support from other creditors and jeopardizing the plan.

[52] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.) at para. 74, Huddart, J. held, in a case where there would have been no effect on other creditors if a late claim was accepted as it would be paid from post-arrangement revenue, that it was fair to refuse to grant leave to the late creditor to commence an action against the debtor company for a number of reasons, noting that "(a) CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself ... As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything."

[53] While the facts of this case are distinguishable from the facts before the Court in *Lindsay*, Dresser-Rand filed a very late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. Dresser-Rand's recovery would be improved considerably by its very late recharacterization of claim if Dresser-Rand's new submissions with respect to the resale value of the compressor is accepted.

[54] Dresser-Rand submits that, from its perspective, the Monitor's draft letter of January 14, 2010 was a "proposed resolution" of the claim, and that thus BA Energy and the Monitor should have been aware from early 2010 that the Dresser-Rand claim was unresolved and that Dresser-Rand would be claiming a deficiency in value as an unsecured claim. While the letter is marked "draft" and the Monitor requested a response before it was finalized, it refers to an agreement reached in the teleconference and the clarification of a misunderstanding arising from the Notice of Revision. While the Monitor was advised that this letter was being reviewed by Dresser-Rand, and Dresser-Rand invited a proposal for settlement on February 19, 2010, it was not until March 26, 2010, ten months after the expiry of the initial claims bar date that Dresser-Rand made its revised position clear to the debtor and the Monitor.

[55] Mr. Kaffka states in his affidavits that Dresser-Rand received a verbal estimate of value from an equipment dealer on January 28, 2010. It may well be that Dresser-Rand did not wish to

disclose the low resale value it was now alleging for the compressor at a point in time when it was hoping that BA Energy would make an offer to purchase the compressor, but this was a strategic decision by Dresser-Rand, and, again, the risk of further delay in clearly communicating its revised estimate of value because of this strategic decision must be borne by Dresser-Rand.

[56] Dresser-Rand also submits that it would have filed its amended claim sooner had the Monitor advised it sooner that BA Energy was not interested in purchasing the compressor. It is true that Dresser-Rand may have been able to file its amended claim at the end of February, 2010 instead of at the end of March, 2010 had the Monitor responded earlier to Dresser-Rand's suggestion that BA Energy may wish to make an offer on the equipment, but it should be noted that Dresser-Rand's "proposal" was merely an invitation to BA Energy to make a settlement offer, and not a proposal specifying an acceptable price for the compressor that may have alerted the Monitor to its importance. The Monitor in the Thirteenth Report to the Court dated April 30, 2010 explained that it did not place a high priority on its response to the voice-mail enquiry as it thought that it was one of several enquiries that Dresser-Rand was making to potential purchasers to of the compressor.

[57] Dresser-Rand submits that BA Energy knew as early as January 14, 2010 (the date of the Monitor's draft letter) that Dresser-Rand may have been in the position of recovering less than it was owed if it sold the equipment. While this was anticipated as a possibility in the January 14, 2010 letter, the responsibility for valuing the equipment Dresser-Rand claimed as its security cannot be transferred to the debtor or the Monitor. Dresser-Rand is in the business of manufacturing and marketing the equipment, and had as late as September 22, 2009 made the formal representation in its revised proof of claim that the equipment was worth the amount of its claim. It appears that in January 2010, an officer of BA Energy enquired of the Monitor whether BA Energy could recover any surplus proceeds from Dresser-Rand's sale of the compressor, further indicating that there is no evidence that either the debtor or the Monitor anticipated Dresser-Rand's late change of position on value.

C. *Other Considerations*

[58] Dresser-Rand submits that equity favours its application, as it is a wronged party with a legitimate claim that has been compromised by the CCAA proceedings. While if Dresser-Rand's current position with respect to value is accepted, it may suffer a deficiency in its claim of roughly \$1.6 million still owing on the purchase price of roughly \$8 million for the compressor, Dresser-Rand has possession of the compressor and current estimates of a deficiency are still speculative. There is no overwhelming equitable consideration that would counter-balance relevant prejudice to BA Energy of the late claim.

[59] Dresser-Rand submits that the situation is similar to that described in *Re Look Communications Inc.* (2005) 21 C.B.R. (5th) 265 (Ont. Sup. Ct. J.). However, this is not a situation where BA Energy was aware at all times of the applicant's claim and did not object, nor is it a case where, had court approval of the claim been sought prior to plan approval, it would be

clear that such approval would be granted as a matter of course. No assumptions can be made about the outcome if this amended claim had been brought in a timely way and disputed.

D. Conclusion on a Late Claim

[60] It would not be fair or equitable to accept this late amended claim. Given the facts of this case, there are no conditions that would alleviate relevant prejudice.

[61] If I am wrong in my assessment of whether the late revised claim should be accepted, I would agree with BA Energy that the claim should not in any event be accepted as set out in the Amended Proof of Claim, but should be remitted to the Monitor to allow a proper consideration of value. BA Energy and the Monitor have not been given an opportunity to test the allegations made as to the resale value of the compressor as would occur in the normal course of a claim, given the timing of the late claim in relation to the plan and its sanctioning. While the parties may not have discussed this in advance of the application, it is clear that this was not a normal claims dispute, but was restricted to the issue of whether the claim should be accepted.

E. Conduct Money

[62] In support of this application, Dresser-Rand filed and relied upon affidavits sworn by Mr. Kaffka, who resides in New York. Mr. Kaffka was cross-examined on these affidavits. Dresser-Rand submits that BA Energy should be required to pay conduct money for Mr. Kaffka's attendance at cross-examination.

[63] BA Energy objects to paying conduct money for Mr. Kaffka's cross-examination because he is not an employee of Dresser-Rand Canada Inc., because he had no involvement with the issues prior to January, 2010 and because Dresser-Rand has employees in Alberta who could have provided an affidavit, including Bill Colpitts, its recently-retired General Manager who was involved with the matter and signed the first Proof of Claim.

[64] Dresser-Rand submits that Mr. Kaffka was an appropriate affiant because he was primarily responsible for Dresser-Rand's mitigation efforts after January, 2010 and because he was the individual who determined the market value of the compressor.

[65] While Mr. Kafka's evidence of pre-2010 efforts by Dresser-Rand to mitigate and to assess value was of necessity hearsay, he was involved in 2010 mitigation efforts. He was not so clearly an inappropriate witness that Dresser-Rand is disentitled to reasonable conduct money. I direct that BA Energy be required to pay reasonable conduct money for Mr. Kaffka's attendance.

F. Costs

[66] This is not an appropriate case to depart from the usual practice with respect to costs in commercial insolvency applications, and therefore both Dresser-Rand and BA Energy will bear their own costs.

Heard on the 1st day of June, 2010.

Dated at the City of Calgary, Alberta this 5th day of August, 2010.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Chris D. Simard and Kelsey J. Drozdowski
Bennett Jones LLP
for Dresser-Rand Canada, Ltd.

David LeGeyt
Fraser Milner Casgrain LLP
for Ernst & Young Inc.

Howard A. Gorman and Kyle D. Kashuba
Macleod Dixon LLP
for BA Energy Inc.

**Corrigendum of the Reasons for Decision
of
The Honourable Madam Justice B.E. Romaine**

The cite in paragraph [32] has been changed to read: *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285 (Alta. C.A.), (“*Re: Blue Range Resource Corp.*”).

TAB 8

[IN THE COURT OF APPEAL.]

C. A.

BONNER AND ANOTHER *v.* TOTTENHAM AND EDMON-
TON PERMANENT INVESTMENT BUILDING
SOCIETY.

1898

Aug. 2, 3;
Nov. 30.

*Lease—Sub-lease by Assignee—Liability of Sub-lessee—Rent reserved by original
Lease—Payment by Lessee—Indemnity—Money paid.*

The lessees of premises having assigned the term, the assignee mortgaged the premises by way of sub-demise. The mortgage provided that, upon default by the mortgagor, the mortgagees might enter into possession, or receipt of the rents and profits of the premises, and demise or sell the same, and out of moneys so received by them, whether as rents and profits or purchase-money, should in the first place pay the rent reserved by the original lease. The mortgagees, having entered into possession, did not pay rent which accrued due under the lease while they were in possession. The lessees, having been compelled to pay it, sued the mortgagees to recover the amount so paid by them.

Held, that the action was not maintainable.

Moule v. Garrett, (1870) L. R. 5 Ex. 132; (1872) 7 Ex. 101, distinguished.

APPEAL from the judgment of Channell J. in an action tried by him without a jury.

The action was brought by the plaintiffs, who were lessees of certain premises, to recover from the defendants, who were mortgagees of the premises by way of sub-demise from one Price, to whom the plaintiffs had assigned the term, the amount of rent which the plaintiffs had been compelled to pay to the lessor and which had accrued while the defendants had been in possession of the premises.

By indenture of lease dated April 3, 1882, the premises, numbered 12 and 14, Lordship Lane, Tottenham, were demised by one Moore to the plaintiffs at the yearly rent of 20*l.*, payable quarterly, for a term of ninety-nine years. The lease contained the usual covenants for payment of the rent reserved, repair, and insurance by the lessees, and a condition of re-entry for non-payment of rent or breach of covenant. By indenture dated April 5, 1889, the plaintiffs assigned the premises for the remainder of the term to Edward Price, who by the said

C. A.

1898

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

indenture covenanted with the plaintiffs to pay the rent reserved by the lease, and indemnify the plaintiffs therefrom.

By an indenture dated October 18, 1889, which recited that Price had applied to the defendants' society to lend him 400*l.* in respect of his forty advanced shares therein for the term of fifteen years, and had offered to pay a premium for that advance which, being calculated according to the rules of the society, amounted to 60*l.*, and was to be added to and treated as part of the principal sum advanced, it was witnessed that, in consideration of the sum of 400*l.* paid to Price by the defendants, he demised the above-mentioned premises to the defendants for the residue of the term granted by the lease, except the last day, by way of mortgage for securing to the defendants the payment by him of 180 advance instalments of 3*l.* 14*s.* each, one of such instalments to become due and be paid on the first Monday in every month, commencing with the month of December then next, and also the payment of all fines and other sums, if any, which, according to the rules of the society, might become payable by him to the defendants. The deed provided for the mortgagor's remaining in possession until default by him in payment of any instalment or fine, or in payment of the rent reserved by the lease under which he held the premises, and that, if such default should be made, the defendants might distrain for the amount of any monthly payments or fines in arrear, and of any payment made by the defendants under the powers by the deed conferred upon them, as for rent in arrear upon a common demise, or enter into possession of, or receipt of the rents and profits of, the premises, and might demise or sell the premises, and should out of the moneys so received by them, whether the same were rents and profits or purchase-money, in the first place pay the rent reserved by the lease under which the mortgagor held the premises, and certain other expenses thereby specified, and in the next place retain for the society all advance instalments, fines, and other moneys which under the deed or the rules of the society were then due to them from the mortgagor, and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would have to be paid by

the mortgagor in case he were about to redeem, and should pay the surplus, if any, to the mortgagor. On November 13, 1891, Price was adjudicated bankrupt. The defendants entered into possession of the premises, and had continued in possession ever since. The defendants not having paid rent reserved by the original lease during the time they were so in possession to the amount of 97*l.* 0*s.* 5*d.* the plaintiffs were compelled to pay that rent to the lessor. The learned judge gave judgment for the defendants.

C. A.

1898

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

Aug. 2, 3. *Bray, Q.C.*, and *H. Tindal Atkinson*, for the plaintiffs. The plaintiffs have been compelled to pay that which the defendants by the terms of the instrument under which they held the premises ought to have paid, and the defendants have had the benefit of that payment; for, in the absence of it, the term, upon which their interest in the premises depended, might have been forfeited. The defendants really took the premises subject to the charge of paying this rent, and it is by reason of their default that this burthen has fallen upon the plaintiffs. The case therefore falls within the proposition laid down by Cockburn C.J. in *Moule v. Garrett* (1) to the effect that, "where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid." It is not necessary in a case of this description that there should be between the parties either privity of contract or privity of estate in the sense that the defendants must have the same estate as the plaintiffs had. It is sufficient that the plaintiffs were compellable and have been compelled to pay a sum of money through the default of the defendants, which payment has enured for the defendants' benefit. In such a case the law, in order to do justice, implies a request by the defendants to the plaintiffs to make the payment, which was for the defendants' benefit, and a promise by the defendants to repay the plaintiffs. There was neither privity of contract nor privity of estate between the plaintiffs and the defendants in *Moule v. Garrett*. (2)

(1) L. R. 7 Ex. 101.

(2) L. R. 5 Ex. 132; 7 Ex. 101.

C. A. [They also cited *Sapsford v. Fletcher* (1); *Exall v. Partridge* (2); *Crouch v. Tregonning* (3); *Taylor v. Zamira* (4);
 1898 *Penley v. Watts* (5); *Dawson v. Linton* (6); *Edmunds v. Wallingford*. (7)]
 BONNER
 v.
 TOTTENHAM
 AND
 EDMONTON
 PERMANENT
 INVESTMENT
 BUILDING
 SOCIETY.
Jelf, Q.C., and *Grimwood Mears (G. Spencer Bower with them)*,
 for the defendants. There must be some privity either by
 contract or estate between the plaintiffs and defendants in
 order to support such an action as this. It is essential to the
 right to indemnity in such a case that the defendants and the
 plaintiffs should have been both compellable by law to pay the
 same debt to the same person, and that the defendants should,
 as between themselves and the plaintiffs, be the parties
 primarily liable, the payment being thus for their benefit. In
Moule v. Garrett (8) the defendants were assignees of the term,
 not sub-lessees, and therefore the plaintiff as lessee, and the
 defendants as assignees of the term, were both liable to pay
 the rent, the one by contract and the other by estate; and
 there was privity of estate in the sense that the defendants
 had the estate which had belonged to the lessee. Here the
 defendants have not the same estate as the plaintiffs had, and
 the plaintiffs are not parties to the contract by which the
 defendants undertook to pay rent. No request can be implied
 by the defendants to the plaintiffs to pay the rent due on the
 original lease, which the defendants were not liable to the
 lessor to pay.

[They also cited *England v. Marsden* (9); *Deering v. Winchelsea*. (10)]

H. T. Atkinson, in reply.

Cur. adv. vult.

Nov. 30. A. L. SMITH L.J. read the following judgment:—
 This is an action by plaintiffs who are lessees of premises for a
 long term to recover from the defendants 97*l.*, being rent they

(1) (1792) 4 T. R. 511.

(2) (1799) 8 T. R. 308.

(3) (1872) L. R. 7 Ex. 88.

(4) (1816) 6 Taunt. 524.

(5) (1841) 7 M. & W. 601.

(6) (1822) 5 B. & A. 521.

(7) (1885) 14 Q. B. D. 811.

(8) L. R. 5 Ex. 132; 7 Ex. 101.

(9) (1866) L. R. 1 C. P. 529.

(10) (1800) 2 B. & P. 270.

have had to pay to their lessor under the covenant in their lease, which rent accrued during the time the defendants were in possession of the premises as mortgagees by way of demise from an assignee of the term. Between the plaintiffs and the defendants there exists neither contract nor privity of estate; the defendants were not liable to pay to the plaintiffs the rent in question, nor were they liable to pay it to the plaintiffs' lessor. In these circumstances my brother Channell gave judgment for the defendants, being of opinion that the action was not maintainable, and that the principle of the decision in *Moule v. Garrett* (1) did not apply, the defendants being underlessees and not assignees of the term as in the case cited. My brother Channell held, as I read his judgment, that no request by the defendants to the plaintiffs to pay their lessor the rent in question on their behalf could be implied whereon to maintain the action, and I am of opinion that he was right.

The facts are these. On April 3, 1882, the owner of the premises, Moore, demised them to the plaintiffs for a term of ninety-nine years at the rent of 20*l.* per annum, which the plaintiffs covenanted to pay. On April 5, 1889, the plaintiffs assigned to Price the residue of the term, Price covenanting with the plaintiffs to pay the covenanted rent and indemnify the plaintiffs therefrom. On October 18, 1889, Price demised by way of mortgage the term less one day to the defendants to secure advances made by them to him, and the defendants covenanted with Price that, if they should enter into possession of the premises and receive the rents and profits, they would pay the yearly rent of 20*l.* per annum reserved by the lease of April 3, 1882. In November, 1891, Price was adjudicated bankrupt. The defendants have entered into possession of the premises under their mortgage, and have received the rents and profits thereof in part satisfaction of their mortgage debt, and they have remained in possession ever since. The defendants have not paid the rent which accrued whilst they were in possession, and Moore, the landlord, has compelled the plaintiffs, his lessees, under the covenant in their lease with him to do so;

(1) L. R. 5 Ex. 132; 7 Ex. 101.

C. A.

1898

BONNER

v.

TOTTENHAM

AND

EDMONTON

PERMANENT

INVESTMENT

BUILDING

SOCIETY.

A. L. Smith L.J.

C. A. 1898 they have done so, and they now sue the defendants to recover the amount they have thus had to pay to Moore.

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.
A. L. Smith L.J.

It is clear that no contract or privity of estate exists between the plaintiffs and the defendants, or between the original lessor, Moore, and the defendants; and, unless there be circumstances from which a request to pay can be implied, or, in other words, a contract can be implied between the defendants and the plaintiffs that the defendants would indemnify the plaintiffs if they paid to their landlord the rent accruing whilst they, the defendants, were in possession, there are no circumstances which will support an action by the plaintiffs against the defendants to recover the amount so paid. It is true that Moore could sue the plaintiffs, his lessees, upon their covenant with him in the lease. It is also true that the plaintiffs, the lessees, could sue their assignee, Price, upon his covenant with them. It is also true that Price could sue the defendants, his underlessees, upon their covenant with him. But how can the plaintiffs sue the defendants? I omit Price's trustee in bankruptcy, for he, in my opinion, does not affect this case. It is said that the case of *Moule v. Garrett* (1) shews that the plaintiffs can sue the defendants to recover what they have been compelled to pay to their lessor, and that this case falls within the principle of that case. Now what was the case of *Moule v. Garrett* (1)? It was a case in which there had been two assignments of the term, the defendants being the second assignees thereof. First of all there was, as here, a lease from a lessor to the lessee, Moule, the plaintiff in the action, containing the usual covenants by a lessee. Moule afterwards assigned the term to Bartley, who afterwards assigned the term to the defendants, Garrett & Co., who then committed breaches of covenants in the lease. Moule, having been compelled under his covenant with his lessor to pay to him damages for these breaches committed by the defendants, Garrett & Co., the assignees of Bartley, sued Garrett & Co. to recover the amount so paid by him, Moule, to his lessor. It was held that, inasmuch as both the plaintiff and the defendants were compellable to pay to the original lessor the damages accruing to him for the breaches

(1) L. R. 5 Ex. 132; 7 Ex. 101.

of covenant by the defendants whilst assignees of the term, the former by reason of his covenant with the original lessor and the latter by reason of their being assignees of the term and having committed the breaches whilst assignees, and inasmuch as the plaintiff had been compelled to pay damages to his lessor for these breaches of covenant by the defendants, for which the defendants were also compellable under privity of estate to pay to the lessor, they, the defendants, were liable to indemnify the plaintiff in respect of these payments of which the defendants had had the benefit. For, as Willes J. puts it in *Roberts v. Crowe* (1), the lessee is liable for breaches of covenant committed by the assignee, but being only secondarily liable he has his remedy over against the person primarily liable—that is, the assignee. The ratio decidendi of *Moule v. Garrett* (2) is this: If A. is compellable to pay B. damages which C. is also compellable to pay B., then A., having been compelled to pay B., can maintain an action against C. for money so paid, for the circumstances raise an implied request by C. to A. to make such payment in his ease. In other words, A. can call upon C. to indemnify him. See the notes to *Lampleigh v. Brathwait* (3), and cases there cited. To raise this implied request, both A. and C. must, in my judgment, be compellable to pay B.; otherwise, as it seems to me, the payment by A. to B. so far as regards C. is a voluntary payment, which raises no implication of a request by C. to A. to pay. If Cockburn C.J., in his alternative reason in *Moule v. Garrett* (4) for holding the defendants liable meant this by the expression “by the legal default of another,” I agree; but, if it means by a default for which they were not compellable to pay in that case to the original lessor, I do not agree, and none of the other learned judges who decided that case adopted what Cockburn C.J. then said, and, indeed, Willes J. expressly points out that the obligation of the contract must be common to the plaintiff and the defendant, and that the whole benefit was taken by the defendants. In the present case the defendants are under-

C. A.

1898

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

A. L. Smith L.J.

(1) (1872) L. R. 7 C. P. 629, at p. 637. (2) L. R. 5 Ex. 132; 7 Ex. 101.

(3) 1 Sm. L. C. 9th ed. p. 160.

(4) L. R. 7 Ex. 101.

C. A. 1898
 BONNER
 v.
 TOTTENHAM
 AND
 EDMONTON
 PERMANENT
 INVESTMENT
 BUILDING
 SOCIETY.
 A. L. Smith L.J.

lessees of an assignee of the term, and are not liable at all to the original lessor for rent whenever it accrued, there being between them and the original lessor neither contract nor privity of estate, and there is no suggestion that there were goods upon the demised premises available for distress other than the goods of the mortgagor Price, even if this would have sufficed to maintain the action, about which I say nothing, for it is not before me. The above, in my judgment, is what was decided in *Moule v. Garrett* (1), and the present case, as it appears to me, is an attempt to stretch the decision of that case, and to say that the principle therein laid down applies equally to the case of an underlessee of an assignee who is not compellable to pay the original lessor as to the case of an assignee who is compellable to pay the original lessor. It will be seen upon looking at the case of *Penley v. Watts* (2) that Parke B. deals with this exact point. He says: "The lessee and his assignee are liable to precisely the same extent, and the assignee is a surety for the lessee, but that is not the case in a sub-lease." And, again, in *Moule v. Garrett* (3), in the Exchequer Chamber, when it was suggested that the case of an underlessee of an assignee and an assignee of an assignee were the same, Blackburn J. said: "No, because the underlessee has never come under any obligation to the lessor, but here the defendant, by taking the same estate which the plaintiff had, has become liable to the same obligation," and this is the foundation of the judgment of the Court of Exchequer delivered by Channell B., and the ground upon which the judgment was upheld in the Exchequer Chamber. The fact that in this case the defendants covenanted with Price, the assignee, that if they, the defendants, became mortgagees in possession they would pay the rent, gives Price a remedy against them subject to any set-off which may exist between him and them and does not give the present plaintiffs a right of action against them.

In my judgment, for the reasons above, this action is not maintainable. I agree in the judgment of my brother

(1) L. R. 5 Ex. 132; 7 Ex. 101. (2) 7 M. & W. 601, at p. 608.

(3) L. R. 7 Ex. 101, at p. 102.

Channell and think that this appeal must be dismissed with costs.

C. A.

1898

RIGBY L.J. read the following judgment:—The only question in this case is as to the liability of the defendants, who are mortgagees by sub-lease of an assignee of a lease originally granted to the plaintiffs, to indemnify the plaintiffs in respect of rent recovered by the lessor against them on their covenant in the lease. The mortgagees entered into possession of the leasehold property by virtue of their sub-term in 1890, and the assignee became bankrupt in 1891.

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

Now *prima facie* a sub-lessee of a lessee or assignee of a term comes under no liability to the original lessor either for payment of rent or performance of covenants in the original lease. This is true whether the sub-lease be by way of sale or by way of mortgage, and entry into possession of the sub-term does not make the sub-lessee liable to the lessor. But it is said that the present case is distinguishable from the ordinary case by the fact that the mortgagees expressly covenanted with their mortgagor (assignee of the lease) that, if they entered into possession, they would out of the rents and profits received by them (among other things) pay the rent, and that they have been, as they have, in possession during the whole time during which the rents recovered by the lessor against the plaintiffs, original lessees, have been accruing. The argument is that they are thus placed in the position of the defendants in *Moule v. Garrett* (1), who were held liable to repay to the plaintiff money which the latter had been compelled to pay to the original lessors for breach of covenant in the original lease. In that case the plaintiff, like the plaintiffs here, was an original lessee who had assigned the term before the breach on which he was sued; but the defendants were not, like the defendants here, holders of a sub-term, but were the actual holders at the time of the breach by *puisne* assignment of the whole of the original term, and in that capacity liable by privity of estate to the original lessors for the very damages which had been recovered by them against the original lessee, who in the action was

(1) L. R. 5 Ex. 132; 7 Ex. 101.

C. A. 1898
 BONNER
 v.
 TOTTENHAM
 AND
 EDMONTON
 PERMANENT
 INVESTMENT
 BUILDING
 SOCIETY.
 Rigby L.J.

seeking to recover them over. Both plaintiff and defendants were under a direct obligation to pay the rent to the lessors; but the defendants reaped all the benefit of the payment. It was treated as plain that, as between the plaintiff and defendants, the liability of the defendants to the original lessors by privity of estate was in the nature of a primary liability, that of the plaintiff by privity of contract being secondary; and on this ground the plaintiff was held entitled to recover over against the defendants, as though he were in a manner surety for them for payment of their debt. Here there is no privity either of estate or contract between the defendants and either the original lessor or the plaintiffs in this action, so that there can be nothing analogous to the relation of principal and surety between them. The reasoning in *Moule v. Garrett* (1), therefore, has no application.

If the assignee had been solvent, the plaintiffs would have had a sufficient remedy in recourse to him. The fact of his having become bankrupt can give no right of action against the defendants on the principle of *Moule v. Garrett* (1) which did not otherwise exist. The Legislature has made provision in the Bankruptcy Acts for the adjustment of rights of bankrupt holders of leases and other parties interested; and it is in Bankruptcy, if anywhere, that the plaintiffs must find their remedy.

VAUGHAN WILLIAMS L.J. read the following judgment:—
 In this case Moore, by an indenture of lease dated April 3, 1882, let to the plaintiffs two houses numbered 12 and 14, Lordship Lane, Tottenham, at the yearly rent of 20*l.* The plaintiffs on April 5, 1889, assigned the term to Edward Price, who covenanted to pay the rent of 20*l.* a year reserved by the lease of April 3, 1882, and to indemnify the plaintiffs therefrom. By an indenture of mortgage dated October 18, 1889, Price, in consideration of the sum of 400*l.* lent him by the defendants, the Tottenham and Edmonton Permanent Investment Building Society, demised to the defendants the said houses for the remainder of the said term of ninety-nine years, except the last

(1) L. R. 5 Ex. 132; 7 Ex. 101.

day of such term, by way of mortgage for securing to the society the payment by the mortgagor of one hundred and eighty advance instalments of 3*l.* 14*s.* each, payable monthly, and all fines and other sums which, according to the rules of the society, might become payable by him. The mortgage deed provided for the mortgagor remaining in possession until default by the mortgagor in the payment of the instalments and fines, or in the payment of the rent reserved by the lease under which the mortgagor held, and that, if such default should be made, the society might distrain for the amount of the monthly payments and fines, and the amount of any payments made by the society under the powers thereby conferred upon them, as for rent in arrear upon a common demise, and might enter into possession of the premises or the rents and profits thereof, and might demise or sell the premises, and should, out of moneys so received by them, whether the same were the rents and profits or purchase-money, pay in the first place the rent reserved by the lease under which the mortgagor held, and in the next place retain for the said society all advance instalments, fines, &c., and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would have to be paid by the mortgagor in case he were about to redeem, and pay the surplus, if any, to the mortgagor. Price has become bankrupt, and the defendants have gone into possession. There is no evidence what rents, profits, or proceeds they have actually received. The only remaining fact is that the plaintiffs have been called on to pay, and have paid, the principal rents since April, 1892.

The question raised in this case, namely, whether an underlessee, who is a mortgagee by way of demise from an assignee of the lessee, and who is in possession of the demised lands, can be sued for money paid by the lessee, who has been compelled according to his covenant to pay the rent reserved by the principal lease, has not, so far as I know, been directly determined until now. It is plain that, generally speaking, an underlessee, whether holding of the lessee or of the assignee of the lessee, cannot be under any obligation to indemnify the lessee against the claim of the lessor for the rent reserved by

C. A.

1898

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

Vaughan
Williams L.J.

C. A. 1898
 BONNER
 v.
 TOTTENHAM
 AND
 EDMONTON
 PERMANENT
 INVESTMENT
 BUILDING
 SOCIETY.
 Vaughan
 Williams L.J.

the lease, because the underlessor generally is presumed to indemnify the underlessee against the rent payable by the principal lease: see *Jones v. Morris* (1): and the payment of the rent would not therefore be for his relief. The case of *Moule v. Garrett* (2) does not determine the question, although it goes far to define the principles upon which the question must be decided. In *Moule v. Garrett* (2) the defendants were not underlessees, but assignees of the term, and the ground upon which they were held to be liable was that, the lessee and the defendants both being liable to the lessor upon all the covenants in the lease, which ran with the land, the former by contract and the latter by privity of estate, the defendants, having had the whole benefit for which the covenant was entered into by the plaintiff as lessee, were liable to recoup to the plaintiff the amount which he had been compelled to pay the lessor for breaches of covenant occurring during the defendants' possession. Channell B. in delivering the judgment of the majority of the Court says: "It is true that there is no express covenant between the parties, but they are each liable to the lessor for the performance of the covenants; they are each directly liable, and the lessor may sue either at his option; but the assignee having at the time the estate which has been the consideration for the covenants ought, as between himself and the lessee, to perform them"; and in *Moule v. Garrett* (3) in the Exchequer Chamber Blackburn J. says, "I express my entire concurrence in what fell from Channell B."; and Willes J. says: "I concur upon the ground that where two parties have become bound, the one by contract and the other by estate, to perform the same covenant, the former is entitled to indemnity against the latter to the extent of his interest, although there is no immediate privity of contract between them; and I think that the defendants are liable in this action by reason of their having had the whole benefit for which the covenant was entered into by the plaintiff as lessee. The principle of the decision in *Deering v. Earl of Winchelsea* (4) appears to

(1) (1849) 3 Ex. 742.

(3) 41 L. J. (Ex.) 62.

(2) L. R. 5 Ex. 132; 7 Ex. 101;

(4) 2 Bos. & P. 270.

39 L. J. (Ex.) 69; 41 L. J. (Ex.) 62.

govern the case." Cockburn C.J. bases his judgment on precisely the same ground, but adds: "there is another ground upon which the judgment of the Court below may be upheld, namely, that the premises, the subject-matter of this lease, being in the possession of the defendants, they were the parties whose duty it was to perform the covenants to be performed upon and in respect of those premises, and whose immediate duty it was to keep those premises in repair. By reason of their default the plaintiff, the original lessee, became liable (although he had parted with the estate) by the terms of his covenant to make good to his lessor the damage which had arisen from the default of the defendants; and I take it to be a general proposition applicable to such a case as this, that, where one man is compelled to pay damages by reason of the default of another, he is entitled to recover compensation from the person through whose default that damage is occasioned. The reason for this rule appears to be well stated in Mr. Leake's excellent work on Contracts." (1) The passage referred to runs thus: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount." Now what (according to the judgments of Channell B., Blackburn J., and Willes J.) were the conditions upon which the liability of the defendants to the plaintiff was based? First, that the plaintiff and defendants were both liable to be sued by the lessor for the same breaches of the same covenant. Secondly, that the defendants had had at the date of those breaches the whole benefit of the land the subject of the lease containing that covenant.

These being the conditions upon which the defendants in *Moule v. Garrett* (2), the sub-assignees of the lease, were held liable, it is necessary to consider whether one finds these conditions in principle present in a case in which lessees, who have been compelled to pay the rent reserved by the lease, are seeking to get recoupment from underlessees of an assignee

C. A.

1898

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

Vaughan
Williams L.J.

(1) 1st ed. p. 41.

(2) L. R. 5 Ex. 132; 7 Ex. 101.

C. A.
1898

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

Vaughan
Williams L.J.

of the lease, who are in possession as mortgagees. Now first, as to the common liability of the lessee and underlessee, they clearly are not both liable to be sued by the lessor for rent. The lessee alone can be sued, and the underlessee is only liable to the lessor in the sense that the lessor has a remedy in rem by distress on goods on the property demised and by the power of re-entry for non-payment of rent or breach of covenant. It is in this sense only that the underlessee can be said to be liable to the lessor for the rent, and, so far as distress is concerned, his direct liability is limited to cases in which he happens to have goods on the land, although he may have an indirect liability to indemnify against distress those who by his licence having goods on the land have been compelled to redeem their goods from distraint. Is this a common liability within the reason upon which the condition is based? I think it is not. I am now dealing only with the principle upon which the common law liability is based. **There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued.** The two principles are well illustrated by the case of *Hunter v. Hunt* (1) and the observations of Eyre C.B. in *Deering v. Winchelsea*. (2) The former was a case in which one underlessee of a separate portion of premises, the whole of which were held under one original lease at an entire rent, who had paid the whole rent under

(1) (1845) 1 C. B. 300.

(2) 2 Bos. & P. 270.

threat of distress, brought an action against an underlessee to recover from him a proportion of the money which he had so paid as money paid to his use, and it was held that at law he had no right of action. In the latter case, the Lord Chief Baron, in dealing with the principle in equity, takes as an illustration of the equitable principle a series of cases, in some of which the defendant seems to have been under no liability to be sued, but in which the goods of one had been legally taken or sacrificed for the benefit, not of himself alone, but of himself and others, and says, that "the reason is that they are all in *æquali jure*, and, as the law requires equality, they shall equally bear the burden. This is considered as founded in equity. The principle operates more clearly in a court of equity than at law. At law the party is driven to an *audita querela* or *scire facias* to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law." The *audita querela*, which is a defendant's writ, and the *scire facias* both assume a legal liability to judgment or execution in some person other than him against whom judgment has been obtained. The case also of *Leigh v. Dickeson* (1), in which it was held that one tenant in common of a house who expends money upon the repairs of the house has no right of action against his co-tenant in common for contribution in respect of money so expended, is based upon the consideration that there is no common liability to repair, and seems further to shew that in equity as well as at law there must at least be a legal liability on the plaintiff to pay the sum or bear the burden in respect of which he seeks recoupment or contribution from the defendant. This seems to me to account for the common law condition that the defendant cannot be liable to be sued for money paid unless he is personally liable to be sued for the money which the plaintiff claims to have paid to his use. The common law condition may also be explained by reference to the form of action, "money paid to the use of the defendant at his request," for it seems that, unless the defendant is under a personal liability to pay the money which the plaintiff has

C. A.

1898

BONNER

v.

TOTTENHAM

AND

EDMONTON

PERMANENT

INVESTMENT

BUILDING

SOCIETY.

Vaughan
Williams L.J.

C. A.
1898
BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.
Vaughan
Williams J., J.

assumed to pay for him, one cannot imply the authority from the defendant to the plaintiff to make the payment on his behalf. This proposition does not of course extend to cases where the contractual relation of the parties, whether by express contract or by contract to be implied from their dealings with one another, raises a request or authority to pay, but otherwise I believe it of universal application in an action for money paid: see *Lewis v. Campbell*. (1) For these reasons I think that the right of the lessor to distrain or re-enter does not constitute a liability in the underlessee to the lessor within the meaning of the condition of the common law principle. But the plaintiff may be entitled to recover within the equitable principle, if he has been compelled to pay or bear the burden, and can establish that the defendant has such an interest or benefit as to make the maxim apply "Qui sentit commodum sentire debet et onus"; but in my judgment an underlessee has no such interest in the lease or benefit from the payment of the rent as to make that maxim apply or to bring him within the equitable principle. The equitable principle seems to me based upon natural justice requiring that equity should neutralise "inter se" the accident that the burden has been borne by one for the benefit of others associated with him in interest, whether such incidence of burden is the result of election of a plaintiff who might have sued all those interested, or whether it is the result of the requirements of the law as to the parties to actions, or whether it is the result of what may be more properly called "accident" like the "jettison" of a part of a cargo severally owned, or the seizure of wines on behalf of the Crown in right of prisage. In each of these cases the application of the equitable principle depends on community of interest in something in respect of which one has borne a burden for the benefit of another or others. The covenant in accordance with which a lessee pays rent or expends money in repairs is a covenant in a lease in which the underlessee has no interest. He has no contractual interest, and no estate is vested in him; the only sense in which it can be said that he has an interest in the lease is that the lessee or assignee of the

(1) (1849) 8 C. B. 541, at p. 549.

lease who has granted the underlease cannot defeat his own grant by a collusive surrender of the lease to the original lessor ; and it does not seem to me that this fact constitutes such an interest in him that he can within the equitable principle be said to have an interest in the lease containing the covenant under which the lessee is compellable to do the act alleged to have been done for the benefit of the underlessee. The case of the assignee of a lease on the contrary does shew the necessary interest, as is well illustrated by the judgment of Popham C.J. and the whole Court in the Dean and Chapter of Windsor's case, quoted by Tindal C.J. in *Tremeere v. Morison* (1), "that the action of covenant did lie although the lessee had not covenanted for him and his assigns ; for such covenant which extends to the support of the thing demised is quodammodo appurtenant to it and goes with it : And in respect the lessee hath taken upon him to bear the charges of the reparations the yearly rent was the less which goes to the benefit of the assignee and qui sentit commodum sentire debet et onus." It may be remarked on this passage that the rent payable by the underlessee has no necessary relation to the rent reserved by the lease.

In conclusion, in my judgment the defendants have not, within either the equitable or common law principle, such an interest in the lease that it can be said that the payment by the lessees of the rent reserved by the lease was a payment for their benefit or relief, and I do not think that it makes any difference that the underlease was in fact a mortgage by demise.

The only other question with which I have to deal is the question whether there is anything in the provision in the underlease or mortgage by demise, for the application of the rents and profits to the payment of the rent reserved by the lease in case the mortgagees go into possession, which will enable the plaintiffs to maintain this action. I think not. It is plain that, apart from the provision for the application of rents and profits, an underlessee who has bought an interest by way of underlease from an assignee of the lease by the

C. A.

1898

BONNER

v.

TOTTENHAM

AND

EDMONTON

PERMANENT

INVESTMENT

BUILDING

SOCIETY.

Vaughan

Williams L.J.

(1) (1834) 1 Bing. N. C. 89, at p. 98.

C. A.
1898
BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.
—
Vaughan
Williams L.J.

payment of a lump sum cannot, according to any principle, be called on to pay again for that for which he has already once paid, by indemnifying the lessee against the periodical rent as it accrues from time to time. Now, so far as the clause for the application of the rents and profits is concerned: first, it is plain that the lessee cannot at law take advantage of a contract to which he is not a party. It may be true that the trustee in Price's bankruptcy, who does not seem to have disclaimed, may be entitled to compel application of the rents, profits, and proceeds to the payment of the paramount rent, as being a fund held by the defendants in trust for that purpose, and the plaintiffs are, I think, entitled to insist upon the trustee in Price's bankruptcy on proper terms taking proceedings to enforce the application of the fund; but I do not think that the lessees can, at all events in this action, as framed and with these parties, enforce that trust. It is not as if the defendant society was in course of liquidation, and the lessees were attempting to carry in a proof to enforce the indemnity due from the estate to their debtor. It is sufficient, however, to say that the judgment of Channell J. in the action before him was quite right, and that the plaintiffs cannot in it recover any indemnity from the defendants.

With regard to the second ground upon which Cockburn C.J. based his judgment in *Moule v. Garrett* (1), I do not think that it is anything more than a statement of the principle of *Deering v. Winchelsea* (2), which principle is the foundation of all the cases in which the assignee has been held liable to recoup a lessee who has been compelled to pay rent as it were as surety for the assignee.

It seems to me that no injustice is done to the plaintiffs by holding that they must fail in this action, for I am of opinion that, if they take proper steps against the trustee in bankruptcy, they can in effect recover this rent from the defendants, provided the state of things is such that the trustee can compel the defendants to apply moneys received to the payment of these rents in arrear; and moreover, as the trustee has not disclaimed, they have, it seems, a remedy against the trustee

(1) L. R. 7 Ex. 101; 41 L. J. (Ex.) 62.

(2) 2 B. & P. 270.

personally as an assignee of the lease in respect of such rents as have accrued since the bankruptcy, unless and until the trustee assigns over. I have only to add with regard to the cases of *Sapsford v. Fletcher* (1), *Taylor v. Zamira* (2), *Dawson v. Linton* (3), and *Exall v. Partridge* (4), which were cited to us, that each of these cases turned really on the contractual relations of the parties.

C. A.

1898

BONNER
v.
TOTTENHAM
AND
EDMONTON
PERMANENT
INVESTMENT
BUILDING
SOCIETY.

Appeal dismissed.

Solicitor for plaintiffs: *Albert Saunders.*

Solicitors for defendants: *Howard & Shelton, for C. E. Burrows, Tottenham.*

E. L.

[IN THE COURT OF APPEAL.]

THE LOWER RHINE AND WÜRTENBERG INSURANCE ASSOCIATION v. SEDGWICK.

C. A.

1898

Nov. 26.

Insurance, Marine—Reinsurance—"Subject to same terms as Original Policy"—Policies in existence at Date of Reinsurance—Policies coming into existence subsequently—Limit of Liability of Reinsurer.

A time policy of insurance on a ship was expressed to be "a reinsurance of policy or policies" (here there was a blank space not filled in) "and subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon." The assured had underwritten two time policies on the ship, and these were in force when the reinsurance was effected. Subsequently, during the currency of the reinsurance policy, the two other policies came to an end, and he underwrote a fresh time policy of insurance of the same subject-matter, differing as to the valuation of the ship and in other respects from the two earlier policies. A loss occurred and was paid under the fresh policy:—

Held, that the original policies referred to in the reinsurance policy were the policies then in existence, and that the liability of the reinsurer did not extend to losses which might be incurred by the assured under a policy not containing the same terms, conditions, and clauses as the original policies.

Judgment of Kennedy J., [1898] 1 Q. B. 739, reversed.

APPEAL from a judgment of Kennedy J., reported [1898] 1 Q. B. 739.

The action was brought to recover back money paid by the

(1) 4 T. R. 511.

(2) 6 Taunt. 523.

(3) 5 B. & A. 521.

(4) 8 T. R. 308.

TAB 9

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

COUNSEL: *Douglas J. Wray and Jesse B. Kugler*, counsel for the Applicant,
Communications, Energy and Paperworkers Union of Canada ("CEP")
David Byers and Maria Konyukhova, counsel for the Monitor

PEPALL J.

REASONS FOR DECISION

Introduction

[1] The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

[2] On October 6, 2009, the CMI Entities obtained an initial order pursuant to the CCAA staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

**NO PROCEEDINGS AGAINST THE CMI ENTITIES
OR THE CMI PROPERTY**

15. **THIS COURT ORDERS** that until and including November 5, 2009, or such later date as this Court may order (the “Stay Period”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

[3] On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, “Claim” is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date¹ (a “Prefiling Claim”) and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a “Restructuring Claim”). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

[4] On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

[5] On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

¹ The Filing Date was October 6, 2009, the date of the initial order.

[6] John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership (“CTLP”), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley’s termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union’s ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA]². The Union reserves its right to make further submissions in this regard.

[7] In spite of the parties’ good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

[8] The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

(a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept,

² The words in brackets were omitted but presumably this was the intention.

settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and

(b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

[9] The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

[10] CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

[11] For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

[12] Since the commencement of the CCAA proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

[13] Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of

Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

[14] The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

[15] Both parties agree that the following two issues are to be considered:

- (a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?
- (b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

[16] In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective

agreement would have the effect of depriving the grievor of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

[17] Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

[18] The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

[19] The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

[20] As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services and*

*Support – Facilities Subsector Bargaining Assn. v. British Columbia*³, the claims procedure order does not interfere with freedom of association.

[21] Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

[22] The purpose of the CCAA has frequently been described but bears repetition. In *Lehndorff General Partner Limited*⁴, Farley J. stated:

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

[23] The stay provisions in the CCAA are discretionary and very broad. Section 11.02 provides that:

(1) A court may, on an initial application in respect of the 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;

³ [2007] S.C.J. No. 27.

⁴ (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at para. 6.

(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) 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.

[24] As the Court of Appeal noted in *Nortel Networks Corp.*⁵, the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the CCAA and in particular to enable continuance of the company seeking CCAA protection: *Lehndorff General Partner Limited*⁶.

[25] Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the

⁵ [2009] O.J. No. 4967 at para. 33.

⁶ *Supra*, note 4 at para. 10.

restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lendorff General Partner Limited* ⁷:

The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors.

[26] In *Canwest Global Communications Corp.* ⁸, I had occasion to address the issue of lifting a stay in a CCAA proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* ⁹ and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*" ¹⁰. They included where:

- a) a plan is likely to fail;
- b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
- c) the applicant shows necessity for payment;
- d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

⁷ *Ibid*, at para. 6.

⁸ (2009) O.J. 5379.

⁹ (2000) 19 C.B.R. (4th) 1.

¹⁰ (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

- e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;
- f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;
- g) there is a real risk that a creditor's loan will become unsecured during the stay period;
- h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;
- i) it is in the interests of justice to do so.

[27] The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp.*¹¹:

There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

[28] There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Luscar Ltd. v. Smoky River Coal Limited*¹², the issue was whether a judge had

¹¹ *Supra*, note 8 at para. 32.

¹² [1999] A.J. No. 676.

the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

The above jurisprudence persuades me that “proceedings” in section 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a “proceeding” that can be stayed under section 11 of the *CCAA*.¹³

[29] I do recognize that the *Luscar* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

[30] In considering balance of convenience, CEP’s primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy

¹³ *Ibid*, at para. 33.

before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

[31] The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

[32] Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the CCAA proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

[33] The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of CCAA. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the CCAA proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent CCAA debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

[34] That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to

Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

[35] As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

[36] In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

[37] Section 33 of CCAA was added to the statute in September, 2009. The relevant subsections now provide:

33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in

force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

[38] Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the CCAA in *White Birch Paper Holding Company*¹⁴. He stated that the fact that a collective agreement remains in force under a CCAA proceeding does not have the effect of “excluding the entire collective labour relations process from the application of the CCAA.”¹⁵ He went on to write that:

It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.¹⁶

[39] In *Canwest Global Communications Corp.*¹⁷, I wrote that section 33 of the CCAA “maintains the terms and obligations contained in the collective agreement but does not alter priorities or status.”¹⁸ In that case when dealing with the issue of immediate payment of severance payments, I wrote:

There are certain provisions in the amendments that expressly mandate certain employee related payments. In those

¹⁴ 2010, Q.C.C.S. 2590.

¹⁵ *Ibid*, at para. 31.

¹⁶ *Ibid*, at para. 35.

¹⁷ [2010] O.J. No. 2544.

¹⁸ *Ibid*, at para. 32.

instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.¹⁹

[40] I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the CCAA and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the CCAA or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the Act.

[41] Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

[42] CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the

¹⁹ *Ibid*, at para. 33.

following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the CCAA. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*²⁰, the Supreme Court of Canada stated:

We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of “collective bargaining”, as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. ...

In our view, it is entirely possible to protect the “procedure” known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.²¹

[43] In my view, nothing in the claims procedure or the CCAA impacts the procedure known as collective bargaining.

Conclusion

[44] Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

²⁰ *Supra*, note 3.

²¹ *Ibid*, at paras. 19 and 29.

Pepall J.

Released: April 7, 2011

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
CANWEST GLOBAL COMMUNICATIONS CORP.
AND OTHER APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: April 7, 2011

TAB 10

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF CONFEDERATION TREASURY SERVICES LIMITED, a corporation incorporated under the laws of the Province of Ontario having its head office in the City of Toronto, in the Municipality of Metropolitan Toronto, Province of Ontario, and

IN THE MATTER OF the Winding-Up Act, and

IN THE MATTER OF the Liquidation of Confederation Life Insurance Company

BEFORE: CATZMAN, CARTHY and MOLDAVER JJ.A.

COUNSEL: Peter H. Griffin and Risa Kirshblum for Ernst & Young

A. Sternberg for former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited

William G. Horton for the Rehabilitator of Confederation Life Insurance Company in the United States

R.N. Robertson and E. Lamek for the trustee of the estate of Confederation Treasury Services Limited, a bankrupt

HEARD: December 19, 1996

ENDORSEMENT

Ernst & Young ("E&Y") filed a proof of claim, dated February 21st, 1996, with the trustee of the estate of Confederation Treasury Services Limited ("the trustee"). In one of several orders made on April 8th, 1996, Farley J. granted a motion by the trustee disallowing E&Y's proof of claim. No appeal was taken from this order until its significance became apparent during the argument of the appeal from another order made by Farley J. on the same day. In that appeal, E&Y and the former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited ("the

directors and officers") sought an order that would entitle them to assert a claim against the trustee for relief arising out of their potential liability in an action now pending in Michigan. But only a creditor may seek such leave: see ss. 69 ff. of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("the *BIA*"). Section 2 of the *BIA* defines "creditor" to mean a person having a claim, preferred, secured or unsecured, provable as a claim under the *Act*, and defines "claim provable in bankruptcy", "provable claim" and "claim provable" to include any claim or liability provable in proceedings under the *Act* by a creditor. The trustee resisted the other appeal on a number of grounds, including the ground that, because E&Y's proof of claim had been disallowed, it was not a "creditor" entitled to the relief it sought.

E&Y immediately brought this motion for leave to extend the time to appeal from the order disallowing its proof of claim. The uncontradicted evidence of E&Y is that it always intended to appeal the whole of the disposition of Farley J. made on April 8th, 1996 which had the result of foreclosing its entitlement to assert a claim for contribution and indemnity from the trustee, and we are not satisfied that the trustee would suffer any prejudice from the granting of such leave. Leave to extend the time to appeal from the order disallowing the proof of claim is therefore granted.

We turn to the appeal itself. Section 121 of the *BIA* deems 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 to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E & Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rehabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.

In so far as the cases of *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 and *Re Wiebe* (1995), 30 C.B.R. (3d) 109, relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the *BIA*.

Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the *BIA*, the matter is remitted to the Ontario Court (General Division) to value

E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E&Y's claim shall be deemed a proved claim to the amount of its valuation.

It has been common ground throughout the argument of these appeals that the directors and officers, who have not yet filed a proof of claim with the trustee, fall into the same category as E&Y with respect to the relief sought against them in the Michigan proceedings. Such a proof of claim, as and when it is filed by the directors and officers, is to be treated in the same manner as we have directed in respect of E&Y's proof of claim.

Having regard to the circumstances out of which the appeal from the disallowance of E&Y's proof of claim arose, we order that there should be no costs of this appeal except the usual order for payment of the costs of the trustee out of the estate of Confederation Treasury Services Limited.

TAB 11

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MR. JUSTICE COSTIGAN

IN THE MATTER OF THE BANKRUPTCY OF MERIT ENERGY

BETWEEN:

LARRY DELF, ON BEHALF OF HIMSELF, AND ALL OTHER MEMBERS
OF A CLASS HAVING A CLAIM AGAINST THE DEFENDANTS, MERIT
ENERGY LTD., DUNCAN A. CHISHOLM, KENT J. EDINGA, JOHN W.
FERGUSON, DAVID D. JOHNSON, JOHN P. KAUMEYER, LAWRENCE F.
WALTER, FIRST ENERGY CAPITAL CORP., DUNDEE SECURITIES
CORPORATION, PETERS & CO. LIMITED, NESBITT BURNS INC., NEWCREST
CAPITAL INC., RBC DOMINION SECURITIES INC., BUNTING WARBURG
DILLON READ INC., PRICE WATERHOUSE COOPERS LLP

Appellants
(Plaintiffs)

- and -

MERIT ENERGY LTD.

Respondent
(Defendant)

APPEAL FROM A PORTION OF THE JUDGMENT AND
ORDER OF THE HONOURABLE MR. JUSTICE LOVECCHIO
DATED AND ENTERED THE 17TH DAY OF AUGUST, 2001

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:

W. E. McNally
For the Appellants

F. R. Dearlove
C. D. Simard
For the Respondent

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

CÔTÉ J.A. (for the Court):

[1] The very full reasons of the chambers judge are found at 2001 ABQB 583, and set out the facts and issues sufficiently.

[2] In our view, the tests used by the chambers judge to characterize were the appropriate ones. And reinforcing that view is the applicable standard of review. Since the question is applying an established legal test to a novel fact situation, we owe considerable deference to the chambers judge.

[3] Counsel for the appellant stresses the express indemnity covenant here, but in our view, it is ancillary to the underlying right, as found by the chambers judge. Characterization flows from the underlying right, not from the mechanism for its enforcement, nor from its non-performance.

[4] The appeal is dismissed.

APPEAL HEARD on January 7, 2002

MEMORANDUM FILED at CALGARY, Alberta,
this 11th day of January, 2002

CÔTÉ J.A.

TAB 12

Citation: FBI Foods Ltd. v. Glassner et
al
2001 BCSC 151

Date: 20010201
Docket: C995160
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FBI FOODS LTD. - LES ALIMENTS FBI LTEE.

PLAINTIFF

AND:

IRVING GLASSNER

DEFENDANT

AND:

CADBURY SCHWEPPEES INC. AND CADBURY BEVERAGES CANADA INC.

THIRD PARTIES

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE DILLON

Counsel for the Plaintiff

Michael P. Carroll, Q.C.

Counsel for the Defendant

Richard R. Sugden, Q.C.

Dates and Place of Hearing:

December 12 & 13, 2000
Vancouver, B.C.

[1] The plaintiff claims contribution against the defendant for half of the amount that the plaintiff paid to settle a breach of confidence claim previously brought by Cadbury Schweppes Inc. ("Cadbury") against both parties. This trial proceeded by agreed statement as to all facts with the addition of some discovery evidence read in by the plaintiff. Various judgments also form the background to this case. Third party proceedings between the defendant and Cadbury are left for another day, depending on the outcome of this trial.

Facts

[2] Cadbury successfully sued the plaintiff and defendant for breach of confidence arising from the wrongful use by the plaintiff and defendant of confidential information in the production of a clam and tomato cocktail in competition with Cadbury's own product known as "Clamato". Cadbury was awarded judgment on May 25, 1994 (93 B.C.L.R. (2d) 318 (B.C.S.C.)) against the parties to this action and Lawrence Kurlender ("Kurlender") for damages in the amount that FBI Foods Ltd. ("FBI") or Caesar Canning Ltd. would have paid to develop a product to compete in the tomato cocktail market in Canada. The defendant was found personally liable in the action as a director of Caesar Canning Ltd., the company that originally secured the licence to manufacture and market Clamato cocktail

in Canada, because he knew or should have known that his company did not have licence to copy the Clamato recipe and was "alive to the peril of what his company was doing under his direction" (at 341 and 335). The plaintiff was vicariously liable through its employee, Kurlender, who knew the facts constituting the breach of confidence and indifferently assumed the risk. Although counsel spent much time at this trial explaining the facts that gave rise to the breach of confidence, these facts are detailed in the reasons for judgment at trial and need not be repeated here. Damages were to be assessed on taxation but the parties subsequently agreed that this amount was \$29,761.20 based on the amount that was paid to an expert to figure out the formula for Clamato and basically copy it without containing any clam or seafood product.

[3] In this action, the defendant admitted on discovery that he copied the recipe for "Clamato" without the clam and with different seasonings. The original licence agreement had prohibited the use of clams in any product. When the licence was terminated, all parties initially thought that the restriction against clams was the only operating restriction. However, when the plaintiff and defendant developed a product

that was basically the same without the clams based upon the "Clamato" recipe, Cadbury sued for breach of confidentiality.

[4] Cadbury appealed the Supreme Court decision, claiming damages for lost profit and royalties as well as an injunction to prevent these parties from selling products derived from the Clamato recipe. The plaintiff and defendant cross-appealed, seeking dismissal of the award against them. The defendant prepared a draft factum but never filed it. Instead, the defendant settled Cadbury's claim against him just prior to hearing of the appeal. The terms of this settlement were not made known to the plaintiff until recently.

[5] The settlement between Cadbury and the defendant was in the form of a covenant by Cadbury not to sue and contained the following provision:

FOR AND IN CONSIDERATION of the sum of ONE DOLLAR (\$1.00), and other good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, the undersigned hereby jointly and severally promise, covenant and agree to and with IRVING GLASSNER, his heirs, executors, administrators, agents and assigns, that neither we, or either of us, nor anyone claiming through us, will hereafter bring, commence, prosecute or maintain, or cause or permit to be brought, commenced, prosecuted or maintained, any suit or action, either at law or in equity for any claim or right of action now existing, against IRVING GLASSNER, either personally or in his capacity as a former officer and director of CAESAR CANNING LTD., and that *neither we, nor either of us, nor anyone claiming through us, will enforce, prosecute or*

recover upon, or attempt to enforce, any claim or right of action whatsoever now existing, which we, or either of us, or anyone claiming through us, may now have or may hereafter assert. (My italics)

[6] Cadbury was successful against the plaintiff in the British Columbia Court of Appeal on August 15, 1996 and obtained damages for lost profits for one year plus an injunction (23 B.C.L.R. (3d) 325 (B.C.C.A.)). The one year represented the 'head start time' that a company would have needed to produce a competitive tomato cocktail on the market without the confidential information misused by the plaintiff and defendant. Caesar Beverages Inc., a company owned 50% by the plaintiff and 50% by Caesar Canning Ltd. (a company owned by the defendant and his wife), produced and sold the products during this head start period in eastern Canada. A wholly owned subsidiary of the plaintiff produced the product in the west after purchasing the assets of Caesar Canning Ltd. from a receiver in 1986, but was immune from liability for damages because this involvement was after the head start period. The defendant's appeal against Cadbury was dismissed as abandoned.

[7] Following the judgment of the Court of Appeal, the plaintiff informed the defendant that it reserved its right to claim against the defendant for contribution and indemnity for at least 50% of whatever costs or damages it was obliged to

pay Cadbury as a result of the judgment. It also informed the defendant that it intended to appeal to the Supreme Court of Canada.

[8] On January 28, 1999, the Supreme Court of Canada gave its judgment in the matter (***Cadbury Schweppes Inc. v. FBI Foods Ltd.*** (1999), 59 B.C.L.R. (3d) 1 (S.C.C.)). Liability for breach of confidence was not contested so the Supreme Court was concerned primarily with remedies. The appropriate remedy was fact driven and intended to restore Cadbury's lost opportunity. The court disallowed the injunction and referred the matter back to the British Columbia Supreme Court for assessment of damages upon proper principles. This was to be based upon lost profits from lost market opportunity over the twelve months that it would otherwise have taken the defendants to develop their own product.

[9] The plaintiff immediately informed the defendant that it was examining whether it could claim contribution from the defendant and subsequently informed the defendant that it would be seeking contribution. The defendant was invited to comment upon settlement negotiations that were progressing between Cadbury and the plaintiff but the defendant declined to do so. The defendant was specifically informed about the

settlement offer of \$300,000 and was asked to contribute 50%. The defendant declined to do so.

[10] In the settlement negotiations, Cadbury outlined the value of its claim in excess of \$1,000,000 as related only to lost sales attributable to the plaintiff and not to Caesar Canning Ltd.. The eventual settlement agreement of December 21, 1999 was for payment of \$300,000 to Cadbury in settlement of all claims including the judgment of the Supreme Court of Canada. It included the following payment term:

The said sum of \$300,000.00 will be payable in two equal installments of \$150,000.00. The first such installment will be paid on or before December 31, 1999. The second installment will be payable on the earlier of the date that FBI receives a payment by way of contribution and indemnity from Irving Glassner pursuant to proceedings instituted by FBI against Irving Glassner in the Supreme Court of British Columbia, Vancouver Registry Action No. C995160, or June 1, 2000.

The defendant was not a party to this agreement. The plaintiff now claims contribution for half of that settlement based upon the 50% interest held by Caesar Canning Ltd. in Caesar Beverages Ltd., the company that produced the offending product in the east. The defendant acknowledges ownership of Caesar Canning Ltd. and does not contest the percentage of attribution.

Issues

[11] The plaintiff states that its claim for equitable contribution arose once all appeals had been completed and settlement accomplished. The defendant, however, states that the plaintiff has not proven that any portion of the settlement was paid on behalf of the defendant. He also states that third party proceedings should have been brought in the original actions and delay in doing so has prejudiced the defendant. Further, judicial discretion should be exercised to prevent the claim being advanced at this stage as an abuse of process.

[12] The following questions are to be decided. When did the plaintiff's claim for equitable contribution arise? Has the plaintiff proven that it paid for a portion of the loss for the defendant? Does issue estoppel prevent the plaintiff from proceeding with this claim because it should have brought third party proceedings in the earlier action? Should this claim not be allowed to proceed as an abuse of process?

Analysis

[13] It should be noted from the outset that the plaintiff's claim is for equitable contribution in the nature of unjust enrichment and is not brought under the **Negligence Act**, R.S.B.C. 1996, c. 333. There is no tort involved. The

difference between the principle of common law liability and the principle of liability in equity was stated in ***Bonner v. Tottenham and Edmonton Permanent Investment Building Society*** [1899] 1 Q.B. 161 (C.A.) at 174:

There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued.

The equitable principle requires that the burden borne by one for the benefit of others associated with him in interest, whether borne because of election by a plaintiff of choice of parties or by requirement of law as to parties to actions, be shared equally (*supra* at 175-176). From this, it is clear that it is not necessary for equitable recovery that the beneficiary be sued in the first action in order for a plaintiff to recover a benefit paid. This is different from contribution at law wherein liability must be established in

the initial action (see *Bonner v. Tottenham*, *supra* at 174 and distinguish from *Cook v. Teh* (1988), 28 B.C.L.R. (2d) 300 (B.C.S.C.) at 302 and *Krusel v. Firth* (1991), 54 B.C.L.R. (2d) 392 (B.C.S.C.) at 397).

[14] The rule of equity that allows a right of contribution is that if two persons are equally liable to be sued for one sum, and one is compelled to pay, he has a right of contribution against the other person liable which is measured by the benefit which that person has received by the payment (*Moxham v. Grant*, [1900] 1 Q.B. 88 (C.A.)). The principle found early expression in surety cases where equity provided some relief to common law that said that the surety could not sue until he had actually paid more than his portion of the debt. In equity, the claim could be advanced earlier if judgment had been obtained against the surety for more than his portion. Burnyeat, J. recently restated the doctrine in *Clayburn Industries v. Recor Services* (2000), 78 B.C.L.R. (3d) 19 at 25-26; 2000 BCSC 1069 as follows:

Originally, the right to contribution was only available as between co-sureties for the same debt. The following description is given for the contribution between co-sureties in Snells's Principles of Equity, Sweet & Maxwell Ltd., 1982, 28th ed.:

Where there are two or more sureties for the same debts, and one of them pays the whole debt or more than his proportion of it, he has a right to contribution from his co-surety or co-

sureties if he cannot obtain indemnity from the principle debtor. (at p.469)

No action for contribution could be brought at law until the surety had actually paid more than his proportion of the debt. In equity, however, even before payment it has always been possible for a surety to bring an action in the nature of *quia timet* against his co-sureties if judgment has been obtained against him by the creditor for more than his proportion, or perhaps if he is merely threatened by the creditor with an action for more than his proportion. (at p.470)

The principle of contribution is based on the concept of unjust enrichment and, because it is general in nature, it is not restricted to surety cases. Although the application of the doctrine generally arises in the context of co-sureties or guarantors, the rules extend in general to persons who, in one way or another, incur a common liability where one of them has discharged more than his or her proportionate share of that mutual obligation. The principles of contribution have been extended to cases involving co-insurers, co-mortgagors, co-trustees, corporate directors and partners and other co-obligors but the right to contribution at common law does not apply among joint tortfeasors: *Merryweather v. Nixan* (1799), 8 T.R. 186.

[15] Section 53(3) of the **Law and Equity Act**, R.S.B.C. 1996, c. 253 sets out the principles of contribution between persons jointly liable. But, these same principles are in effect between several concurrent wrongdoers so that once it is determined that the respective wrongs have caused the same damage for which both parties are liable, any difference in the initial wrongs is irrelevant (**Clayburn Industries v. Recor Services**, *supra* at 26-27).

[16] Here, the plaintiff and defendant are concurrent wrongdoers, severally liable because there were different wrongs committed based upon different participation in the breach of confidence. It is conceded that in order for the plaintiff to have an equitable claim against the defendant, it must have borne a burden for the benefit of the defendant. The defendant contests in several ways that any benefit was received.

[17] The defendant says that the amount paid by the plaintiff to Cadbury was for lost profits and royalties and because the defendant was found not liable to Cadbury for lost profits at trial and then settled against Cadbury, the plaintiff cannot seek contribution. While this may be the case at common law (see *Krusel v. Firth*, *supra* at 397; *Sylte v. Jackson Bros. Logging Co.* (1988), 27 B.C.L.R. (2d) 357 (B.C.S.C.) at 363-4); but contra see *Tucker (Public Trustee of) v. Asleson* (1993), 102 D.L.R. (4th) 518 (B.C.C.A.), 78 B.C.L.R. (2d) 173), it is not so in equity where there need be no finding of liability and contribution will ensue as long as a benefit has been paid on the defendant's behalf.

[18] The defendant then argued that the covenant not to sue the defendant given in settlement extinguished the defendant's liability to Cadbury. As such, Cadbury could not have

recovered the whole of its loss from the plaintiff and only recovered that portion attributable to the plaintiff. This is very similar to the argument above and is answered the same as it applies to equity. However, in **Tucker**, Madam Justice Southin found that release of a tortfeasor severally liable with another did not preclude a claim in contribution from the other tortfeasor severally liable for the excess that it had to pay regardless that the liability of the tortfeasor released was not disputed at trial. She said at 576:

... if the person suffering the damage or loss has released his cause of action against one, that one is not liable to contribute to the other".

To my mind that does not make sense. I think the right of contribution and indemnity among several concurrent tortfeasors is independent of what the injured person does if, in fact, damage or loss has been caused by the fault of two or more. A finding in an action between the person suffering the loss and one of the several concurrent tortfeasors that the latter has caused some part of the damage by his fault, makes that person liable to the person suffering the loss for the whole of the loss, subject to deduction for what that person has received from the released tortfeasor, but does not prevent the tortfeasor who was sued from maintaining his claim for contribution, whether in that action or a separate action. In the first action, it is quite unnecessary for the court to make any division of fault but in the proceedings for contribution it must do so in order to implement the statute.

By analogy, this reasoning applies in this case.

[19] The defendant then refined his argument even further and said that the damages paid by the plaintiff were attributable

exclusively to FBI Foods. In **British Columbia Ferry Corp. v. T&N plc** (1993), 86 B.C.L.R.(2d) 353 (B.C.S.C.), **Tucker** was distinguished because the plaintiff ferry corporation sought only that portion of damage actually caused by the defendant tortfeasor in the action and had agreed not to seek any portion of the losses claimed against the third party against whom contribution was then sought.

[20] Throughout the original action, Cadbury pursued the whole of its loss that it suffered through wrongful copying and use of the Clamato formula without distinction between the defendants when it came to damages. The trial judge found a common liability between the plaintiff and defendant through the joint venture and the conduct of the defendant and Kurlender in wrongfully copying and using the Clamato formula. Damages flowed from that. The sole separation of the defendants in damages occurred in the Court of Appeal in respect of FBI Brands only. FBI Brands was the corporation operating in the west that had taken over after the receivership of Caesar's Canning Ltd. and after the head start period. There was no attempt at trial or in the Court of Appeal to separate causation or to apportion damages between the defendants, except as already stated. The damages as agreed between Cadbury and the plaintiff were for lost profits

in eastern Canada as arose through Caesar Beverages Inc.. In the Supreme Court of Canada, Cadbury did not contest the separation out of FBI Brands. In settlement correspondence, Cadbury made it clear that it sought damages for lost sales only within the FBI area and not the area of Caesar's Canning. By FBI 'area' was meant eastern Canada as indicated in tables to the settlement letters. This situation is different from ***B.C. Ferry Corp. v. T&C plc.*** where the plaintiff elected to claim from one defendant only that portion of loss caused by that defendant alone.

[21] The benefit derived here was payment by FBI of damages for the lost profits and royalties from the eastern market which was operated through the eastern production and distribution company, Caesar Beverages Ltd., which was owned equally by FBI and Mr. Glassner through his company, Caesar Canning Inc.. That equal ownership would give rise to benefit of 50 percent in a settlement was not, in itself, contested.

[22] The claim for contribution does not arise until the payor has paid more than his share. There is no equity to receive a contribution until a disproportionate share of the loss has been paid (***Hawrish v. Peters***, [1982] 1 S.C.R. 1083 at 1086-1088). In the case of co-sureties, ascertainment of the right to contribution may be made prospectively but is then a

different right than that which accrues upon actual payment (*Hawrish, supra* at 1090).

[23] As between several concurrent tortfeasors, the right of contribution and indemnity is independent from the loss suffered by the injured person. It is a separate and distinct cause of action that does not arise until the judgment or settlement in the original action (*Cristovao v. Doran's Beverages Inc.* (1983), 143 D.L.R. (3d) 641 at 648 (Ont.H.C.); *Tucker v. Asleson, supra* at 576). Procedurally, it is open to claim for contribution by third party action in the first action or in a separate action after liability is determined in the first action.

[24] The negligence cases are helpful to decide that it is not necessary to bring third party proceedings in the first action in order to found a claim in contribution. In fact, it really should be brought in a separate action after the settlement or judgment in the first action has been paid. While the claim can be brought in the earlier action, the right does not accrue until payment of a disproportionate amount on behalf of the defendant. The negligence cases clearly suggest that the party who recognizes that there may be a claim in contribution at the end of the day has an option. While this may appear to go against the general principle of *res judicata* that

litigants should bring forward their entire case in one action and avoid carving up a controversy that should be resolved in one action (*Lim v. Lim* (1999), 180 D.L.R. (4th) 87 at 92-93; 1999 BCCA 596), judicial economy is not always the overriding principle, especially when the cause of action does not arise until after judgment or settlement in the first action and a disproportionate share of the loss has been paid. In *Lim*, Mr. Justice Hall recognized that this principle of judicial economy should be followed "to the extent possible" (at 92). He acknowledged that there were limits to the principle and that the interests of justice must always be regarded. He found the decision of the Nova Scotia Court of Appeal in *Hoque v. Montreal Trust Co.* (1997), 162 N.S.R. (2d) 321 at 338 (N.S.C.A.) helpful in that regard. There, the court said that the test was not whether the issue could have been raised in the first action, but whether it should have been raised depending on a number of factors. Cromwell, J.A. said at 338:

My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether

there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

These considerations support a flexible approach so that litigation is not shut out except after scrupulous examination of all of the circumstances and where reasonable diligence would have caused the matter to be raised earlier (*Yat Tung Investment Co. v. Dao Heng Bank*, [1975] A.C. 581 at 590 (H.L.); *Hoque supra* at 331; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 at 11 (B.C.C.A.)).

[25] The defendant agrees with these principles and that the plaintiff had an option to wait. However, he stated that the plaintiff should have brought the issue as third party proceedings in the first action based upon the *Hoque* factors. The new allegation is not inconsistent with matters actually decided in the first action: however, the cause of action did not arise until the first action was settled. It is a separate cause of action. It would not have been practicable to bring the action for contribution in the first action when the parties were of one interest in that action. It is not a simple situation such as an action for debt where there are co-sureties so that the amount of contribution is clear from

the start. The plaintiff could not have ascertained the amount of the settlement with due diligence in the first action which was hard fought. Therefore, it does not follow as a matter of principle that this action should be barred. Issue estoppel is not appropriate.

[26] Further and separately, the defendant stated that it is an abuse of process to allow the action now because the defendant has been prejudiced by failure to raise the matter in the first action. The delay in bringing an action against the defendant has prevented the defendant from putting forward a defence, namely, that the corporate veil should not have been pierced at trial in the first action. When the defendant did not proceed with his appeal, he did not pursue the alleged error of the trial judge in attributing responsibility for Caesar Canning Ltd. to the defendant. Instead, he settled with Cadbury for undisclosed terms and did not participate further in the appeals. He did not seek to settle with the plaintiff. It was not until after judgment from the British Columbia Court of Appeal that the plaintiff advised the defendant that it was going to claim contribution. The defendant says that it is unfair and an abuse of process to allow the plaintiff's action to proceed in these circumstances when the defendant could have been completely absolved of liability.

[27] An action can be struck out as an abuse of process when *res judicata* is not available. The *res judicata* rule in **Henderson v. Henderson** (1843), 67 E.R. 313 as quoted in **Lim supra** at 92 is also a rule of public policy (**Vervaeke v. Smith**, [1982] 2 All E.R. 144 at 152 (H.L.)). This rule requires parties to bring forward their whole case in one action. Lyons, J.A. recognized that it is possible to get beyond the hard and fast rules of issue estoppel in **Solomon v. Smith** (1987), 45 D.L.R.(4th) 266 at 275:

I agree ... that a plea of issue estoppel is not available. However to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast, institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can best be avoided. ... we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process — a waste of time and resources of litigants and the court and erosion of the principle of finality so crucial to the proper administration of justice.

Abuse of process has been invoked in this way to prevent the regurgitation of issues and actions that had already been

decided in another jurisdiction and that were continued in a course of conduct intended to harass (**420093 B.C.Ltd. v. Bank of Montreal** (1995), 128 D.L.R.(4th)488 at 504-6 (Alta. C.A.)). This wider sense of the doctrine in **Henderson** has been said to be reserved for “special circumstances” where justice demands non-application of the rule (**Yat Tung Investment Co. supra** at 590). The policy is aimed at preventing fresh litigation between the same parties over the same subject matter (**Nesbitt Thomson Deacon Inc. v. Everett** (1989) 37 B.C.L.R. (2d) 341 at 343 (B.C.C.A.)).

[28] This is not the type of repetitious litigation as seen in **420093 B.C. Ltd.**. Nor is it an obvious waste of time or an attempt to re-litigate an issue. In fact, the defendant does not argue this. He states that the defence has been prejudiced by not having the opportunity on appeal to absolve the defendant of liability. This, however, ignores the reality that the cause of action did not arise until after settlement monies were paid on behalf of the defendant and that, in equity, it is unnecessary for a beneficiary to even be sued in the first action in order for a plaintiff to recover a benefit paid. The plaintiff was entitled to wait and see whether it would be held liable in the Supreme Court of Canada. Neither party requested adjudication of third party claims in the

first action. In *Nesbitt Thomson Deacon Inc. supra* at 343, Hutcheon, J.A. considered it clearly without merit to argue that third party proceedings should have been brought in the first action when the second action was to recover monies paid to settle the first action. Although invited by the defendant to distinguish this case on the facts, I find that I am unable to do so.

[29] This leaves the matter of prejudice. In *Tucker* (albeit a negligence case), fault had to be borne by Tucker even though her liability was not disputed at trial and she did not appeal (at 573). Findings in the first action do not prevent a claim in contribution unless the plaintiff in the first action elected to claim only from one for loss caused by that one (see *British Columbia Ferry Corp. v. T & C plc supra* at 356 and above). It cannot be said that serious prejudice has resulted here. The defendant chose to settle early on favourable terms that were not communicated to the plaintiff. He then chose to abandon his appeal when the possibility of the plaintiff claiming contribution was still possible. He ignored offers to participate in settlement discussions. It is unnecessary for me to weigh the likelihood of success of the defendant's forgone appeal argument.

Conclusion

[30] There is no reason to bar the plaintiff's claim. There were no arguments advanced against the quantum of the contribution in this situation. The defendant shall pay the plaintiff \$150,000. Interest is payable pursuant to the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79. The plaintiff is entitled to costs on the scale of three.

"Janice Dillon, J."
the Honourable Madam Justice Janice Dillon

TAB 13

CITATION: Laurentian University of Sudbury, 2021 ONSC 3885
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2021-05-31

SUPERIOR COURT OF JUSTICE - ONTARIO

**RE: 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 LAURENTIAN UNIVERSITY OF
SUDBURY**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor
Ernst & Young Inc

Vern W. DaRe, for the DIP Lender

Aryo Shalviri and Jules Monteyne, for the Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for the Toronto Dominion Bank

George Benchetrit, for the Bank of Montreal

Peter J. Osborne, for the Board of Governors

Joseph Bellissimo and Natalie Levine, for Huntington University

Andrew Hatnay, Demetrios Yiokaris, for Thorneloe University

Alex MacFarlane and Lydia Wakulowsky, for Northern Ontario School of Medicine

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General
Association

Guneev Bhinder, for the Canada Foundation for Innovation

André Claude, for the University of Sudbury

Tracey Henry, for Laurentian University Staff Union (LUSU)

Charlie Sinclair, Counsel for Laurentian University Faculty Association (LUFA)

HEARD: May 28, 2021

ENDORSEMENT

[1] Laurentian University (“Laurentian” or the “Applicant”) brings this motion seeking the following two orders:

- (a) an Order appointing Mr. Louis (Lou) Pagnutti as Chief Redevelopment Officer (“CRO”) of Laurentian and approving the terms of his engagement; and
- (b) an Order approving the claims process proposed by the Applicant and the Monitor to identify the universe of potential claims that may exist against the Applicant, in order to allow the Applicant and the Monitor to address such claims in contemplation and formulation of a Plan of Compromise or Arrangement (the “Plan”).

[2] The Applicant also requests an amendment to para. 36 of the Amended and Restated Initial Order to increase the maximum amount of fees and disbursements of the Board of Governors’ (the “Board”) independent counsel (“Board Counsel”) that is permitted to be paid by the Applicant from \$250,000, plus HST, to a maximum amount of \$500,000, plus HST.

[3] The evidentiary basis for the requested relief is set out in the affidavit of Dr. Robert Haché, sworn May 21, 2021, and in the Fourth Report of the Monitor dated May 27, 2021.

Appointment of CRO

[4] The Applicant is of the view that the appointment of the CRO will minimize the disruption to the operations of the Applicant. The CRO will provide strategic guidance in assisting with the Applicant’s restructuring and will also support the Applicant’s senior leadership team, including the President and Vice-Chancellor.

[5] The Applicant is of the view that the CRO will provide a fresh perspective and assist the Applicant in moving to a financially sustainable and successful future.

[6] A proposed engagement letter indicates that the compensation to the CRO is at an hourly rate of \$650 per hour (up to a maximum of 80 hours each month). There is no additional “success fee” component to the CRO’s compensation.

[7] The Monitor has reviewed the proposed fees and disbursements set out in the CRO Engagement Letter and believes them to be fair and reasonable in the circumstances.

[8] The proposed appointment of the CRO is supported by the Laurentian University Faculty Association, Laurentian University Staff Union, the Board and the DIP Lender.

[9] The Monitor is also in support of the appointment of Mr. Pagnutti.

[10] The appointment of Mr. Pagnutti was opposed by University of Sudbury (“U Sudbury”). Counsel to U Sudbury indicated that there was a degree of disappointment that his client was not consulted with respect to the appointment of the CRO. He suggested that there should be further consultations and an opportunity provided to consider other individuals for the position, taking into account the bilingual and tricultural nature of Laurentian.

[11] I am not persuaded by the arguments put forth by U Sudbury. The Notice of Disclaimer with respect to U Sudbury is now final. In effect, U Sudbury is not part of the going forward plan of Laurentian. Consequently, the participation of U Sudbury in Phase 2 of the restructuring will be severely limited. The support for the appointment of Mr. Pagnutti is widespread and, in my view, this appointment should take effect as soon as possible.

[12] I am satisfied that the arrangements set out in the CRO Engagement Letter are fair and reasonable in the circumstances and an Order will issue appointing Mr. Pagnutti as CRO of Laurentian and approving the terms of his engagement.

Increase of Fees to Board Counsel

[13] The request to increase the maximum amount of fees and disbursements of Board Counsel is not opposed. I accept that Board Counsel has been busy throughout the CCAA proceeding to address and advise on issues relevant to the Board. As the proposed claims process commences, it is expected that the Board will continue to require the advice of Board Counsel, necessitating an increase of the fees incurred by Board Counsel.

[14] In my view, it is appropriate that para. 36 of the Amended and Restated Initial Order be amended to increase the maximum amount of fees and disbursements of Board Counsel that is permitted to be paid by the Applicant from \$250,000, plus HST, to a maximum amount of \$500,000.

Claims Process

[15] The Applicant seeks approval to undertake a process to identify, determine and resolve certain claims of its creditors (the “Claims Process”). The Claims Process will be conducted in order to identify and determine for voting and/or distribution purposes the potential universe of claims that may exist against Laurentian, to allow Laurentian to deal with such claims and formulate a Plan.

[16] The Applicant contends that the proposal is a fair, efficient, and reasonable process for the determination and resolution of all claims against the Applicant and its Directors and Officers.

[17] The Claims Process has been prepared by the Applicant, in consultation with the Monitor.

[18] The Monitor supports the proposed Claims Process Order.

[19] The DIP Lender, LUFA and LUSU are supportive of the Claims Process Order.

[20] In the Fourth Report, the Monitor states that the Applicant and the Monitor provided a draft of the Claims Process Order to the Toronto Dominion Bank, (“TD Bank”), Royal Bank of Canada and Bank of Montreal (collectively, the “Pre-filing Lenders”). The Pre-Filing Lenders are collectively owed in the range of \$130 million.

[21] The Monitor also reports that the Applicant and the Monitor have engaged in multiple discussions with the Pre-filing Lenders in respect of the Claims Process and that the Monitor has agreed to provide weekly updates to the Pre-filing Lenders with respect to claims received and the status of the Monitor’s review of claims.

[22] TD Bank has proposed an amendment to the Claims Process Order. TD Bank proposes that the Monitor shall consult with the Pre-filing Lenders and any other stakeholders as the Monitor deems appropriate (the “Consultation Parties”) with respect to each claim in excess of \$5 million which the Monitor proposes to accept and to provide the Consultation Parties with not less than 10 days’ prior written notice of the intent to accept such claim. Any Consultation Party who objects to the acceptance of such claim by the Monitor may then apply to the court within 10 days for a review of the proposed acceptance.

[23] The Monitor has noted a number of areas of concern with respect to the TD Bank proposal:

- (a) The proposed amendment will lead to confusion.
- (b) The proposal effectively removes the role of a Claims Officer for any claim over \$5 million. If any Consultation Party opposes the Monitor’s acceptance of a claim over \$5 million, the result is that the claim will be directly referred to the court for determination rather than a Claims Officer. The result will be increased litigation and increased cost versus the expeditious summary process that is typical in a CCAA claims process.
- (c) The proposal eliminates the ability of the Monitor to negotiate and settle claims in the ordinary course.
- (d) If the settlement of a claim is opposed and the Monitor’s assessment of the claim is required to be justified in court, the Monitor will either have to disclose its assessment of its strengths and weaknesses of the claim and the litigation risk associated with the claim or a cumbersome process will need to be developed where the Monitor can share its assessment with the court under seal.
- (e) The Monitor is not in a position to determine which stakeholders should be Consultation Parties.
- (f) In the event that a material number of claims over \$5 million are opposed by any one of the Consultation Parties, the process to obtain a determination

of such claims could result in significant delay to the resolution of such claims.

- (g) The above factors are likely to make the Claims Process more expensive and inefficient.

[24] TD Bank supports the making of a Claims Process Order at this time but submits that, in the circumstances, the process should contemplate disclosure and consultation by the Monitor with the Pre-filing Lenders.

[25] TD Bank submits that Laurentian and the Monitor have acknowledged that material claims will be submitted, some of which claims are unliquidated and/or contingent and may be subject to a bona fide dispute - both with respect to liability and quantum. The consensual resolution of such claims will bear directly on the likelihood of success of any Plan.

[26] TD Bank further submits that its proposed change is reasonable and appropriate in the circumstances and will create a fair and transparent process which furthers the remedial objectives of the CCAA. Further, this proposal does not give a consent or veto right to any creditor with respect to acceptance or compromise of any claim.

[27] Based upon information available to TD Bank at the time its factum was issued, the total quantum of claims is unknown but can reasonably be expected to include: (a) the claims of the Pre-filing Lenders; (b) claims of current and former employees; (c) claims of the federated universities arising from the termination and disclaimer of their agreements with Laurentian; (d) potential claims arising from the pension-related claim; and (e) claims of other creditors with pre-filing and restructuring claims.

[28] TD Bank anticipates many of these claims will be for significant amounts, will be complex, and will engage multiple legal and valuation issues. The acceptance or settlement of these claims will bear directly on the entitlements of the creditors under and in respect of any Plan.

[29] TD Bank submits that the transparency and consultation that it seeks to import into the Claims Process will enhance the likelihood of a viable Plan.

Analysis

[30] The broad remedial objectives of the CCAA are to facilitate a restructuring rather than a liquidation of assets. The objective of a restructuring will most likely be achieved where stakeholders are treated as advantageously and fairly as the circumstances permit (see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at paras. 15-19, 56-66 and 70 (“*Century Services*”)).

[31] A claims process is an essential component of any plan and it is necessary and appropriate that the claims process furthers the remedial objective of the CCAA (*Timminco Limited, Re*, 2014 ONSC 3393 at para. 41).

[32] A claims process order must be carefully drafted so as to ensure that the process by which claims are determined is both fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims (*Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 at para. 38 (“*Steels*”).

[33] TD Bank submits that its proposal is consistent with the entitlements of creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) to review proofs of claim filed by others and to seek an order from the court expunging or reducing a proof of claim accepted by a trustee. TD Bank points out that such entitlements are available to creditors under the BIA in both bankruptcy and commercial proposal proceedings and to the extent possible, aspects of insolvency law that are common to the BIA and CCAA should be harmonized. The examples provided by TD Bank are BIA, ss. 26, 37, 66, 126 and 135(5); see also *Century Services* at para. 24.

[34] TD Bank references the following cases as examples where the disclosure and involvement of certain parties has been incorporated into the claims process. These cases are *Crystallex International Corp., Re*, 2012 ONSC 6812; *Target Canada Co.* (11 June 2015), Toronto, CV-15-10832-00CL (Ont. S.C.) at para. 30; *Carillion Canada Holdings Inc.* (6 July 2018), Toronto, CV-18-590812-00CL (Ont. S.C.); and *Steels* at para. 13.

[35] TD Bank acknowledges there are no set rules in the CCAA which govern the Claims Process. I agree with this statement.

[36] The facts underlining each of the cases relied upon by TD Bank needs to be taken into account. *Crystallex* had been a bitterly fought proceeding extending nearly 10 years. *Target Canada* was a liquidation proceeding from the outset. *Carillion* was also a liquidating CCAA process, as was *Steels*. Suffice to say, there are considerable differences in how a supervising judge will approach a liquidating CCAA in contrast to a CCAA proceeding leading to an operational restructuring. For this reason, the cases referred to by TD Bank are of limited assistance.

[37] In an operational restructuring, it is necessary to consider the timelines. From the outset, Laurentian has proceeded on the basis that it intends to remain in operation. Laurentian has stressed that it is essential that these proceedings be completed as soon as possible. The proceedings cannot be completed without the Claims Process being finalized. I am concerned that the TD Bank proposals could delay the Claims Process from being completed on a timely basis.

[38] The proposal to establish Consultation Parties is problematic. Under the TD Bank proposal, the Pre-filing Lenders are involved in the consultation process as are such other stakeholders as the Monitor deems appropriate. The TD Bank proposal affects claims in excess of \$5 million. In the context of this proceeding, a \$5 million claim is a significant claim. I am hard-pressed to think of a situation where such a claimant would not be deemed an appropriate Consultation Party. I am given to understand that there might be in the range of 15 or so claims over \$5 million. If each claimant or a substantial majority of these claimants is deemed to be a Consultation Party, the sheer size of the group would impede its mandate and progress. The process will cease to be efficient and effective in resolving issues.

[39] I am mindful of the submission made by counsel to TD Bank that it is important to move quickly – but not to rush. This requires a balancing of competing interests, to ensure that the process remains fair to all.

[40] I have been persuaded that the Pre-filing Lenders should have some involvement in this process. However, the TD Bank proposal runs the risk of being convoluted and cumbersome to the extent that the Claims Process may not be completed on a timely basis. A middle ground must be found.

[41] The fact that there are no set rules to govern the claims process leads, in some cases, to a bespoke claims process. This situation calls for a bespoke process.

[42] Counsel to TD Bank made reference to the claim process in the BIA. One such provision, which was not referenced in argument, is set out in s. 30(1)(i) of the BIA:

Powers exercisable by a trustee with permission of inspectors

30 (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(i) compromise any claim made by or against the estate.

[43] This section has two components. The first relates to the involvement of inspectors. The role of an inspector in the BIA is defined in ss. 116-120. The second relates to the compromise of claims against the estate. The trustee may, with the permission of the inspectors, compromise such claims.

[44] It is also noteworthy to reference BIA s. 119(2):

Decisions of inspectors subject to review by court

119 (2) The decisions and actions of the inspectors are subject to review by the court at the instance of the trustee or any interested person and the court may revoke or vary any act or decision of the inspectors and it may give such directions, permission or authority as it deems proper in substitution thereof or may refer any matter back to the inspectors for reconsideration.

[45] In my view, the concerns expressed by TD Bank can be addressed by incorporating certain provisions similar to those dealing with inspectors in the BIA and modifying same to address the circumstances of this case.

[46] An inspector can play a critical role. In *Re Bryant Isard & Co.* (1923), 4 C.B.R. 41 at para. 24 (Ont. S.C.), Fisher J. summed up the position of inspectors in these words: “Inspectors stand in a fiduciary relation to the general body of creditors and should perform their duties impartially and in the interests of the creditors who appoint them. They should see that the trustee acts in accordance with the *Bankruptcy Act*, and if it is brought to their notice he has not done so, they should discipline him and, if necessary, take steps to have him removed.”

[47] In these circumstances, I have concluded that the Claims Process procedure proposed by the Applicant should be modified so as to provide for the appointment of up to four “inspectors”. Two of the inspectors are to be representatives of the Pre-filing Lenders with the remaining two “inspectors” being drawn from the group of creditors who file claims in excess of \$5 million (a “Material Claim”). The selection of the inspectors is to be made by the Monitor, in consultation with the Applicant, the Pre-filing Lenders and the known creditors with Material Claims

[48] The Monitor shall inform the “Inspector Group” that they are to act in the best interests of all creditors and that they stand in a fiduciary relationship to all creditors and should perform their duties impartially.

[49] Compensation for the “Inspector Group” is to be calculated using the structure provided for in R. 135 of the Bankruptcy and Insolvency General Rules.

[50] The Claims Process provision is to be modified so as to provide that the Monitor shall consult with the “Inspector Group” in respect of the acceptance or settlement of Material Claims. The Monitor is authorized to compromise any Material Claim – provided it has received permission from three members of the “Inspector Group”.

[51] In the event that the Monitor does not receive authorization to compromise the material claim, the Monitor or any member of the “Inspector” group may apply to court within 10 days for review of the proposed acceptance.

[52] The foregoing process is intended to ensure that the concerns of the Pre-filing Lenders are addressed, without unduly paralyzing the Claims Process that has been put forth by the Applicant with the support of the Monitor.

[53] The Applicant and the Monitor are directed to modify the Claims Process Order to take into account these reasons. The modifications are solely to affect the assessment of Material Claims. The other aspects of the Claims Process proposed by the Applicant are approved. If more detailed directions are required, a case conference may be scheduled.

Chief Justice G.B. Morawetz

Date: May 31, 2021

TAB 14

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

NATIONAL BANK OF CANADA, BANK ONE,
NA AND BANK ONE, CANADA

Plaintiffs

- and -

MERIT ENERGY LTD.

Defendant

- and -

IN THE MATTER OF THE BANKRUPTCY OF MERIT ENERGY LTD.

[Note: An Erratum has been filed on July 5, 2001; the correction has been made to the text and the Erratum is appended to this Judgment.]

[Note: An Erratum has been filed on July 9, 2001; the correction has been made to the text and the Erratum is appended to this Judgment.]

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

APPEARANCES:

Frank Dearlove and Chris Simard, Bennett Jones, LLP
for Arthur Andersen Inc.

William E. McNally, McNally and Cuming; David A. Klein, Klein Lyons
for Larry Delf, Representative Flow-Through Shareholder

Jim G. Shea, Shea Nerland Calnan
for the Flow-Through Shareholders who are not members of the Representative Class

Norman D. Anderson
agent for Magellan Aerospace Limited and Canada Dominion Resources Limited
Partnership III

Matthew R. Lindsay and Phil J. Schreiber, Fraser Milner Casgrain
for the Underwriters except First Energy Capital Corporation

Tristram Mallet, Osler, Hoskin & Harcourt
for First Energy Capital Corporation

Douglas G. Stokes, Rooney Prentice
for certain Directors

D. Detomasi, Scott Hall
for Barry Stobo

Jeff Sharpe, Burnett Duckworth & Palmer
for Duncan Chisholm and Laurence Waller

Graham McLennan, McLennan Ross
for PriceWaterhouseCoopers LLP

Steven H. Leidl, Macleod Dixon
for National Bank of Canada, Bank One, NA and Bank One, Canada

INTRODUCTION

[1] On August 31, 2000, applications were brought by Dundee Securities Corporation, Peters & Co. Limited, Nesbitt Burns Inc., Newcrest Capital Inc., RBC Dominion Securities, Bunting Warburg Dillon Read Inc., First Energy Capital Corporation (being the underwriters in the flow-through common share offering of Merit Energy Ltd., described below), certain directors and officers of Merit Energy Ltd. and Larry Delf, a representative purchaser of flow-through common

shares in Merit, to determine whether these applicants were entitled to a priority in the nature of an equitable lien over the proceeds of the sale of Merit's assets.

[2] I dismissed the equitable lien applications. The Underwriters, except First Energy Capital Corporation, appealed that decision.

[3] Needless to say, the applicants wanted to be recognized as ordinary creditors of Merit in the event they did not have an equitable lien.

[4] Pending the hearing of the equitable lien appeal, the administration of the estate of Merit continued. As a result of my dismissal of the equitable lien claim, the Trustee anticipated that a fund of approximately \$10 million would be available for distribution to unsecured creditors.

[5] Accordingly, the Trustee sought a determination as to the right of the Flow-Through Shareholders, the Underwriters and the Directors and Officers to be recognized as ordinary creditors of Merit and to be included in the distribution.

[6] I heard argument on that issue on April 30, 2001 but reserved my decision until the results of the appeal were known. On May 18, 2001, the appeal was heard and dismissed¹, so it is now appropriate to make the requested determination.

[7] The Trustee takes the position that the claims in issue are in substance claims by shareholders for the return of equity and, on the basis of the decision in *Re: Blue Range Resource Corp.*², must rank behind the claims of Merit's unsecured creditors.

[8] Alternatively, the Trustee argues that their claims are too contingent to constitute provable claims under the *Bankruptcy and Insolvency Act*.³

[9] The Flow-Through Shareholders, the Underwriters and the Directors and Officers⁴ submitted that their claims were in substance creditor claims and that they were not too contingent, thus qualifying them to rank as unsecured creditors in Merit's insolvency. If that position is sustained, the quantification of those claims will be a separate issue.

¹ Reasons followed the dismissal from the bench 2001 ABCA 138.

² (2000), 15 C.B.R.(4th) 169 (Alta. Q.B.).

³ R.S.C.1985, c.B-3

⁴ PriceWaterhouseCoopers LLP, Merit's auditor at the material times, was not involved in previous applications but made similar submissions to the Underwriters, Directors and Officers. PriceWaterhouseCoopers' position will be addressed separately in these reasons.

BACKGROUND

[10] Merit was in the business of the exploration, development and production of natural gas and crude oil in Alberta and Saskatchewan.

[11] On July 15, 1999, the Underwriters entered into an underwriting agreement with Merit whereby they agreed to participate in a public offering of 2,222,222 Flow-Through Shares of Merit. Paragraph 16 of the Underwriting Agreement states in part:

The Corporation shall indemnify and save each of the Indemnified Persons harmless against and from all liabilities, claims, demands, losses, (other than losses of profit in connection with the distribution of common shares), costs, damages and expenses to which any of the Indemnified Persons may be subject or which any of the Indemnified Persons may suffer or incur, whether under the provisions of any statute or otherwise, in any way caused by, or arising directly or indirectly from or in consequence of:

- (a) any information or statement contained in the Public Record (other than any information or statement relating solely to one or more of the Underwriters and furnished to the Corporation by the Underwriters for inclusion in the Public Record) which is or is alleged to be untrue or any omission or alleged omission to provide any information or state any fact the omission of which makes or is alleged to make any such information or statement untrue or misleading in light of all the circumstances in which it was made;
- (b) any misrepresentation or alleged misrepresentation (except a misrepresentation or alleged misrepresentation which is based upon information relating solely to one or more of the Underwriters and furnished to the Corporation by the Underwriters for inclusion in the Public Record) in the Public Record.

[12] The Underwriting Agreement provides in Paragraph 2 (entitled "Corporation's Covenants as to Qualification") that:

[Merit] agrees:

- (a) prior to the filing of the Preliminary Prospectus and thereafter and prior to the filing of the Prospectus, to allow the Underwriters to participate fully in the preparation of the Preliminary Prospectus (excluding the documents incorporated therein by reference) and such other documents as may be required under the Applicable Securities Laws in the Filing Jurisdictions to qualify the distribution of the Common Shares in the Filing Jurisdictions and allow the Underwriters to conduct all due diligence which the Underwriters may reasonably require (including with respect to the documents incorporated therein by reference) in order to (i) confirm the Public Record is accurate and current in all material respects; (ii) fulfill the Underwriters' obligations as agents and underwriters; and

(iii) enable the Underwriters to responsibly execute the certificate in the Preliminary Prospectus or the Prospectus required to be executed by the Underwriters;

(b) the Corporation shall, not later than on July 19, 1999, have prepared and filed the Preliminary Prospectus...with the Securities Commissions...

(c) the Corporation shall prepare and file the Prospectus...as soon as possible and in any event not later than 4:30 p.m. (Calgary time) on August 3, 1999...

...

(e) that, during the period commencing with the date hereof and ending on the conclusion of the distribution of the Common Shares, the Preliminary Prospectus and the Prospectus will fully comply with the requirements of Applicable Securities Laws of the Filing Jurisdictions and, together with all information incorporated therein by reference, will provide full, true and plain disclosure of all material facts relating to the Corporation and the Common Shares and will not contain any misrepresentation; provided that the Corporation does not covenant with respect to information or statements contained in such documents relating solely to one or more of the Underwriters and furnished to the Corporation by one or more of the Underwriters for inclusion in such documents or omissions from such documents relating solely to one or more of the Underwriters and the foregoing covenant shall not be considered to be contravened as a consequence of any material change occurring after the date hereof or the occurrence of any event or state of facts after the date hereof if, in each such case, the Corporation complies with subparagraphs 3(a), (b), (c) and (d).

[13] In accordance with its covenant, Merit filed a Preliminary Prospectus and a Prospectus to qualify the shares for issue and ultimately the offering closed on August 17, 1999, at which time 2, 222, 222 Flow-Through Shares of Merit were issued.

[14] The Prospectus indicated that:

The gross proceeds of this Offering will be used to incur CEE in connection with the Corporation's ongoing oil and natural gas exploration activities. The Underwriters' fee and the expenses of this Offering will be paid from Merit's general funds...

The Flow-through Common Shares will be issued as 'Flow-through Shares' under the Act. The Corporation will incur on or before December 31, 2000, and renounce to each purchaser of Flow-through Common Shares, effective on or before December 31, 1999, CEE in an amount equal to the aggregate purchase price equal to the aggregate purchase price paid by such purchaser.

Subscriptions for Flow-through Common Shares will be made pursuant to one or more subscription agreements ('Subscription Agreements') to made between the Corporation and one or more of the Underwriters or one or more sub-agents of the Underwriters , as agent for, on behalf of and in the name of the purchasers of Flow-through Common Shares...

[15] The Prospectus also indicated that:

... Pursuant to the Subscription Agreements, the Corporation will covenant and agree (i) to incur on or before December 31, 2000 and renounce to the purchaser, effective on or before December 31, 1999, CEE in an amount equal to the aggregate purchase price paid by such purchaser for the Flow-Through Common Shares and (ii) that if the Corporation does not renounce to such purchaser, effective on or before December 31, 1999, CEE equal to such amount, or if there is a reduction in such amount renounced pursuant to the provision of the Act and as the sole recourse of the purchaser for such failure or reduction, the Corporation shall indemnify the purchaser as to, and pay in settlement thereof to the purchaser, an amount equal to the amount of any tax payable or that may become payable under the Act...by the purchaser as a consequence of such failure or reduction...

In respect of CEE renounced effective on December 31, 1999, and not incurred prior to the end of the period commencing on the date that the Subscription Agreement is entered into and ending on February 29, 2000, the Corporation will be required to pay an amount equivalent to interest to the Government of Canada. Any amount of CEE renounced on December 31, 1999 and not incurred by December 31, 2000 will result in a reassessment of deductible CEE to subscribers. However, interest in respect of additional tax payable under the Act by a purchaser of Flow-Through Common Shares will generally not be levied in respect of such reassessment until after April 30, 2001.

[16] The Underwriters each entered into Subscription and Renunciation Agreements with Merit for the purchase of the Flow-Through Shares, containing the covenants described in paragraph 15 above.

[17] Merit did not incur CEE as anticipated and in fact only approximately \$4 million (of the anticipated \$15 million of CEE) was renounced to the Flow-Through Shareholders prior to Merit being placed in receivership, leaving an \$11 million shortfall. As a result, those Flow-Through Shareholders, who anticipated tax deductions based on \$15 million of CEE, were potentially faced with a tax problem.

[18] The Directors and Officers entered into indemnity agreements with Merit, which state in part that:

To the full extent allowed by law, [Merit]...agrees to indemnify and save harmless the Indemnified Party, his heirs, successors and legal representatives from and against any

and all damages, liabilities, costs, charges or expenses suffered or incurred by the Indemnified Party, his heirs, successors or legal representatives as a result of or by reason of the Indemnified Party being or having been a director and/or officer of [Merit] or by reason of any action taken by the Indemnified Party in his capacity as a director and/or officer of [Merit], including without limitation, any liability for unpaid employee wages, provided that such damages, liabilities, costs, charges or expenses were not suffered or incurred as a direct result of the Indemnified Party's own fraud, dishonesty or wilful default.

[19] Merit, the Underwriters and the Directors and Officers have been named as defendants in several actions commenced throughout Canada by or on behalf of the Flow-Through Shareholders. These actions allege that Merit, the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are liable to the Plaintiffs because of misrepresentations made in the Prospectus. The Plaintiffs seek, *inter alia*, damages against all defendants, rescission of their purchase of the Flow-Through Shares and damages for lost tax benefits associated with the Flow-Through Shares. The Underwriters have third-partied Merit and the Directors and Officers. As noted, the Underwriters and the Directors and Officers previously sought recognition as equitable lien holders (which was denied) and now they seek recognition as ordinary creditors.

[20] PriceWaterhouseCoopers was at all material times the auditor of Merit. As PriceWaterhouseCoopers had not yet filed a proof of claim at the time the Trustee filed its motion, the Trustee's materials did not address its claim as part of its application. However, the Trustee did not object to PriceWaterhouseCoopers participating in this application.

[21] PriceWaterhouseCoopers is in a similar position as the Underwriters and the Directors and Officers as it too has an indemnity from Merit and has also been sued by the Flow-Through Shareholders for misrepresentation. Its indemnity states that:

Merit Energy Ltd. hereby indemnifies PriceWaterhouseCoopers LLP ("PriceWaterhouseCoopers")...and holds them harmless from all claims, liabilities, losses, and costs arising in circumstances where there has been a knowing misrepresentation by a member of Merit Energy Ltd.'s management, regardless of whether such a person was acting in Merit Energy Ltd.'s interest. This indemnification will survive termination of this engagement letter. This release and indemnification will not operate where PriceWaterhouseCoopers ought to have uncovered such knowing misrepresentation but failed to, due the gross negligence or willful misconduct of PriceWaterhouseCoopers, its partners and/or employees.

ISSUES

1. Are the claims of the Flow-Through Shareholders subordinate to the claims of Merit's unsecured creditors?

2. Are the claims of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers subordinate to the claims of Merit's unsecured creditors?

DECISION - ISSUE 1

The claims of the Flow-Through Shareholders are subordinate to the claims of Merit's unsecured creditors as they are in substance shareholder claims for the return of an equity investment.

ANALYSIS

[22] Central to this application are the reasons of my sister Romaine J. in *Re: Blue Range Resource Corp.*

[23] In that case, Big Bear Exploration Ltd. completed a hostile takeover for all of the shares of Blue Range Resource Corporation. After the takeover was completed, Big Bear alleged that the publicly disclosed information upon which it had relied in purchasing the Blue Range shares was misleading and that the shares were worthless. As sole shareholder, Big Bear authorized Blue Range to commence CCAA proceedings and then submitted a claim as an unsecured creditor in Blue Range's CCAA proceedings, based on the damages it alleged it had suffered as a result of Blue Range's misrepresentations.

[24] Romaine J. rejected Big Bear's attempt to prove as an unsecured creditor and held that Big Bear's claim was "in substance" a shareholder claim for a return of an equity investment and therefore ranked after the claims of unsecured creditors according to the general principles of corporate law, insolvency law and equity.

[25] Romaine J. stated at pp. 176-177:

In this case, the true nature of Big Bear's claim is more difficult to characterize. There may well be scenarios where the fact that a party with a claim in tort or debt is a shareholder is coincidental or incidental, such as where a shareholder is also a regular trade creditor of a corporation, or slips and falls outside the corporate office and thus has a claim in negligence against the corporation. In the current situation, however, the very core of the claim is the acquisition of Blue Range shares by Big Bear and whether the consideration paid for such shares was based on misrepresentation. Big Bear had no cause of action until it acquired shares of Blue Range, which it did through share purchases for cash prior to becoming a majority shareholder, as it suffered no damage until it acquired such shares. This tort claim derives from Big Bear's status as shareholder, and not from a tort unrelated to that status. The claim for misrepresentation therefore is hybrid in nature and combines elements of both a claim in tort and a claim as shareholder. It must be determined what character it has in substance.

It is true that Big Bear does not claim rescission. Therefore, this is not a claim for return of capital in the direct sense. What is being claimed, however, is an award of damages measured as the difference between the “true” value of Blue Range shares and their “misrepresented” value - in other words, money back from what Big Bear “paid” by way of consideration...A tort award to Big Bear could only represent a return of what Big Bear invested in equity of Blue Range. It is that kind of return that is limited by the basic common law principle that shareholders rank after creditors in respect of any return on their equity investment. ...

I find that the alleged share exchange loss derives from and is inextricably intertwined with Big Bear’s shareholder interest in Blue Range. The nature of the claim is in substance a claim by a shareholder for a return of what it invested qua shareholder, rather than an ordinary tort claim.

[26] Romaine J. went on at pp. 177-184 to describe five policy reasons which justified the conclusion that shareholders’ claims such as Big Bear’s should be ranked behind the claims of Blue Range’s unsecured creditors. In summary, they are:

- (i) the claims of shareholders rank behind the claims of creditors in insolvency;
- (ii) creditors do business on the assumption that they will rank ahead of shareholders in the event of their debtor’s insolvency;
- (iii) shareholders are not entitled to rescind their shares on the basis of misrepresentation after the company has become insolvent;
- (iv) United States jurisprudence supports the priority of creditors in “stockholder fraud” cases; and
- (v) to allow the shareholders to rank *pari passu* with the unsecured creditors could open the floodgates to aggrieved shareholders launching misrepresentation actions.

[27] ***Re Canada Deposit Insurance v. Canadian Commercial Bank***⁵ is also central to this application. That case involved an issue of priorities with respect to the insolvency of the Canadian Commercial Bank. In an effort to preserve the bank, a participation agreement was entered into among the governments of Canada and Alberta, the Canada Deposit Insurance Corporation and six commercial banks. The sum of \$255 million was advanced and it was to be repaid by CCB out of certain portfolio assets and pre-tax income. The agreement promised an indemnity in the event of insolvency, and gave the participants a right to subscribe for shares in CCB at a named price.

⁵ (1992), 97 D.L.R. (4th) 385 (S.C.C)

[28] The Supreme Court of Canada held that although the participation agreement contained both debt and equity features, it was, in substance, a debt transaction. Iacobucci J. stated at p. 406:

As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of \$255 million. Instead of trying to pigeon-hole the entire agreement between the Participants and C.C.B. in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a creditor-debtor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore those features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to coexist in the given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement. [emphasis added]

[29] As noted, the Flow-Through Shareholders have commenced several actions. Against Merit, they seek rescission or damages due to an alleged misrepresentation in the Prospectus (based on their statutory rights to these remedies as disclosed in the Prospectus). They also claim damages relating to lost tax benefits associated with the Flow-Through Shares. While this is a contractual remedy based on the Subscription and Renunciation Agreements, it also has elements of misrepresentation flowing from certain descriptive statements made in the Prospectus.

[30] The Flow-Through Shareholders submitted that they are entitled to be treated as creditors based on the actions they have commenced, but the Trustee objects to this treatment and has sought the direction of the Court in this regard.

i. The Trustee's Position

[31] The Trustee (through counsel) focussed on the allegations made in the statements of claim in its analysis. It suggested that the essential allegation of the Flow-Through Shareholders in their actions is misrepresentation and that as a result of such misrepresentation they have suffered damages. The Trustee then described the remedy sought as, in essence, a claim for a return of equity. The Trustee suggested that the claim for the anticipated tax benefits was no

more than a claim for a benefit that was ancillary to their shareholding interest. The Trustee also described the Flow-Through Shareholders' application to prove as unsecured creditors as an attempt to take a "second kick at the can", following the failure of their equity investment.

[32] Using the reasoning of Romaine J. in *Re: Blue Range Resource Corp.*, the Trustee argued that the claim of the Flow-Through Shareholders must be subordinated to Merit's unsecured creditors. The Trustee submitted that all five policy reasons listed in that case (and described above) are present in this case, emphasizing that the dividend will be reduced 20 to 27% (from 15 to 11-12 cents) if the Flow-Through Shareholders' claims are included in the unsecured creditors' pool and that the facts in this case favour subordination even more than the facts in *Re: Blue Range Resource Corp.*, as some of the Flow-Through Shareholders are seeking to rescind their purchase of the Flow-Through Shares in their actions.

ii. The Flow-Through Shareholders' Position

[33] Arguments were filed separately by Mr. McNally, as Counsel for Larry Delf (Mr. Delf being the designate of the Representative Flow-Through Shareholders group), and by Mr. Shea as Counsel for certain other Flow-Through Shareholders.

The Representative Flow-Through Shareholders Group's Position

[34] Mr. McNally did not take issue with the suggestion that as a general rule, shareholders rank after secured creditors. He also did not object to the reasoning of Romaine J. in *Re: Blue Range Resource Corp.*, provided the case is limited to its context and not used to stand for the general proposition that in no circumstances may a shareholder ever have a claim provable in bankruptcy.

[35] Mr. McNally did object to the Trustee's characterization of the claim as a single claim for misrepresentation seeking damages equal to their purchase price for the shares. He suggested that the claims involved firstly, a right to damages or rescission *qua* shareholder under securities legislation and secondly, a right to damages for breach of an indemnity provision *qua* debt holder. He also submitted that this latter claim may also be seen as having nothing to do with misrepresentation in the Prospectus or a return of capital, but arises independently as a result of Merit's failure to incur and then renounce CEE to the shareholders to enable them to obtain certain tax deductions.

[36] Mr. McNally suggested that this latter claim for tax losses was also a claim provable in bankruptcy. He referenced Laskin J.A.'s recognition in *Re Central Capital Corporation*⁶ that shareholders may participate as creditors in the context of declared dividends because the liquidity provisions of corporate legislation would not have been triggered if the dividends had

⁶ (1996), 27 O.R. (3d) 494 (C.A.)

been declared prior to insolvency and would therefore be enforceable debts. Laskin J.A. stated at p.536:

It seems to me that these appellants must either be shareholders or creditors. Except for declared dividends, they cannot be both... Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared it is a debt on which each shareholder can sue the corporation.

[37] Mr. McNally also relied on *Re G.M.D. Vending Co.*⁷ where the British Columbia Court of Appeal allowed declared but unpaid dividends to rank with other unsecured claims in a bankruptcy.

[38] He also emphasized that the CEE aspect of the relationship between the Flow-Through Shareholders, on the one hand, and Merit, the Underwriters and the Directors and Officers, on the other, possesses many of the indicia of debt mentioned by Weiler J.A. in *Re Central Capital Corporation* in that: (1) Merit is obliged to expend the funds raised by the Prospectus on CEE and the funds are advanced by Flow-Through Shareholders for this specific purpose alone, (2) there is an indemnity provision in the Prospectus itself to the Flow-Through Shareholders if this does not occur, evidencing an intention that the investors are to be fully repaid for the loss of the tax benefit,⁸ and (3) interest becomes due for the amount of the failed tax write-off and is covered by the indemnity provision as tax payable.

[39] He suggested that the indemnity provisions in the Subscription and Renunciation Agreements are enforceable at law without consideration of corporate liquidity and are an acknowledgment of the unique commercial position of the Flow-Through Shareholders in the event that the CEE is not renounced. He concluded by submitting that the potential liquidity problem and contingent liability must constitute the rationale for the presence of the indemnity in the Subscription and Renunciation Agreements in the first place.

The Other Flow-Through Shareholders Group's Position

[40] Mr. Shea suggested that not only were the claims for tax losses relating to the CEE provable claims, the tort/statutory aspects of their claims were also provable claims, albeit they

⁷ (1994), 94 B.C.L.R. (2d) 130 (B.C.C.A.)

⁸ See *Ontario Securities Commission v. Consortium Construction Inc.* (1993), 1 C.C.L.S. 117 at 138-139.

would be dealt with as “contingent” claims within the meaning of ss. 121 and 135 of the BIA⁹. He further submitted that the fact they are claims by shareholders is irrelevant.

[41] He relied on *Gardner v. Newton*¹⁰ as authority for the proposition that a contingent claim is a claim that may or may not ripen into a debt depending on the occurrence of some future event. Mr. Shea also suggested that so long as the claim is not too remote or speculative, a claim, even though it has not yet been reduced to judgment, may still be a contingent claim. Mr. Shea pointed out that the Ontario Court of Appeal in *Re Confederation Treasury Services Ltd.*¹¹ departed from the earlier cases relied upon by the Trustee, including *Claude Resources (Trustee of) v. Dutton*¹². The Court of Appeal stated they imposed too high of a threshold for the

⁹ **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 ...shall be deemed to be claims provable in proceedings under this Act.**(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135(1.1) The trustee shall determine whether any contingent or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

¹⁰ (1916), 29 D.L.R.276 (Man.K.B.)

¹¹ (1997), 43 C.B.R. (3d) 8.

¹² (1993), 22 C.B.R. (3d) 56 (Sask.Q.B.), referred to favourably by Farley J. in *Canadian Triton International Ltd. (Re)* (1997), 49 C.B.R. (3d) 192 (Ont. Gen. Div.) and follow

establishment of a contingent claim and held that it was not necessary to demonstrate probability of liability but merely to show they were not too remote or speculative.

[42] He asserted that the claims are not shareholder claims, but claims for statutory remedies and for breach of contract and must rank with Merit's other unsecured creditors for that reason. Mr. Shea also said the Court must look to the substance of the relationship between the claimant and the bankrupt and most importantly, the context in which the claim is made.

[43] Mr. Shea then argued that it would not be equitable to subordinate these claims while other claims based on tort, breach of contract or statutory remedy are allowed to rank as unsecured claims and concluded that the traditional principles for subordinating claims by shareholders do not apply to this case.

[44] He suggested that allowing claims for statutory remedies and/or breach of contract based on misrepresentation to rank as unsecured claims will not affect how creditors do business with companies. Further, he argued that allowing this result will not "open the floodgates" as the statutory remedies involved are narrow in scope and have strict and relatively short time frames.

iii. The Underwriters' Position

[45] Firstly, the Underwriters supported the Flow-Through Shareholders' submissions regarding the nature of their claims. They emphasized that *Re: Blue Range Resource Corp* should not stand for the proposition that shareholders must always be subordinated to unsecured creditors simply because they are shareholders. Rather, the nature and substance of their claims determines the treatment they receive in the estate.

[46] The Underwriters also suggested that *Re: Blue Range Resource Corp* turned on its unique facts of a purchaser of Blue Range shares having knowledge of misrepresentations yet exercising shareholder rights, such as authorizing the company to take CCAA proceedings and then making an unsecured claim in those proceedings for the loss associated with its share purchase. The shareholder in that case did not claim rescission and did not deny or attempt to

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 (Ont.
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 Div.)

avoid its shareholder status. Moreover, there was no contractual right to be treated by the company as anything but a shareholder.

[47] The Underwriters distinguished the claims of the Flow-Through Shareholders from those of Big Bear in *Re: Blue Range Resource Corp* as follows: (1) the Flow-Through Shareholders are not pursuing tort claims based on their status as shareholders, but rather are asserting a statutory right of rescission, thereby refuting their status as shareholders, (2) the Flow-Through Shareholders also allege a direct contractual claim for indemnity against Merit pursuant to Subscription and Renunciation Agreements in which Merit agreed to incur qualifying expenditures (CEE), to renounce the resulting tax benefits to them and to indemnify them if it failed to incur the CEE, and (3) if their claims are ultimately successful, the Flow-Through Shareholders will be former shareholders and current creditors of Merit.

Resolution- ISSUE 1

[48] I agree with Romaine J. that the correct approach is to first examine the substance of the claim made against the insolvent. There are the two claims mentioned by counsel for the Flow-Through Shareholders. The first is an alternate remedy for damages or rescission based on the alleged misrepresentations contained in the Prospectus. I was advised that some have advanced only one of these alternative claims. The second is cast as a claim in damages under the indemnity in the Subscription and Renunciation Agreements for the failure to renounce CEE.

[49] The Flow-Through Shareholders' claims for rescission or damages based on misrepresentation derive from their status as Merit shareholders. Regardless of how they are framed¹³, the form the actions take cannot overcome the substance of what is being claimed. It is plain from the Prospectus and the Subscription and Renunciation Agreements that the Flow-Through Shareholders invested in equity. It is equally plain from their actions that what they seek to recoup, in substance, is their investments. As in *Re: Blue Range Resource Corp*, the "very core" of these claims arises from the circumstances surrounding the acquisition of Merit shares. The Flow-Through Shareholders had no cause of action until they acquired the Flow-Through Shares and their claims include a direct claim for return of capital in their request for rescission and in the case of a damage claim, just as in *Re: Blue Range Resource Corp*, the measure of damages enables them to recover the purchase price of the shares.

[50] It is true these shareholders are using statutory provisions to make their claims in damages or rescission rather than the tort basis used in *Re: Blue Range Resource Corp*, but in substance they remain shareholder claims for the return of an equity investment. The right to a return of this equity investment must be limited by the basic common law principle that shareholders rank after creditors in respect of any return of their equity investment.

[51] Now what about the second aspect of the claims?

¹³ Counsel described the claims variously as "statutory", "statutory/tort and "contractual"

[52] The second claim of the Flow-Through Shareholders has some of the features of a debt and the Subscription and Renunciation Agreements provide for a specific remedy in the event Merit fails to comply with its undertaking to make and renounce the CEE expenditures .

[53] While the discussion in *Re Central Capital Corporation* regarding the claim for declared dividends is appealing, it does not precisely apply in these circumstances. The tax advantages associated with flow-through shares is reflected in a premium paid for the purchase of the shares¹⁴. In essence, what happens in a flow-through share offering (as sanctioned by the *Income Tax Act*¹⁵) is the shareholder buys deductions from the company. As the company has given up deductions, it wants to be paid for those deductions that it is renouncing. From the perspective of the purchaser of the shares, the premium for the shares would not have been paid without some assurance that the deductions will be available. I note the purchaser is also required to reduce their adjusted cost base of the shares (for tax purposes) by the amount of the deductions utilized by the purchaser.

[54] While the Flow-Through Shareholders paid a premium for the shares (albeit to get the deductions), in my view the debt features associated with the CEE indemnity from Merit do not “transform” that part of the relationship from a shareholder relationship into a debt relationship. That part of the relationship remains “incidental” to being a shareholder.

[55] In summary, the Flow-Through Shareholders’ claims, regardless of the basis chosen to support them, are in substance claims for the return of their equity investment and accordingly cannot rank with Merit’s unsecured creditors.

DECISION - ISSUE 2

The claims of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are not subordinate to the claims of Merit’s unsecured creditors as they are in substance creditors’ claims that are not too contingent to constitute provable claims.

i. The Trustee’s Position

[56] The Trustee argued that while on their face, the Underwriters’ and the Directors and Officers’ claims are not shareholder claims, “in substance”, they are shareholders’ claims and are no more than an indirect passing-on to Merit of the Flow-Through Shareholders’ claims. As a result, the Trustee submitted, equity dictates that since the Flow-Through Shareholders’ claims must rank behind those of the unsecured creditors, the claims of the Underwriters and the

¹⁴V.M. Jog et al, “Flow Through Shares: Premium-Sharing and Trust-Effectiveness”, (1996), 44 Can. Tax J. at p. 1017.

¹⁵ R.S.C. 1985, (5th Supp.),c. 1.

Directors and Officers must fail as well. The Trustee suggested this subordination follows from the policy considerations set out by Romaine J. in ***Re: Blue Range Resource Corp.*** Alternatively, the Trustee asserted that the claims of the Underwriters and the Directors and Officers are so contingent they must be valued at nil.

ii. The Underwriters' Position

[57] The Underwriters argued that regardless of how the Court characterized the Flow-Through Shareholders' claims, the Trustee cannot succeed against the Underwriters because: (1) the indemnity claims are based on contractual, legal and equitable duties owed to the Underwriters by Merit, to which the Flow-Through Shareholders are strangers and to which ***Re: Blue Range Resource Corp.*** has no application; (2) equitable subordination has never been applied by Canadian courts and the Trustee cannot satisfy the test even if the court chooses to apply it, and (3) the Underwriters' claims are precisely the type of contingent claims contemplated by the BIA.

iii. The Directors' and Officers' Position

[58] The Directors and Officers conceded that, while some of the potential liability they face is as a result of the Flow-Through Shareholders' claims against them, or via indemnity claims brought by the Underwriters and Auditors against them, their claim is simply a claim in contract that is not an effort to obtain a return of equity. They argued that the enforceability of the indemnity is not contingent on the source of the potential liability.

[59] In any case, the Directors and Officers face claims other than from Merit's shareholders, which include: (1) a Saskatchewan action alleging the Directors and Officers assented to or acquiesced in Merit not paying its accounts and ought to be held liable for them, and (2) an Alberta action relating to ownership and lease payments on oilfield equipment. The Directors and Officers asserted that the existence of these claims demonstrate that they are not simply attempting to pass on shareholder claims, but rather they are making a contractual claim for all the potential liability they face, as the indemnity intends.

[60] The Directors and Officers also suggested that, as with the Underwriters, some of the contingency in their claim under the indemnity has been realized to the extent of legal fees incurred in defending the various actions. In any case, they agreed with the Flow-Through Shareholders and Underwriters that a contingent claim need not be "probable" in order to be "provable" but need only something more than to "remote and speculative in nature".

[61] Further, directors and officers require indemnities and commercial necessity dictates that these indemnities have real value.

Resolution - ISSUE 2

Nature of the Underwriters and the Directors' and Officers' claims against Merit

[62] The fundamental premise of the Trustee's argument is that the Underwriters' indemnity simply "flows through" or "passes on" the Flow-Through Shareholders' claim to Merit. This ignores the nature of the causes of action being advanced by the Underwriters and the existence of a contractual indemnity freely given by Merit for good and valuable consideration. The Trustee did not suggest that the indemnity was invalid or unenforceable, rather, it argued that this valid and enforceable right should be treated as a "shareholders' claim" and subordinated. With respect, I cannot agree with the Trustee's position.

[63] The Trustee's argument attempts to shift the Court's focus from the Underwriters' claim against Merit to the claim being asserted against the Underwriters, even though it is the former that the Trustee wants the Court to subordinate. The Flow-Through Shareholders' cause of action against the Underwriter's is predicated on the Underwriters' alleged failure to discharge a statutory duty and their liability is not contingent in any way on a successful claim by the Underwriters against Merit under the indemnity.

[64] The Underwriters' indemnity claims against Merit are not made as a shareholder or for any return of investment made by the Underwriters. Rather, they are based on contractual, legal and equitable duties owed directly by Merit to the Underwriters. Similarly, the other causes of action advanced by the Underwriters against Merit in the Third Party Notice do not arise from any equity position in the company, but are based on agency, fiduciary and contractual relationships between the Underwriters and Merit, to which the Flow-Through Shareholders are strangers and are unavailable for them to assert.

[65] For example, the Underwriters are entitled to an indemnity for defence costs even if the Flow-Through Shareholders' claims fail completely. The ultimate success or failure of the Flow-Through Shareholders' claims makes no difference to the existence and enforceability of this right against Merit.

[66] As the Underwriters' claims are not claims for a return of equity, *Re: Blue Range Resource Corp* does not apply. That decision only addressed equity claims of shareholders and I am not prepared to extend its application to the claims of the Underwriters in the application before me, simply because the claims triggering an indemnity by the Underwriters against Merit were shareholders' claims.

[67] As Firstenergy Capital Corp. emphasized, even if I were to apply the policy considerations for subordinating claims identified by Romaine J. in *Re: Blue Range Resource Corp* to the Underwriters' claims, these policy considerations support a conclusion that the Underwriters' claims are of the type I believe that Romaine J. would protect, not subordinate:

1. Shareholders rank behind creditors in insolvency - the issue here is whether the Underwriters are properly characterized as equity stakeholders or creditors. This is done by considering the substance of their claim. Regardless of how the Flow-Through

Shareholders' claims are characterized, the substance of the Underwriters' claims against Merit are contractual. They arise out of a contract for indemnity between Merit and the Underwriters. This is clearly distinct from a claim for return of shareholders' equity. The Trustee asked the court to consider the fact of a possible future payment from the Underwriters to the Flow-Through Shareholders in characterizing the claim of the Underwriters against Merit. Given the nature of the obligations under an indemnity, this is inappropriate. Describing the Underwriters' claims as "no more than and indirect passing-on of the Flow-Through Shareholders' claims" is based on a flawed analysis of the obligations under an indemnity and ignores the statutory duty of the Underwriters to the Flow-Through Shareholders. There are two distinct obligations.

The first obligation relates to the Flow-Through Shareholders' claims against the Underwriters and any obligations that may be imposed on the Underwriters as a result. This obligation is completely unrelated to, and unaffected by the Underwriters' indemnity. The second obligation is between Merit, as indemnifier, and the Underwriters. This second obligation is the obligation that must be characterized in this application. The Flow-Through Shareholders are strangers to this claim.

2. Creditors do business with companies on the assumption they will rank ahead of shareholders on insolvency - the focus of this analysis is the degree of risk-taking respectively assumed by shareholders and creditors. Unlike shareholders who assume the risks of insolvency, the Underwriters bargained, as any other creditor, for their place at the creditor table in an insolvency. An indemnity is a well-known commercial concept business people routinely use to eliminate or reduce risk and should be recognized as a necessary and desirable obligation.

To subordinate the Underwriters' claim would amount to a reversal of the expectations of the parties to the indemnities. The evidence before me suggests that the Underwriters would not have participated in Merit's offering without the indemnity. I need not decide whether that is true.

Subordinating the Underwriters would fundamentally change the underlying business relationship between underwriters and issuers, and would be unexpected in the industry. Such a result might make it impossible for an underwriter to recover under an indemnity from a bankrupt issuer in respect of an equity offering.

3. Shareholders are not entitled to rescind shares after insolvency - this consideration has no bearing on the Underwriters as they are not shareholders seeking to rescind shares. Their claims against the bankrupt are for damages under a contract for indemnity. Further, I was not asked to determine this particular question in this application.

4. The principles of equitable subordination - In *Re Canada Deposit Insurance v. Canadian Commercial Bank*, the Supreme Court of Canada expressly left open the

question of whether equitable subordination formed part of Canadian insolvency law, but expressed its opinion as to the applicable test as developed in the United States:

...(1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute...(p. 420)

An application of these criteria would lead to the conclusion that equitable subordination would not apply in this case, even if it was part of Canadian law.

Although the Trustee suggested that the Underwriters may have “participated” in the misrepresentation, there is no evidence before me of inequitable conduct on their part. It is perhaps significant that the Flow-Through Shareholders have not alleged any such misconduct as against the Underwriters, but rather they have only advanced the statutory causes of action available to them under securities legislation.

As there is no evidence of inequitable conduct on the part of the Underwriters, there can be no corresponding injury to Merit’s other creditors, or enhancement of the Underwriters’ position.

Finally, the application of equitable subordination of the Underwriters’ claims in this case would be inconsistent with the established priority scheme contained in the *BIA*. The United States Supreme Court addressed this third requirement of consistency in *United States v. Noland*¹⁶:

[t]his last requirement has been read as a ‘reminder to the bankruptcy court that although it is a court of equity, it is not free to adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the court perceives the result as inequitable’

This statement encapsulates what the Trustee is asking to the Court to do: subordinate the claims of the Underwriters, who have asserted their claims under their indemnities as they are entitled to do, merely because the result may be perceived as inequitable. The words of the US Supreme Court are consistent with the view that equitable subordination is an extraordinary remedy that ought to be employed only where there is some misconduct on the part of the claimant. The statutory scheme of distribution in the *BIA* must be paramount, and if it is to be interfered with, it should only be in clear cases where demonstrable inequitable conduct is present.

¹⁶ (1996), 517 U.S. 535 at 539.

5. Floodgates - Romaine J. considered that allowing Big Bear's claim for misrepresentation to rank with unsecured creditors would encourage aggrieved shareholders to claim misrepresentation or fraud. This consideration has no application to the Underwriters, who are not shareholders. Allowing the Underwriters' claims, which are based on a contractual right of indemnity, will not open the door to increased claims of misrepresentation or fraud by shareholders. The nature of the claims against the Underwriters and the Underwriters' claim against Merit are entirely different.

[68] In summary, the Underwriters' claims against Merit are creditors' claims which rank with Merit's other unsecured creditors.

[69] With this result I appreciate the potential for the Flow-Through Shareholders to be seen as obtaining some recovery from the estate before all the unsecured creditors are paid in full. It might even be suggested it may ultimately allow the Flow-Through Shareholders to achieve indirectly what they could not achieve directly, based on the substance of their claims. This may be the final economic result.

[70] However, success by the Flow-Through Shareholders against the Underwriters is not contingent upon success by the Underwriters against Merit nor does it automatically follow that success by the Flow-Through Shareholders against the Underwriters must inevitably lead to success by the Underwriters against Merit. A successful claim by the Underwriters against Merit will be determined on the basis of the provisions of the indemnity and the result of the claim against the Underwriters will be one of the factors in that analysis.

[71] As the possible economic result described in paragraph 69 does not flow from a continuous chain of interdependent events, the possibility that the Flow-Through Shareholders may indirectly recover some of their equity investment from others prior to Merit's unsecured creditors being paid in full would not be a sufficient reason to decide this application differently.

[72] As with the Underwriters, I find that the Directors and Officers have creditors' claims entitled to rank with Merit's other unsecured creditors.

Contingent claims

[73] While the Trustee's primary argument was the claims of the Underwriters and the Directors and Officers are merely indirect shareholder claims, alternatively, it argued that these claims are too contingent and cannot constitute a provable claim on that basis.¹⁷

[74] The Trustee relied on the case of *Claude Resources (Trustee of) v. Dutton* in support of its position. In that case, an indemnity agreement was executed between the bankrupt and its sole

¹⁷ *Supra* footnote 9 for **BIA** definitions in ss. 121 and 135

shareholder, officer and director and entitled the individual to be indemnified for any liabilities arising out of actions taken in his capacity as an officer and director of the bankrupt. This individual was sued in relation to a debenture offering and sought to prove using his indemnity. Noble J. described the claim as having a “double contingency”, in that as a first step the action on the debenture offering must be successful, and if so, then the claim on the application of the indemnity agreement must also succeed. Noble J. held that more is needed beyond evidence that the creditor has been sued and that liability may flow; some element of probability is needed.

[75] The Trustee submitted that there is no evidence as to the potential success of the Flow-Through Shareholders’ claims against the Underwriters and/or the Directors and Officers, nor was it possible prior to judgment in those actions, to determine whether any liability of the Underwriters and/or the Directors and Officers to the Flow-Through Shareholders would qualify for indemnification.

[76] The fact that a claim is contingent does not mean it is not “provable”¹⁸. Provable claims include contingent claims as long as they are not too speculative: *Negus v. Oakley’s General Contracting*¹⁹. Section 121 defines provable claims to include “all debts and liabilities, present or future,...to which the bankrupt may become subject...”.

[77] Section 121 does not specify the degree of certainty required to make a claim provable, other than to include as provable all debts or liabilities to which the bankrupt may become subject. As stated, the Ontario Court of Appeal addressed this in *Re Confederation Treasury Services Ltd.* and held that the test of probable liability set out in *Claude Resources (Trustee of) v. Dutton* and *Re Wiebe* (also relied on by the Trustee) imposed too high of a threshold to establish a valid contingent claim. Rather, the Ontario Court of Appeal expressed that contingent claims must simply be not too “remote or speculative in nature”. I agree with the Ontario Court of Appeal’s view of the test.

[78] On a plain reading of the Underwriting Agreement, the indemnity appears to be engaged by the Flow-Through Shareholders’ actions. The actions are under case management and are proceeding through discoveries at this time. Further, there are several authorities that suggest an indemnity becomes enforceable as soon as a claim of the type indemnified is alleged.²⁰ Finally, at least one part of the Underwriters’ claim is not contingent - they have incurred costs and disbursements in defence of the Flow-Through Shareholders’ claims and according to the terms of the indemnity are currently entitled to reimbursement for those costs, regardless of the outcome of the litigation.

¹⁸ *ibid.*

¹⁹ (1996), 40 C.B.R. (3d) 270 (N.S.S.C.)

²⁰ See for example, *Re Froment; Alta. Lumber Co. v. Department of Agriculture*, [1925] 2 W.W.R. 415 (Alta. S.C.)

iv. PriceWaterhouseCoopers

[79] PriceWaterhouseCoopers made similar submissions to the Underwriters and the Directors and Officers and emphasized the strong policy reason behind supporting auditors' indemnities as unsecured and not subordinated claims. In addition, PriceWaterhouseCoopers has an independent claim for negligent misrepresentation against the Directors and Officers, arising out of the provision of information to PriceWaterhouseCoopers by Merit management which PriceWaterhouseCoopers alleges was known, or ought to have been known, to be incorrect. PriceWaterhouseCoopers suggested this further distinguishes PriceWaterhouseCoopers' situation from the situation before the Court in *Re: Blue Range Resource Corp.*

[80] I find that PriceWaterhouseCoopers' indemnity claim is a creditor's claim entitled to rank with Merit's other unsecured creditors. My reasoning with respect to the Underwriters' claims, as based on their indemnities, applies equally to PriceWaterhouse Coopers' claim based on its indemnity.

[81] I am aware that the indemnities of the Flow-Through Shareholders are not being accorded creditor status, while those of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are. However, as noted, the indemnity feature of the Flow-Through Shareholders' claims is related to certain deductions and those deductions were part of the purchase price for the shares. This in my view is more analogous to *Re Canada Deposit Insurance v. Canadian Commercial Bank* than to *Re Central Capital Corporation* and that to me is sufficient to justify the distinction.

CONCLUSION

[82] The claims of the Flow-Through Shareholders are in substance claims for the return of equity investment and rank behind the claims of Merit's unsecured creditors, which shall include the claims of the Underwriters, the Directors and Officers and PriceWaterhouse Coopers.

[83] If the parties cannot agree on costs, they may see me within 30 days.

HEARD on the 30th day of April 2001.

DATED at Calgary, Alberta this 3rd day of July 2001.

J.C.Q.B.A.

An errata has been issued for the above Judgement as follows:

ERRATA OF THE REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

The Appearances have been revised to include Mr. David A. Klein. Mr. Klein of Klein Lyons attended with Mr. William E. McNally of McNally and Cuming, for Larry Delf, Representative Flow-Through Shareholder.

An errata has been issued for the above Judgement as follows:

ERRATA OF THE REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

Please replace page 2 of your copy of the Judgement.

The initials Q.C. should not follow the name of Douglas G. Stokes, of Rooney Prentice.

TAB 15

Her Majesty The Queen in Right of Canada *Appellant/Respondent on cross-appeal*

v.

Imperial Tobacco Canada Limited *Respondent/Appellant on cross-appeal*

and

Attorney General of Ontario and Attorney General of British Columbia *Intervenors*

- and -

Attorney General of Canada *Appellant/Respondent on cross-appeal*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc. *Respondents/Appellants on cross-appeal*

and

Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick *Intervenors*

Sa Majesté la Reine du chef du Canada *Appelante/intimée au pourvoi incident*

c.

Imperial Tobacco Canada Limitée *Intimée/appelante au pourvoi incident*

et

Procureur général de l'Ontario et procureur général de la Colombie-Britannique *Intervenants*

- et -

Procureur général du Canada *Appellant/intimé au pourvoi incident*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Imperial Tobacco Canada Limitée, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. et Philip Morris International Inc. *Intimées/appelantes au pourvoi incident*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la province du Nouveau-Brunswick *Intervenants*

INDEXED AS: R. v. IMPERIAL TOBACCO CANADA LTD.**2011 SCC 42**

File Nos.: 33559, 33563.

2011: February 24; 2011: July 29.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Third-party claims — Motion to strike — Tobacco manufacturers being sued by provincial government to recover health care costs of tobacco-related illnesses, and by consumers of “light” or “mild” cigarettes for damages and punitive damages — Tobacco companies issuing third-party notices to federal government claiming contribution and indemnity — Whether plain and obvious that third-party claims disclose no reasonable cause of action.

Torts — Negligent misrepresentation — Failure to warn — Negligent design — Duty of care — Proximity — Tobacco manufacturers being sued by provincial government and consumers and issuing third-party notices to federal government claiming contribution and indemnity — Federal government claiming representations constituted government policy immune from judicial review — Whether facts as pleaded establish prima facie duty of care — If so, whether conflicting policy considerations negate such duty.

Torts — Provincial statutory scheme establishing rights of action against tobacco manufacturers and suppliers — Whether federal government liable as a “manufacturer” under the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, or a “supplier” under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and the Trade Practice Act, R.S.B.C. 1996, c. 457.

The appeal concerns two cases before the courts in British Columbia. In the *Costs Recovery* case, the

RÉPERTOIRÉ : R. c. IMPERIAL TOBACCO CANADA LTÉE**2011 CSC 42**N^{os} du greffe : 33559, 33563.

2011 : 24 février; 2011 : 29 juillet.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Mise en cause — Requête en radiation — Fabricants de tabac poursuivis par le gouvernement d'une province qui cherche à recouvrer les sommes consacrées au traitement des maladies liées au tabagisme, et par des consommateurs de cigarettes dites « légères » ou « douces » qui demandent des dommages-intérêts et des dommages-intérêts punitifs — Compagnies de tabac mettant en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Est-il évident et manifeste que les avis de mise en cause ne révèlent aucune cause d'action raisonnable?

Responsabilité délictuelle — Déclaration inexacte faite par négligence — Défaut de mise en garde — Conception négligente — Obligation de diligence — Lien de proximité — Poursuites engagées par le gouvernement d'une province et des consommateurs contre des fabricants de tabac qui ont mis en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Gouvernement fédéral prétendant que les déclarations relevaient de la politique générale du gouvernement et étaient de ce fait soustraites au contrôle judiciaire — Les faits allégués établissent-ils l'existence d'une obligation de diligence prima facie? — Dans l'affirmative, des considérations de politique générale opposées écartent-elles cette obligation?

Responsabilité délictuelle — Régime législatif provincial conférant un droit d'action contre les fabricants et les fournisseurs de tabac — Le gouvernement fédéral a-t-il engagé sa responsabilité à titre de « fabricant » au sens de la Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30, ou de « fournisseur » au sens de la Business Practices and Consumer Protection Act, S.B.C. 2004, ch. 2, et de la Trade Practice Act, R.S.B.C. 1996, ch. 457?

Le pourvoi porte sur deux actions intentées devant les tribunaux de la Colombie-Britannique. Dans l'*Affaire du*

Government of British Columbia is seeking to recover, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act* (“CRA”), the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial. British Columbia alleges that by 1950, the tobacco companies knew or ought to have known that cigarettes were harmful to one’s health, and that they failed to properly warn the public about the risks associated with smoking their product. In the *Knight* case, a class action was brought against Imperial alone on behalf of class members who purchased “light” or “mild” cigarettes, seeking a refund of the cost of the cigarettes and punitive damages. The class alleges that the levels of tar and nicotine listed on Imperial’s packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes.

In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity. They also allege that Canada would itself be liable as a “manufacturer” under the *CRA* or a “supplier” under the *Business Practices and Consumer Protection Act* and the *Trade Practice Act*, and that they are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*. Canada brought motions to strike the third-party notices, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies’ appeals in part. A majority held that the negligent misrepresentation claims arising from Canada’s alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada’s alleged duty of care to consumers should proceed, as should the negligent design claim. The court unanimously struck the remainder of the tobacco companies’ claims.

recouvrement des coûts, le gouvernement de la Colombie-Britannique cherche, aux termes de la *Tobacco Damages and Health Care Costs Recovery Act* (« CRA »), à recouvrer d’un groupe de compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme. Selon la Colombie-Britannique, dès 1950, les compagnies de tabac savaient ou auraient dû savoir que les cigarettes étaient néfastes pour la santé et ont fait défaut de mettre le public en garde adéquatement contre les risques associés à l’usage de leur produit. Dans l’affaire *Knight*, un recours collectif a été intenté contre Imperial seulement, pour demander, au nom des membres qui ont acheté des cigarettes dites « légères » ou « douces », le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs. Selon eux, la teneur en goudron et en nicotine indiquée sur les paquets de cigarettes fabriquées par Imperial ne correspondait pas aux émissions toxiques réelles pour les fumeurs. Ils font valoir que la fumée dégagée par les cigarettes légères était tout aussi néfaste que celle dégagée par les cigarettes régulières.

Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que, si elles étaient tenues responsables envers les demandeurs, elles avaient le droit d’être indemnisées par le Canada pour déclarations inexactes faites par négligence, conception négligente et défaut de mise en garde; ainsi qu’en vertu de l’équité. Elles font également valoir que le Canada aurait engagé sa propre responsabilité à titre de « fabricant » au sens de la *CRA* ou à titre de « fournisseur » au sens de la *Business Practices and Consumer Protection Act* et de la *Trade Practice Act*, et qu’elles sont en droit d’obtenir du Canada une contribution et une indemnisation en vertu de la *Negligence Act*. Le Canada a présenté des requêtes en radiation des avis de mise en cause, faisant valoir qu’il était évident et manifeste que ces avis ne révélaient aucune cause d’action raisonnable. Dans les deux affaires, les juges siégeant en cabinet ont ordonné la radiation de tous les avis de mise en cause. La Cour d’appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. Les juges majoritaires ont conclu à l’opportunité d’instruire, dans l’affaire du *recouvrement des coûts* et dans l’affaire *Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d’une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l’affaire *Knight*, les juges majoritaires ont conclu en outre à l’opportunité d’instruire la demande relative aux déclarations inexactes faites par négligence fondée sur une prétendue obligation de diligence du Canada envers les consommateurs, ainsi que la demande relative à la conception négligente. La cour a radié à l’unanimité les autres demandes présentées par les compagnies de tabac.

Held: The appeals should be allowed and the claims should be struck out. The tobacco companies' cross-appeals should be dismissed.

On a motion to strike, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial. However, the judge cannot consider what evidence adduced in the future might or might not show. Here, it is plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

In the *Costs Recovery* case, the private law claims against Canada for contribution and indemnity based on alleged breaches of a duty of care to smokers must be struck. A third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff, in this case, British Columbia. Here, even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia.

The Claims for Negligent Misrepresentation

There are two relationships at issue in these claims: one between Canada and consumers and one between Canada and tobacco companies. In the *Knight* case, Imperial alleges that Canada negligently represented the health attributes of low-tar cigarettes to consumers. In both the *Knight* case and the *Costs Recovery* case, the tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies.

The facts as pleaded do not bring Canada's relationship with consumers and the tobacco companies within a settled category of negligent misrepresentation. Accordingly, to determine whether the alleged causes of action have a reasonable prospect of success, the general requirements for liability in tort must be met. At

Arrêt : Les pourvois sont accueillis et les demandes sont radiées. Les pourvois incidents interjetés par les compagnies de tabac sont rejetés.

Dans le cas d'une requête en radiation, une demande ne sera radiée que s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que la déclaration ne révèle aucune cause d'action raisonnable. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable. Cependant, le juge ne peut pas anticiper ce que la preuve qui sera produite permettra d'établir. En l'espèce, il est évident et manifeste qu'aucune des allégations des compagnies de tabac visant le Canada n'a une possibilité raisonnable d'être accueillie.

Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts

Dans l'*Affaire du recouvrement des coûts*, les demandes de contribution et d'indemnisation de droit privé dirigées contre le Canada et fondées sur des manquements allégués à une obligation de diligence envers les fumeurs doivent être radiées. Un tiers ne peut être tenu de verser une contribution en vertu de la *Negligence Act* que s'il est directement responsable envers le demandeur, en l'occurrence la Colombie-Britannique. En l'espèce, même si le Canada a manqué à ses obligations envers les fumeurs, ce manquement n'aurait aucune incidence sur la question de savoir s'il est responsable envers la Colombie-Britannique.

Les allégations de déclarations inexactes faites par négligence

Les allégations en l'espèce mettent en cause deux liens : celui entre le Canada et les consommateurs, et celui entre le Canada et les compagnies de tabac. Dans l'affaire *Knight*, Imperial prétend que le Canada a fait preuve de négligence en déclarant faussement aux fumeurs que la cigarette à teneur réduite en goudron serait moins nocive pour la santé. Dans l'affaire *Knight* et l'*Affaire du recouvrement des coûts*, les compagnies de tabac prétendent que le Canada leur a fait des déclarations inexactes par négligence.

Les faits allégués ne font pas entrer la relation du Canada avec les consommateurs et les compagnies de tabac dans une catégorie définie en matière de déclarations inexactes faites par négligence. Par conséquent, afin de déterminer si les causes d'action alléguées ont une possibilité raisonnable d'être accueillies, il faut que

the first stage, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. In a claim of negligent misrepresentation, both of these requirements for a *prima facie* duty of care are established if there was a “special relationship” between the parties. A special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case. If proximity is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

Here, on the facts as pleaded, Canada did not owe a *prima facie* duty of care to consumers. The relationship between the two was limited to Canada’s statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes. However, the relevant statutes establish only general duties to the public, and no private law duties to consumers. In light of the lack of proximity, this claim in the *Knight* case should be struck at the first stage of the analysis.

As for the tobacco companies, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of establishing a special relationship of proximity giving rise to a *prima facie* duty of care. The allegations are that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials, going far beyond the sort of statements made by Canada to the public at large. Furthermore, Canada’s regulatory powers over the manufacturers coupled with its specific advice and its commercial involvement could be seen as supporting a conclusion that Canada ought reasonably to have foreseen that the tobacco companies would rely on the representations and that such reliance would be reasonable in the pleaded circumstance.

les exigences générales en matière de responsabilité délictuelle soient remplies. À la première étape, il faut se demander si les faits révèlent l’existence d’un lien de proximité dans le cadre duquel l’omission de faire preuve de diligence raisonnable peut, de façon prévisible, causer une perte ou un préjudice au plaignant. Dans le cadre d’une action pour déclaration inexacte faite par négligence, ces deux conditions pour qu’il existe une obligation de diligence *prima facie* sont remplies lorsqu’un « lien spécial » unit les parties. L’existence d’un lien spécial est établie lorsque : (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration; et que (2) la confiance que le demandeur accorde à la déclaration serait raisonnable dans les circonstances. Si l’existence d’un lien de proximité est établie, il y a obligation de diligence *prima facie* et l’analyse passe à l’étape suivante dans laquelle on se demande si des considérations de politique empêcheraient de reconnaître cette obligation de diligence *prima facie*.

Compte tenu des faits allégués, le Canada n’avait pas d’obligation de ce genre envers les consommateurs. Le lien entre eux se limitait aux déclarations du Canada adressées au grand public selon lesquelles les cigarettes à faible teneur en goudron sont moins dangereuses pour la santé. Le Canada n’entretenait pas de rapports spéciaux avec les membres du groupe. Par conséquent, le constat qu’il s’agit d’un lien suffisamment étroit doit découler des lois applicables. Les lois pertinentes n’établissent toutefois que des obligations générales envers le public, et aucune obligation de nature privée envers les consommateurs. Vu l’absence de lien de proximité, il convient de radier cette allégation dans l’affaire *Knight* à la première étape de l’analyse.

En ce qui concerne les compagnies de tabac, les faits allégués révèlent que le Canada et les compagnies de tabac entretiennent depuis longtemps des rapports qui peuvent constituer un lien spécial imposant une obligation de diligence *prima facie*. On allègue que le Canada a joué un rôle de conseiller auprès d’un nombre déterminé de fabricants et a entretenu des rapports commerciaux avec les sociétés en cause compte tenu, en partie, des avis fournis à ces dernières par des fonctionnaires, avis qui vont bien au-delà des déclarations faites par le Canada au grand public. De plus, les pouvoirs de réglementation du Canada envers les fabricants, conjugués aux avis précis qu’il a donnés et à sa participation à des activités commerciales, pourraient être considérés comme étayant la conclusion que le Canada aurait raisonnablement dû prévoir que les compagnies de tabac se fieraient aux déclarations et que cette confiance serait raisonnable dans les circonstances alléguées.

Canada's alleged negligent misrepresentations do not give rise to tort liability, however, because of conflicting policy considerations. The alleged representations constitute protected expressions of government policy. Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadian government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who continued to smoke to switch to low-tar cigarettes.

The claims for negligent misrepresentation should also fail because they would expose Canada to indeterminate liability. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers. While the quantum of damages owed by Canada to the companies in both cases would depend on the number of smokers and the number of cigarettes sold, Canada had no control over the number of people who smoked light cigarettes.

The Claims for Failure to Warn

The tobacco companies make two allegations for failure to warn: (1) that Canada directed the tobacco companies not to provide warnings on cigarette packages about the health hazards of cigarettes and (2) that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco it designed and licensed. These two claims should be struck. The crux of the first claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn. The same is true of the second claim. While the tort of failure to warn requires evidence of a positive duty towards the plaintiff, nothing in the third-party notices suggests that Canada was under such a positive duty here. A plea of negligence, without more, will not suffice to raise a duty to warn. In any event,

Les déclarations inexactes que le Canada aurait faites par négligence n'engagent toutefois pas sa responsabilité délictuelle parce que des considérations de politique générale s'y opposent. Les déclarations qui auraient été faites sont des expressions protégées de politique générale du gouvernement. Les décisions de politique générale fondamentale du gouvernement qui sont soustraites aux poursuites sont les décisions qui se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Les déclarations en cause faisaient partie intégrante d'une politique générale adoptée par les plus hautes instances du gouvernement canadien et élaborée par souci pour la santé des Canadiens et des Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac, afin d'inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron.

Les allégations de déclarations inexactes faites par négligence doivent aussi être rejetées parce qu'elles exposeraient le Canada à une responsabilité indéterminée. Reconnaître une obligation de diligence à l'égard des déclarations faites aux compagnies de tabac reviendrait en fait à reconnaître une obligation envers les consommateurs. Le montant des dommages-intérêts dus par le Canada aux compagnies de tabac dans les deux cas dépendrait du nombre de fumeurs et du nombre de cigarettes vendues, alors que le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères.

Les allégations de défaut de mise en garde

Les compagnies de tabac formulent deux allégations de défaut de mise en garde : (1) le Canada a interdit aux compagnies de tabac d'apposer sur les paquets de cigarettes des mises en garde à l'égard des dangers que présentent les cigarettes pour la santé et (2) le Canada n'a pas avisé les compagnies de tabac des dangers que présentent les souches de tabac conçues par le Canada et pour lesquelles il a octroyé des licences. Il faut radier ces allégations. L'élément crucial de la première allégation est essentiellement le même que celui des allégations de déclarations inexactes faites par négligence, et il y a lieu de la rejeter pour les mêmes considérations de politique générale. Les recommandations du ministre de la Santé sur les mises en garde faisaient partie intégrante de la politique générale du gouvernement visant à inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. En tant que telles, elles ne peuvent fonder une action pour défaut de mise en garde. Cela vaut aussi pour la deuxième allégation. Bien que le délit

such a claim would fail for the policy reasons applicable to the negligent misrepresentation claim.

The Claims for Negligent Design

The tobacco companies have brought two types of negligent design claims against Canada. They submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. In the *Knight* case, Imperial submits that Canada breached its duty of care to consumers of light and mild cigarettes. The two negligent design claims establish a *prima facie* duty of care. With respect to Canada's design of low-tar tobacco strains, the proximity alleged with the tobacco companies is not based on a statutory duty, but on commercial interactions between Canada and the tobacco companies. In the *Knight* case also, it is at least arguable that Canada was acting in a commercial capacity towards the consumers of light and mild cigarettes when it designed its strains of tobacco. However, the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy and based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. These claims should accordingly be struck.

Liability as a "Manufacturer" and a "Supplier"

The tobacco companies' contribution claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* should be struck. It is plain and obvious that the federal government does not qualify as a manufacturer of tobacco under that Act. When the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act,

de défaut de mise en garde requière la preuve d'une obligation positive envers le demandeur, les avis de mise en cause ne donnent aucunement matière à croire que le Canada avait une telle obligation en l'espèce. Une allégation de négligence, sans plus, est insuffisante pour imposer une obligation de mise en garde. Quoi qu'il en soit, une allégation de ce genre serait rejetée pour les considérations de politique générale qui s'appliquent aux allégations de déclarations inexactes faites par négligence.

La conception négligente

Les compagnies de tabac ont soulevé à l'encontre du Canada deux types d'allégations de conception négligente. Elles affirment que le Canada a manqué à son obligation de diligence envers elles en concevant de manière négligente ses souches de tabac à faible teneur en goudron. Dans l'affaire *Knight*, Imperial fait valoir que le Canada a manqué à son obligation de diligence envers les consommateurs de cigarettes légères et douces. Ces deux allégations de conception négligente établissent l'existence d'une obligation de diligence *prima facie*. Pour ce qui est des souches de tabac à faible teneur en goudron conçues par le Canada, le prétendu lien de proximité avec les compagnies de tabac se fonde non pas sur une obligation prévue par la loi, mais sur les rapports entre le Canada et les compagnies de tabac. Dans l'affaire *Knight* également, il est au moins possible de soutenir que le Canada agissait comme une entreprise commerciale envers les consommateurs de cigarettes légères et douces lorsqu'il a conçu ses souches de tabac. Cependant, la décision de concevoir des souches de tabac à faible teneur en goudron parce qu'on croit que les cigarettes fabriquées avec ce tabac seraient moins nuisibles pour la santé constitue une ligne de conduite fondée sur la politique générale du Canada en matière de santé et repose sur des facteurs sociaux et économiques. Cette décision de politique générale fondamentale du gouvernement ne saurait fonder une poursuite pour conception négligente. Il faut donc rejeter ces allégations.

Responsabilité d'un « fabricant » et d'un « fournisseur »

Dans l'*Affaire du recouvrement des coûts*, la demande de contribution des compagnies de tabac visant à faire reconnaître au Canada la qualité de « fabricant » au sens de la *CRA* doit être radiée. Il est manifeste et évident que le gouvernement fédéral n'est pas un fabricant de produits du tabac au sens de cette loi. Lorsqu'on interprète la loi dans son contexte eu égard à l'ensemble de ses dispositions, il appert que la législature de la Colombie-Britannique ne voulait pas imposer au Canada la responsabilité d'un fabricant. C'est ce que

and the broader context of the relationship between the province and the federal government. Holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco-related wrongs from taxpayers to the tobacco industry. Similarly, the tobacco companies cannot rely on the recently adopted *Health Care Costs Recovery Act* in an action for contribution under the *CRA*. Finally, Canada could not be liable for contribution under the *Negligence Act* or at common law since it is not directly liable to British Columbia.

Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *Trade Practice Act* and the *Business Practices and Consumer Protection Act* which replaced it should also be struck. Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in those statutes. Those phrases must be understood as limited to activities undertaken for a commercial purpose. Here, it is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier and is not liable under those statutes.

Claims for Equitable Indemnity and Procedural Considerations

The tobacco companies' claims of equitable indemnity should be struck. Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Finally, the claims for declaratory relief should be struck. The tobacco companies' ability to mount defences would not be severely prejudiced if Canada was no longer a third party in the litigation.

confirment le texte de la loi, l'intention qu'avait le législateur au moment de l'adopter et le contexte plus général des rapports entre la province et le gouvernement fédéral. Tenir le Canada responsable en application de la *CRA* contrecarrerait l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une faute du fabricant. Dans le même ordre d'idées, les compagnies de tabac ne peuvent s'appuyer sur la *Health Care Costs Recovery Act*, récemment édictée, dans le cadre d'une action intentée pour obtenir une contribution en vertu de la *CRA*. Enfin, le Canada ne peut être tenu à une contribution au titre de la *Negligence Act* ou en common law parce qu'il n'est pas directement responsable envers la Colombie-Britannique.

Dans l'affaire *Knight*, la demande d'Imperial de reconnaître au Canada la qualité de « fournisseur » au sens de la *Trade Practice Act* et de la loi qui l'a remplacée, la *Business Practices and Consumer Protection Act*, doit aussi être radiée. Le but recherché par le Canada lorsqu'il a développé et promu le tabac, comme l'indique l'avis de mise en cause, tend à indiquer que le Canada n'agissait pas « dans le cours de ses affaires », dans le sens où cette expression est employée dans ces lois. Cette expression doit être interprétée comme visant seulement les activités exercées à une fin commerciale. Il ressort de façon évidente et manifeste des faits allégués que le Canada a promu la consommation de cigarettes à faible teneur en goudron non pas à une fin commerciale, mais à une fin liée à la santé. Le Canada n'est donc pas un fournisseur et sa responsabilité n'est pas engagée en application de ces lois.

Demandes d'indemnité fondées sur l'equity et considérations d'ordre procédural

Les demandes des compagnies de tabac relatives à l'indemnisation en equity doivent être radiées. La doctrine de l'indemnité fondée sur l'equity est une doctrine restreinte qui ne s'applique que dans les cas où le mandant s'engage expressément ou implicitement à indemniser son mandataire pour avoir agi conformément à ses directives. Lorsque le Canada a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Dans ces circonstances, il est déraisonnable de déduire que le Canada avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

Enfin, il convient de radier les demandes de jugement déclaratoire. La capacité des compagnies de tabac de se défendre ne serait pas gravement compromise si la mise en cause du Canada en l'espèce prenait fin.

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John S. Tyhurst, Paul Vickery and Travis Henderson, for the appellant/respondent on cross-appeal *Her Majesty the Queen in Right of Canada* (33559).

Paul Vickery, John S. Tyhurst and Travis Henderson, for the appellant/respondent on cross-appeal the Attorney General of Canada (33563).

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John J. L. Hunter, Q.C., and *Brent B. Olthuis*, for the respondent/appellant on cross-appeal *Imperial Tobacco Canada Limited* (33563).

Written submissions only by *Kenneth N. Affleck, Q.C.*, for the respondents/appellants on cross-appeal *Rothmans, Benson & Hedges Inc.* and *Rothmans Inc.* (33563).

Written submissions only by *Jeffrey J. Kay, Q.C.*, for the respondents/appellants on cross-appeal *JTI-MacDonald Corp.*, *R.J. Reynolds Tobacco Company* and *R.J. Reynolds Tobacco International Inc.* (33563).

Written submissions only by *Craig P. Dennis* and *Michael D. Shirreff*, for the respondents/appellants on cross-appeal *B.A.T. Industries p.l.c.* and *British American Tobacco (Investments) Limited* (33563).

Written submissions only by *Christopher M. Rusnak*, for the respondent/appellant on cross-appeal *Carreras Rothmans Limited* (33563).

Written submissions only by *D. Ross Clark*, for the respondent/appellant on cross-appeal *Philip Morris U.S.A. Inc.* (33563).

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John S. Tyhurst, Paul Vickery et Travis Henderson, pour l'appelante/intimée au pourvoi incident *Sa Majesté la Reine du chef du Canada* (33559).

Paul Vickery, John S. Tyhurst et Travis Henderson, pour l'appelant/intimé au pourvoi incident le procureur général du Canada (33563).

Deborah Glendining et Nada Khirdaji, pour l'intimée/appelante au pourvoi incident *Imperial Tobacco Canada Limitée* (33559).

Ryan D. W. Dalziel et Daniel A. Webster, c.r., pour l'intimée *Sa Majesté la Reine du chef de la Colombie-Britannique* (33563).

John J. L. Hunter, c.r., et *Brent B. Olthuis*, pour l'intimée/appelante au pourvoi incident *Imperial Tobacco Canada Limitée* (33563).

Argumentation écrite seulement par *Kenneth N. Affleck, c.r.*, pour les intimées/appelantes au pourvoi incident *Rothmans, Benson & Hedges Inc.* et *Rothmans Inc.* (33563).

Argumentation écrite seulement par *Jeffrey J. Kay, c.r.*, pour les intimées/appelantes au pourvoi incident *JTI-MacDonald Corp.*, *R.J. Reynolds Tobacco Company* et *R.J. Reynolds Tobacco International Inc.* (33563).

Argumentation écrite seulement par *Craig P. Dennis* et *Michael D. Shirreff*, pour les intimées/appelantes au pourvoi incident *B.A.T. Industries p.l.c.* et *British American Tobacco (Investments) Limited* (33563).

Argumentation écrite seulement par *Christopher M. Rusnak*, pour l'intimée/appelante au pourvoi incident *Carreras Rothmans Limited* (33563).

Argumentation écrite seulement par *D. Ross Clark*, pour l'intimée/appelante au pourvoi incident *Philip Morris U.S.A. Inc.* (33563).

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Nancy Brown, for the intervener the Attorney General of British Columbia (33559-33563).

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

TABLE OF CONTENTS

	<u>Paragraph</u>
I. <u>Introduction</u>	1
II. <u>Underlying Claims and Judicial History</u> ...	6
A. <i>The Knight Case</i>	6
B. <i>The Costs Recovery Case</i>	11
III. <u>Issues Before the Court</u>	15
IV. <u>Analysis</u>	17
A. <i>The Test for Striking Out Claims</i>	17
B. <i>Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case</i>	27
C. <i>The Claims for Negligent Misrepresentation</i>	32
(1) <u>Stage One: Proximity and Foreseeability</u>	40
(2) <u>Stage Two: Conflicting Policy Considerations</u>	61

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Jeffrey S. Leon, Robyn M. Ryan Bell et Michael A. Eizenga, pour l'intervenante Sa Majesté la Reine du chef de la province du Nouveau-Brunswick (33563).

Nancy Brown, pour l'intervenant le procureur général de la Colombie-Britannique (33559-33563).

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

TABLE DES MATIÈRES

	<u>Paragraphe</u>
I. <u>Introduction</u>	1
II. <u>Demandes initiales et historique judiciaire</u>	6
A. <i>L'Affaire Knight</i>	6
B. <i>L'Affaire du recouvrement des coûts</i>	11
III. <u>Questions en litige</u>	15
IV. <u>Analyse</u>	17
A. <i>Le critère applicable à la radiation d'une demande</i>	17
B. <i>Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts</i>	27
C. <i>Les demandes fondées sur des déclarations inexactes faites par négligence</i>	32
(1) <u>Première étape de l'analyse : le lien de proximité et la prévisibilité</u>	40
(2) <u>Deuxième étape de l'analyse : considérations de politique générale opposées</u>	61

(a) <i>Government Policy Decisions</i>	63	a) <i>Décisions de politique générale du gouvernement</i>	63
(i) <u>Conduct at Issue</u>	67	(i) <u>La conduite en cause</u>	67
(ii) <u>Relevance of Evidence</u>	68	(ii) <u>La pertinence de la preuve</u>	68
(iii) <u>What Constitutes a Policy Decision Immune From Judicial Review?</u>	72	(iii) <u>Les décisions de politique générale soustraites au contrôle judiciaire</u>	72
(iv) <u>Conclusion on the Policy Argument</u>	92	(iv) <u>Conclusion sur l'argument relatif à la politique générale</u> ...	92
(b) <i>Indeterminate Liability</i>	97	b) <i>Responsabilité indéterminée</i>	97
(c) <i>Summary on Stage-Two Policy Arguments</i>	102	c) <i>Résumé quant aux arguments de politique générale soulevés à la deuxième étape de l'analyse</i>	102
D. <i>Failure to Warn</i>	103	D. <i>Le défaut de mise en garde</i>	103
(1) <u>Labelling Claim</u>	104	(1) <u>L'allégation relative à l'étiquetage</u> ...	104
(2) <u>Failure to Warn Imperial About Health Hazards</u>	106	(2) <u>Le défaut de mettre Imperial en garde contre les dangers pour la santé</u>	106
E. <i>Negligent Design</i>	110	E. <i>La conception négligente</i>	110
(1) <u>Prima Facie Duty of Care</u>	112	(1) <u>Obligation de diligence prima facie</u>	112
(2) <u>Stage-Two Policy Considerations</u>	116	(2) <u>Considérations de politique générale soulevées à la deuxième étape de l'analyse</u>	116
F. <i>The Direct Claims Under the Costs Recovery Acts</i>	117	F. <i>Les allégations directes faites en vertu des lois sur le recouvrement des coûts</i>	117
(1) <u>Could Canada Qualify as a Manufacturer Under the Tobacco Damages and Health Care Costs Recovery Act?</u>	121	(1) <u>Le Canada peut-il être un fabricant au sens de la Tobacco Damages and Health Care Costs Recovery Act?</u>	121
(a) <i>Text of the Statute</i>	122	a) <i>Le texte de la loi</i>	122
(b) <i>Legislative Intention</i>	127	b) <i>L'intention du législateur</i>	127

(c) <i>Broader Context</i>	129	c) <i>Le contexte plus général</i>	129
(d) <i>Summary</i>	132	d) <i>Résumé</i>	132
(2) <u>Could Canada Be Found Liable Under the <i>Health Care Costs Recovery Act</i>?</u>	133	(2) <u>Le Canada peut-il être tenu responsable en vertu de la <i>Health Care Costs Recovery Act</i>?</u>	133
(3) <u>Could Canada Be Liable for Contribution Under the <i>Negligence Act</i> if It Is Not Directly Liable to British Columbia?</u>	135	(3) <u>Le Canada peut-il être tenu à une contribution en application de la <i>Negligence Act</i> s'il n'est pas directement responsable envers la Colombie-Britannique?</u>	135
(4) <u>Could Canada Be Liable for Common Law Contribution?</u>	138	(4) <u>Le Canada peut-il être tenu en common law de verser une contribution?</u>	138
G. <i>Liability Under the Trade Practice Act and the Business Practices and Consumer Protection Act</i>	140	G. <i>Responsabilité en vertu de la Trade Practice Act et de la Business Practices and Consumer Protection Act</i>	140
H. <i>The Claim for Equitable Indemnity</i>	146	H. <i>La demande d'indemnité fondée sur l'equity</i>	146
I. <i>Procedural Considerations</i>	149	I. <i>Considérations d'ordre procédural</i>	149
V. <u>Conclusion</u>	151	V. <u>Conclusion</u>	151

I. Introduction

[1] Imperial Tobacco Canada Ltd. (“Imperial”) is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial (“*Costs Recovery case*”). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased “light” or “mild” cigarettes, seeking a refund of the cost

I. Introduction

[1] Imperial Tobacco Canada Limitée (« Imperial ») est défenderesse dans deux actions intentées devant les tribunaux de la Colombie-Britannique, soit *British Columbia c. Imperial Tobacco Canada Ltd.*, dossier : S010421, et *Knight c. Imperial Tobacco Canada Ltd.*, dossier : L031300. Dans la première, le gouvernement de la Colombie-Britannique cherche à recouvrer d’un groupe de 14 compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme (l’« *Affaire du recouvrement des coûts* »). Dans la deuxième action, un recours collectif intenté contre Imperial uniquement, M. Knight, au nom

of the cigarettes and punitive damages (“*Knight* case”).

[2] In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (“CRA”), as a “manufacturer”. In the *Knight* case, it is alleged that Canada would be liable as a “supplier” under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“BPCPA”), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 (“TPA”).

[3] In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies’ appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada’s alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada’s alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously

des autres membres qui ont acheté des cigarettes dites « légères » ou « douces », demande le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs (l’« *Affaire Knight* »).

[2] Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que si elles sont tenues responsables envers les demandeurs, elles ont le droit d’être indemnisées par le Canada pour déclarations inexactes faites par négligence, pour conception négligente et défaut de mise en garde; elles fondent aussi leur demande sur l’équité. Elles font également valoir que le Canada aurait engagé sa propre responsabilité au titre des régimes législatifs invoqués dans ces deux affaires. Dans l’*Affaire du recouvrement des coûts*, elles invoquent sa responsabilité, à titre de [TRADUCTION] « fabricant », aux termes de la *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30 (« CRA »). Dans l’*Affaire Knight*, c’est à titre de [TRADUCTION] « fournisseur » que le Canada serait responsable, aux termes de la *Business Practices and Consumer Protection Act*, S.B.C. 2004, ch. 2 (« BPCPA ») et de la loi qui l’a précédée, la *Trade Practice Act*, R.S.B.C. 1996, ch. 457 (« TPA »).

[3] Dans les deux affaires, le Canada a présenté des requêtes en radiation des avis de mise en cause en vertu du par. 19(24) des *Supreme Court Rules*, B.C. Reg. 221/90 (remplacé par la règle 9-5 des *Supreme Court Civil Rules*, B.C. Reg. 168/2009), faisant valoir qu’il était évident et manifeste que ces avis ne révélaient aucune cause d’action raisonnable. Les juges siégeant en cabinet, faisant droit aux requêtes du Canada dans les deux actions, ont ordonné la radiation de tous les avis de mise en cause. La Cour d’appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. À trois voix contre deux, les juges majoritaires ont conclu à l’opportunité d’instruire, dans l’*Affaire du recouvrement des coûts* et dans l’*Affaire Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d’une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l’*Affaire Knight*, les juges majoritaires ont conclu en

struck the remainder of the tobacco companies' claims.

[4] The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

[5] For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

II. Underlying Claims and Judicial History

A. *The Knight Case*

[6] In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

autre à l'opportunité d'instruire la demande relative aux déclarations inexactes faites par négligence fondée sur une prétendue obligation de diligence du Canada envers les consommateurs, ainsi que la demande relative à la conception négligente dans l'*Affaire Knight*. La cour a radié à l'unanimité les autres demandes présentées par les compagnies de tabac.

[4] Le gouvernement du Canada en appelle de la décision de permettre l'instruction des demandes pour déclarations inexactes faites par négligence et pour conception négligente. Les compagnies de tabac forment un appel incident à l'égard de la radiation des autres demandes.

[5] Pour les motifs qui suivent, je conclus que toutes les demandes introduites par Imperial et les autres compagnies de tabac à l'encontre du gouvernement du Canada sont vouées à l'échec et doivent être radiées. Je suis d'avis d'accueillir les appels du gouvernement du Canada dans les deux affaires et de rejeter les appels incidents.

II. Demandes initiales et historique judiciaire

A. *L'Affaire Knight*

[6] Dans l'*Affaire Knight*, un groupe de consommateurs de la Colombie-Britannique, composé de fumeurs de cigarettes légères ou douces, a intenté un recours collectif contre Imperial en vertu de la *BPCPA* et de la loi qui l'a précédée, la *TPA*. Ces consommateurs prétendent qu'Imperial s'est livrée à des pratiques trompeuses en présentant les cigarettes à teneur réduite en goudron comme un choix moins nuisible à la santé des consommateurs que les autres cigarettes. Selon eux, la teneur en goudron et en nicotine indiquée sur les paquets de cigarettes légères et douces fabriquées par Imperial ne correspondait pas aux émissions toxiques réelles pour les fumeurs. Ils font valoir que la fumée dégagée par les cigarettes légères était tout aussi néfaste que celle dégagée par les cigarettes régulières. Ils réclament le remboursement du coût d'achat des cigarettes ainsi que des dommages-intérêts punitifs.

[7] Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

[8] Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were “almost the only tobacco varieties available to Canadian tobacco manufacturers” (*Knight* case, amended third-party notice of Imperial, at para. 97).

[9] Imperial makes five allegations against Canada:

- (1) Canada is itself liable under the *BPCPA* and the *TPA* as a “supplier” of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.
- (2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco

[7] Par voie d’avis, Imperial a mis en cause le gouvernement du Canada. Selon elle, Santé Canada aurait informé les compagnies de tabac et le public que les cigarettes à teneur réduite en goudron étaient moins nuisibles que les cigarettes régulières. Imperial fait valoir que Santé Canada s’était d’abord opposé à l’impression de mises en garde relatives à la santé sur les paquets de cigarettes avant de changer sa politique en 1967. Le ministère invitait les fumeurs ne souhaitant pas cesser de fumer à consommer des cigarettes à teneur réduite en goudron et a demandé aux compagnies de tabac de révéler volontairement les quantités de goudron et de nicotine dans leurs publicités afin d’encourager les consommateurs à acheter des marques à faible teneur en goudron. Contre toute attente, il appert maintenant que ces cigarettes seraient peut-être plus nuisibles à la santé des fumeurs que les autres.

[8] Imperial prétend également qu’Agriculture Canada a protégé par licences plusieurs souches de tabac à teneur réduite en goudron — cultivées par lui après des travaux de recherche et de développement — et a perçu des redevances des compagnies, dont Imperial, qui utilisaient ses souches. Selon Imperial, en 1982, les souches d’Agriculture Canada représentaient [TRADUCTION] « presque les seules variétés dont disposaient les fabricants canadiens de produits du tabac » (*l’Affaire Knight*, avis de mise en cause modifié d’Imperial, par. 97).

[9] Imperial formule contre le Canada les cinq allégations suivantes :

- (1) La responsabilité du Canada lui-même est engagée aux termes de la *BPCPA* et de la *TPA* à titre de [TRADUCTION] « fournisseur » de produits du tabac puisqu’il s’est livré à des pratiques trompeuses, et Imperial a le droit, aux termes de la *Negligence Act*, R.S.B.C. 1996, ch. 333, de réclamer au Canada une contribution et une indemnisation.
- (2) Le Canada a manqué à ses obligations de droit privé envers les consommateurs en faisant par négligence des déclarations inexactes au sujet de l’effet, sur la santé, des cigarettes à teneur réduite en goudron, en faisant défaut de les

strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.

- (3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.
- (4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.
- (5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

[10] Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (2007 BCSC 964, 76 B.C.L.R. (4th) 100). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93). The Court of Appeal unanimously struck the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the

mettre en garde contre les risques associés à ces produits et en ne faisant pas preuve de diligence raisonnable dans la conception de sa souche de tabac. Par conséquent, Imperial se dit en droit d'obtenir du Canada une contribution et une indemnisation en vertu de la *Negligence Act*.

- (3) Le Canada a manqué à ses obligations de droit privé envers Imperial en faisant par négligence des déclarations inexactes au sujet de l'effet, sur la santé, des cigarettes à teneur réduite en goudron, en faisant défaut de mettre en garde Imperial contre les risques associés à ces produits et en ne faisant pas preuve de diligence raisonnable dans la conception de sa souche de tabac. Imperial se dit en droit de réclamer au Canada des dommages-intérêts dans la mesure de leur responsabilité envers les membres du groupe.
- (4) Subsidiairement, le Canada est tenu en equity d'indemniser Imperial.
- (5) Si la responsabilité du Canada envers Imperial n'est reconnue à l'égard d'aucune des allégations précédentes, Imperial peut obtenir un jugement déclarant que le Canada reste partie au litige, ce qui le soumettra aux obligations de communication préalable de la preuve prévues aux *Supreme Court Rules*.

[10] Par requête, le Canada a demandé et obtenu de la juge Satanove de la Cour suprême de la Colombie-Britannique la radiation des avis de mise en cause (2007 BCSC 964, 76 B.C.L.R. (4th) 100). La juge siégeant en cabinet a radié toutes les demandes formées contre le Canada. Imperial a eu partiellement gain de cause devant la Cour d'appel (2009 BCCA 541, 99 B.C.L.R. (4th) 93). Les juges de cette cour ont radié à l'unanimité la demande relative aux manquements aux obligations légales, la demande relative à la conception négligente qui oppose Imperial au Canada, ainsi que la demande d'indemnisation en equity. Au nom des juges majoritaires, le juge Tysoe a permis l'instruction des deux demandes concernant les déclarations

failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

B. *The Costs Recovery Case*

[11] The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by “tobacco related wrong[s]”. Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one’s health, and that they failed to properly warn the public about the risks associated with smoking their product.

[12] Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the “tobacco companies”. The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

inexactes faites par négligence et de celle portant sur la conception négligente opposant le Canada et les consommateurs. Les juges majoritaires n’ont pas traité de la demande relative au défaut de mise en garde. Le juge Hall, dissident, aurait radié toutes les demandes de mise en cause.

B. *L’Affaire du recouvrement des coûts*

[11] Le gouvernement de la Colombie-Britannique a demandé aux termes de la *CRA* de recouvrer les sommes consacrées au traitement des maladies liées au tabagisme découlant d’une [TRADUCTION] « faute d’un fabricant ». Cette loi prévoit que les fabricants de produits du tabac sont tenus de verser ces sommes directement à la province. La demande visait 14 compagnies de tabac. Selon la Colombie-Britannique, dès 1950, ces compagnies de tabac savaient ou auraient dû savoir que les cigarettes étaient néfastes pour la santé et ont fait défaut de mettre le public en garde adéquatement contre les risques associés à l’usage de leur produit.

[12] Divers défendeurs dans l’*Affaire du recouvrement des coûts*, dont Imperial, ont mis en cause le Canada pour le rôle qu’il aurait joué dans l’industrie du tabac. Je les désigne collectivement comme les « compagnies de tabac ». Les allégations contenues dans l’avis présentent une similitude frappante avec celles formulées dans l’*Affaire Knight*. Les compagnies de tabac font valoir que Santé Canada les aurait informées, ainsi que le public, de l’effet moins nuisible des cigarettes à teneur réduite en goudron par rapport aux cigarettes régulières et aurait conseillé aux fumeurs d’abandonner le tabagisme ou d’acheter des cigarettes à teneur réduite en goudron. Les compagnies de tabac prétendent que, bien qu’initialement opposé à l’impression de mises en garde sur les paquets de cigarettes, le Canada a fini par l’exiger et a déterminé les renseignements qui devaient y figurer. Les compagnies de tabac plaident également qu’Agriculture Canada avait protégé par licences les souches de tabac à teneur réduite en goudron — cultivées par lui après des travaux de recherche et de développement — que les compagnies utilisaient dans la fabrication des cigarettes en échange du paiement de redevances.

[13] The tobacco companies brought the following claims against Canada:

- (1) Canada is itself liable under the *CRA* as a “manufacturer” of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.
- (2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.
- (3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.
- (4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.
- (5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

[14] Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation claim between Canada and the tobacco companies to proceed (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Hall J.A.,

[13] Les compagnies de tabac ont formulé contre le Canada les allégations suivantes :

- (1) La responsabilité du Canada lui-même est engagée aux termes de la *CRA* à titre de [TRANSLATION] « fabricant » de produits du tabac, et les compagnies de tabac ont le droit, en vertu de la *Negligence Act*, de réclamer au Canada une contribution et une indemnisation.
- (2) Le Canada a manqué à ses obligations de droit privé envers les consommateurs en raison du défaut de mise en garde, de la conception négligente et de déclarations inexactes faites par négligence. De plus, les compagnies de tabac sont en droit de réclamer du Canada contribution et indemnisation dans la mesure de leur responsabilité envers la Colombie-Britannique suivant la *CRA*.
- (3) Le Canada a manqué à ses obligations de droit privé envers les compagnies de tabac en raison du défaut de mise en garde, de la conception négligente et de déclarations inexactes faites par négligence au sujet de l’effet, sur la santé, des cigarettes à faible teneur en goudron. Les compagnies de tabac se disent en droit de réclamer au Canada des dommages-intérêts dans la mesure de leur responsabilité envers la Colombie-Britannique au titre de la *CRA*.
- (4) Subsidiairement, le Canada est tenu d’indemniser en equity les compagnies de tabac.
- (5) Si la responsabilité du Canada envers les compagnies de tabac n’est retenue à l’égard d’aucune des allégations précédentes, les compagnies de tabac ont droit à une réparation de nature déclaratoire.

[14] La juge Wedge, siégeant en cabinet, a fait droit à toutes les requêtes en radiation présentées par le Canada (2008 BCSC 419, 82 B.C.L.R. (4th) 362). Les juges majoritaires de la Cour d’appel, sous la plume du juge Tysoe, ont permis l’instruction de la demande relative aux déclarations inexactes faites par négligence opposant les compagnies

dissenting, would have struck all the third-party claims.

III. Issues Before the Court

[15] There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

[16] There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?
2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?
3. Should the tobacco companies' negligent misrepresentation claims be struck out?

de tabac au Canada (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Le juge Hall, dissident, aurait radié toutes les demandes de mise en cause.

III. Questions en litige

[15] Les questions à trancher dans l'*Affaire du recouvrement des coûts* et dans l'*Affaire Knight* se chevauchent considérablement, tout particulièrement quant aux demandes fondées sur la common law. Dans les deux cas, il s'agit de savoir si le Canada pourrait être tenu responsable, d'une part en common law, pour déclarations inexactes faites par négligence, conception négligente et défaut de mise en garde et, d'autre part, suivant la doctrine de l'indemnisation en equity. Par souci d'éviter les répétitions, j'examinerai ensemble les questions communes.

[16] Par ailleurs, les deux affaires présentent également des questions et des arguments distincts. Ainsi, dans l'*Affaire du recouvrement des coûts*, le Canada fait valoir que les demandes de contribution fondées sur la *Negligence Act* et sur l'obligation de diligence qu'on lui impute à l'égard des fumeurs devraient être radiées, car, même s'il avait manqué à une telle obligation, il ne pourrait être tenu responsable envers la demanderesse, la Colombie-Britannique. Les demandes fondées sur les lois sont elles aussi distinctes. Par conséquent, les questions en litige peuvent être formulées comme suit :

1. Quel est le critère applicable à la radiation d'une demande pour absence de cause d'action raisonnable?
2. Les demandes de contribution et d'indemnisation fondées sur la *Negligence Act* et sur les manquements allégués à l'obligation de diligence envers les fumeurs doivent-elles être radiées dans l'*Affaire du recouvrement des coûts*?
3. Les demandes des compagnies de tabac relatives aux déclarations inexactes faites par négligence doivent-elles être radiées?

4. Should the tobacco companies' claims of failure to warn be struck out? 5. Should the tobacco companies' claims of negligent design be struck out? 6. Should the tobacco companies' claim in the <i>Costs Recovery</i> case that Canada could qualify as a "manufacturer" under the <i>CRA</i> be struck out? 7. Should Imperial's claim in the <i>Knight</i> case that Canada could qualify as a "supplier" under the <i>TPA</i> and the <i>BPCPA</i> be struck out? 8. Should the tobacco companies' claims of equitable indemnity be struck out? 9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the <i>Supreme Court Rules</i>?	4. Les demandes des compagnies de tabac relatives au défaut de mise en garde doivent-elles être radiées? 5. Les demandes des compagnies de tabac relatives à la conception négligente doivent-elles être radiées? 6. Dans l'<i>Affaire du recouvrement des coûts</i>, la demande des compagnies de tabac de reconnaître au Canada la qualité de [TRADUCTION] « fabricant » au sens de la <i>CRA</i> doit-elle être radiée? 7. Dans l'<i>Affaire Knight</i>, la demande d'Imperial de reconnaître au Canada la qualité de [TRADUCTION] « fournisseur » au sens de la <i>TPA</i> et de la <i>BPCPA</i> doit-elle être radiée? 8. Les demandes des compagnies de tabac relatives à l'indemnisation en equity doivent-elles être radiées? 9. Si la responsabilité du Canada envers les compagnies de tabac n'est retenue à l'égard d'aucune des demandes de mise en cause, les compagnies de tabac ont-elles quand même le droit d'obtenir contre lui un jugement le déclarant partie aux deux litiges, ce qui le soumettra aux obligations de communication préalable de la preuve prévues aux <i>Supreme Court Rules</i>?

IV. Analysis

A. *The Test for Striking Out Claims*

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of

IV. Analyse

A. *Le critère applicable à la radiation d'une demande*

[17] Les parties conviennent du critère applicable à la radiation d'une demande pour absence de cause d'action raisonnable en vertu de l'al. 19(24)a) des *Supreme Court Rules* de la Colombie-Britannique. La Cour a réitéré ce critère à maintes reprises : l'action ne sera rejetée que s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que la déclaration ne révèle aucune cause d'action raisonnable : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263, par. 15; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980. Autrement dit, la demande doit n'avoir

success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[18] Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

[19] The power to strike out claims that have no reasonable prospect of success is a valuable house-keeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised

aucune possibilité raisonnable d'être accueillie. Sinon, il faut lui laisser suivre son cours : voir généralement *Syl Apps Secure Treatment Centre c. B.D.*, 2007 CSC 38, [2007] 3 R.C.S. 83; *Succession Odhavji*; *Hunt*; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735.

[18] Bien que les parties acceptent d'emblée ce critère, il ressort des arguments qui nous ont été présentés que toutes ne voient pas du même œil son application aux faits. Il peut donc se révéler utile de revoir l'objet du critère et son application.

[19] Le pouvoir de radier les demandes ne présentant aucune possibilité raisonnable de succès constitue une importante mesure de gouverne judiciaire essentielle à l'efficacité et à l'équité des procès. Il permet d'élaguer les litiges en écartant les demandes vaines et en assurant l'instruction des demandes susceptibles d'être accueillies.

[20] Ce faisant, il favorise deux conséquences positives, soit l'instruction efficace des litiges et le bien-fondé des décisions sur ces demandes. La radiation des demandes n'ayant aucune possibilité raisonnable de succès favorise l'efficacité et fait épargner temps et argent. Les plaideurs peuvent se concentrer sur les demandes importantes et n'ont pas à consacrer des jours — parfois même des semaines — à la preuve et aux arguments de demandes vouées de toute façon à l'échec. Il en va de même pour les juges et les jurés, dont l'attention est portée là où il le faut, soit sur les demandes présentant une possibilité raisonnable de succès. Les gains d'efficacité découlant de cet élagage contribuent à leur tour à l'amélioration de l'administration de la justice. Plus la preuve et les arguments sont axés sur les vraies questions, mieux les thèses des parties à l'égard de ces questions et le bien-fondé de l'affaire se dégageront de l'instruction du procès.

[21] Quoique très utile, la requête en radiation ne saurait être accueillie à la légère. Le droit n'est pas immuable. Des actions qui semblaient hier encore vouées à l'échec pourraient être accueillies demain. Avant qu'une obligation générale de diligence envers son prochain reposant sur la prévisibilité

on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

soit reconnue dans l'arrêt *Donoghue c. Stevenson*, [1932] A.C. 562 (H.L.), peu de gens auraient pu prévoir qu'une entreprise d'embouteillage puisse être tenue responsable, en l'absence de tout lien contractuel, du préjudice corporel et du traumatisme émotionnel causé par la découverte d'un escargot dans une bouteille de bière de gingembre. Avant l'arrêt *Hedley Byrne & Co. c. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), l'action en responsabilité délictuelle pour déclarations inexactes faites par négligence aurait paru vouée à l'échec. L'histoire de notre droit nous apprend que souvent, des requêtes en radiation ou des requêtes préliminaires semblables, à l'instar de celle présentée dans *Donoghue c. Stevenson*, amorcent une évolution du droit. Par conséquent, le fait qu'une action en particulier n'a pas encore été reconnue en droit n'est pas déterminant pour la requête en radiation. Le tribunal doit plutôt se demander si, dans l'hypothèse où les faits allégués seraient avérés, il est raisonnablement possible que l'action soit accueillie. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable.

[22] Une requête en radiation pour absence de cause d'action raisonnable repose sur le principe que les faits allégués sont vrais, sauf s'ils ne peuvent manifestement pas être prouvés : *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, p. 455. Aucune preuve n'est admissible à l'égard d'une telle requête : par. 19(27) des *Supreme Court Rules* de la Colombie-Britannique (maintenant le par. 9-5(2) des *Supreme Court Civil Rules*). Il incombe au demandeur de plaider clairement les faits sur lesquels il fonde sa demande. Un demandeur ne peut compter sur la possibilité que de nouveaux faits apparaissent au fur et à mesure que l'instruction progresse. Il peut arriver que le demandeur ne soit pas en mesure de prouver les faits plaidés au moment de la requête. Il peut seulement espérer qu'il sera en mesure de les prouver. Il doit cependant les plaider. Les faits allégués sont le fondement solide en fonction duquel doit être évaluée la possibilité que la demande soit accueillie. S'ils ne sont pas allégués, l'exercice ne peut pas être exécuté adéquatement.

[23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

[25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the*

[23] Dans notre Cour, Imperial et les autres compagnies de tabac ont prétendu que la requête en radiation devrait prendre en compte non seulement les faits plaidés, mais la possibilité que, au fur et à mesure que l'instruction progresse, la preuve en révélerait davantage quant au comportement du Canada et au rôle qu'il a joué dans la promotion de la consommation de cigarettes à teneur réduite en goudron. Cette position dénote une compréhension fondamentalement erronée de ce que vise une requête en radiation. Elle n'a rien à voir avec la preuve. Elle porte sur les actes de procédure. Les faits allégués sont réputés véridiques. La question de savoir si la preuve corrobore ou corrobore les faits allégués n'a aucune pertinence quant à la requête en radiation. Le juge saisi de la requête en radiation ne peut pas anticiper ce que la preuve qui sera produite permettra d'établir. Si l'on exigeait cela du juge, la requête en radiation perdrait sa logique et deviendrait en fin de compte inutile.

[24] Cela n'a rien d'inéquitable pour le demandeur. La présomption selon laquelle les faits allégués sont vrais joue en sa faveur. Le demandeur choisit les faits qu'il allègue en fonction de la cause d'action qu'il fait valoir. Si des faits nouveaux soulèvent de nouvelles possibilités — comme c'est parfois le cas —, la solution consiste à modifier les actes de procédure afin d'alléguer les faits nouveaux à ce moment-là.

[25] La question de la conjecture est liée à la question de savoir si la requête devrait être rejetée en raison de la possibilité qu'une nouvelle preuve apparaisse éventuellement. Le juge saisi d'une requête en radiation se demande s'il existe une possibilité raisonnable que la demande soit accueillie. Dans le monde de la conjecture abstraite, il existe une probabilité mathématique qu'un certain nombre d'événements se produisent. Ce n'est pas ce que le critère applicable aux requêtes en radiation cherche à déterminer. Il suppose plutôt que la demande sera traitée de la manière habituelle dans le système judiciaire — un système fondé sur le débat contradictoire dans lequel les juges sont tenus d'appliquer le droit (et son évolution) énoncé dans les

law and the litigation process, the claim has no reasonable chance of succeeding.

[26] With this framework in mind, I proceed to consider the tobacco companies' claims.

B. *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case*

[27] In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

[28] The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence Act* is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

[29] I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, dealing

lois et la jurisprudence. Il s'agit de savoir si, dans le contexte du droit et du processus judiciaire, la demande n'a aucune possibilité raisonnable d'être accueillie.

[26] C'est en tenant compte de ce cadre que j'entame l'examen des demandes des compagnies de tabac.

B. *Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts*

[27] Dans l'*Affaire du recouvrement des coûts*, le Canada plaide que toutes les demandes de contribution fondées sur ses prétendues obligations de diligence envers les fumeurs doivent être radiées. Le Canada prétend que, aux termes de la *Negligence Act*, une contribution ne peut être accordée si le tiers n'est pas directement responsable envers le plaignant. Il prétend que même s'il a manqué à ses obligations envers les fumeurs, ce manquement ne peut pas servir de fondement aux demandes de contribution des compagnies de tabac si elles sont tenues responsables envers la Colombie-Britannique, l'unique demanderesse dans l'*Affaire du recouvrement des coûts*. La Cour d'appel a accepté cet argument.

[28] Les compagnies de tabac prétendent qu'il n'est pas nécessaire qu'une personne soit directement responsable envers le demandeur pour être tenue de verser une contribution. Elles prétendent que la contribution dont parle la *Negligence Act* repose sur la faute et non pas sur la responsabilité. Elles affirment que la *Negligence Act* vise à permettre aux défendeurs d'être indemnisés par d'autres parties qui sont également responsables du dommage causé au plaignant, et qu'interdire un droit d'action contre le Canada ferait échec à cet objectif.

[29] Je souscris à l'opinion du Canada et de la Cour d'appel selon laquelle un tiers ne peut être tenu de verser une contribution en vertu de la *Negligence Act* que s'il est directement responsable envers le plaignant. Dans l'arrêt *Giffels Associates*

with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

... I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss. [Emphasis added; p. 1354.]

[30] Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

[31] The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

C. *The Claims for Negligent Misrepresentation*

[32] There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members

Ltd. c. Eastern Construction Co., [1978] 2 R.C.S. 1346, où il était question d'une disposition législative semblable à celle de la Colombie-Britannique, le juge en chef Laskin a déclaré ce qui suit :

... j'estime qu'il faut d'abord établir la responsabilité envers la demanderesse pour pouvoir réclamer la contribution. Je ne vois pas comment une personne pourrait, en vertu du par. 2(1), réclamer à une autre personne une contribution relativement à la perte subie par un tiers sans que chacune des deux premières personnes soit responsable envers le tiers de la perte qu'il a subie. [Je souligne; p. 1354.]

[30] Par conséquent, il est évident et manifeste que les réclamations de droit privé dirigées contre le Canada dans l'*Affaire du recouvrement des coûts* qui découlent de prétendues obligations de diligence envers les consommateurs doivent être radiées. Même si le Canada a manqué à ses obligations envers les fumeurs, ce manquement n'aurait aucune incidence sur la question de savoir s'il est responsable envers la Colombie-Britannique, la demanderesse dans cette affaire. Cette conclusion n'a aucune incidence sur la réclamation des consommateurs dans l'*Affaire Knight* puisque dans cette instance, les consommateurs de cigarettes légères ou douces sont les demandeurs.

[31] Dans le reste des présents motifs, l'examen des réclamations de droit privé ne portera que sur les demandes fondées sur les prétendues obligations de diligence du Canada envers les compagnies de tabac dans les deux causes dont la Cour est saisie, et sur les prétendues obligations du Canada envers les consommateurs dans l'*Affaire Knight*.

C. *Les demandes fondées sur des déclarations inexactes faites par négligence*

[32] Deux types de demandes fondées sur des déclarations inexactes faites par négligence sont toujours en litige dans le présent appel. Premièrement, dans l'*Affaire Knight*, Imperial prétend que le Canada a fait preuve de négligence en déclarant faussement aux consommateurs que la cigarette à teneur réduite en goudron serait

are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

[33] Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

[34] For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

[35] The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne*. Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

[36] Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the

moins nocive pour la santé, et qu'il est donc tenu à contribution et à indemnisation sur la base de la *Negligence Act* si les membres du groupe ont gain de cause dans cette poursuite. Deuxièmement, dans les deux affaires dont la Cour est saisie, Imperial et les autres compagnies de tabac prétendent que le Canada a fait aux compagnies de tabac des déclarations inexactes par négligence et qu'il est responsable des pertes que pourraient subir les compagnies de tabac en raison des indemnités à verser aux plaignants dans l'une ou l'autre de ces affaires.

[33] Le Canada demande la radiation des demandes parce qu'il n'existe aucune possibilité raisonnable qu'elles soient accueillies.

[34] Pour les besoins de la requête en radiation, nous devons tenir pour avérés les faits allégués. Nous devons donc accepter que le Canada a déclaré aux consommateurs et aux compagnies de tabac que les cigarettes légères ou douces étaient moins nocives et que ces déclarations n'étaient pas exactes. Nous devons également accepter que les consommateurs et les compagnies de tabac ont agi à leur détriment sur la foi des déclarations inexactes du Canada.

[35] Le droit a reconnu pour la première fois l'action en responsabilité délictuelle par suite d'une déclaration inexacte faite par négligence dans *Hedley Byrne*. Avant cette décision, les parties ne disposaient que de recours contractuels en matière de déclarations inexactes. La décision *Hedley Byrne* a rompu avec cette tradition en accueillant une action pour perte financière par suite d'une déclaration inexacte faite par négligence en l'absence d'un contrat entre les parties. Dans les décennies qui ont suivi, la responsabilité délictuelle pour déclaration inexacte faite par négligence a été retenue dans diverses situations où la relation entre les parties révélait une prévisibilité et l'existence d'un lien suffisamment étroit et où les considérations de politique générale n'empêchaient pas la reconnaissance de la responsabilité délictuelle.

[36] Imperial et les autres compagnies de tabac prétendent que, vu les faits allégués contre le Canada, les paramètres définis du délit de

tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

[37] The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

[38] In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test

déclaration inexacte faite par négligence correspondent à leurs demandes et, par conséquent, l'existence d'une obligation de diligence *prima facie* est établie. Les juges majoritaires de la Cour d'appel ont retenu cet argument dans les deux décisions en cause (*l'Affaire Knight*, par. 45 et 66; *l'Affaire du recouvrement des coûts*, par. 70).

[37] Il faut se demander en premier lieu si les faits allégués font entrer la relation du Canada avec les consommateurs et les compagnies de tabac dans une catégorie définie de relations qui donnent naissance à une obligation de diligence. Le cas échéant, l'existence d'une obligation de diligence *prima facie* sera établie : voir *Childs c. Desormeaux*, 2006 CSC 18, [2006] 1 R.C.S. 643, par. 15. Toutefois, il importe de signaler que la responsabilité pour déclaration inexacte faite par négligence dépend de la nature de la relation entre le plaignant et le défendeur, comme je l'expliquerai davantage plus loin. La question n'est pas de savoir si une déclaration inexacte faite par négligence est un délit reconnu, mais de savoir s'il existe une possibilité raisonnable que la relation alléguée dans les actes de procédure engage la responsabilité pour déclaration inexacte faite par négligence.

[38] À mon avis, les faits allégués ne font entrer aucune des demandes à l'intérieur d'une catégorie définie de déclarations inexactes faites par négligence. Le droit en matière de déclaration inexacte faite par négligence n'a jusqu'à présent pas reconnu la responsabilité dans les types de relations en cause dans ces affaires. Les compagnies de tabac ont fait l'erreur de supposer que les relations, révélées par les actes de procédure, entre le Canada et les compagnies de tabac, d'une part, et entre le Canada et les consommateurs, d'autre part, sont semblables aux autres relations à l'égard desquelles la responsabilité délictuelle pour déclaration inexacte faite par négligence a été retenue. En fait, elles comportent des différences importantes. Il suffit à ce stade de signaler que les compagnies de tabac ont été incapables de citer une décision dans laquelle un gouvernement a été tenu responsable d'une déclaration inexacte faite par négligence relativement à des déclarations faites à une industrie.

set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

[39] At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

(1) Stage One: Proximity and Foreseeability

[40] On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or “proximate”, relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada’s statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the

Afin de déterminer si une pareille cause d’action a une possibilité raisonnable d’être accueillie, nous devons donc examiner s’il a été satisfait aux exigences générales en matière de responsabilité délictuelle énoncées dans le critère établi par la Chambre des lords dans *Anns c. Merton London Borough Council*, [1978] A.C. 728, et quelque peu reformulé, mais appliqué de façon constante par la Cour, notamment dans l’arrêt *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537.

[39] À la première étape de ce critère, il faut se demander si les faits révèlent l’existence d’un lien de proximité dans le cadre duquel l’omission de faire preuve de diligence raisonnable peut, de façon prévisible, causer une perte ou un préjudice au plaignant. Si cette condition est remplie, il y a obligation de diligence *prima facie* et l’analyse passe à l’étape suivante dans laquelle on se demande si des considérations de politique générale empêcheraient de reconnaître cette obligation de diligence *prima facie* : *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41, [2007] 3 R.C.S. 129.

(1) Première étape de l’analyse : le lien de proximité et la prévisibilité

[40] Quant au premier volet du critère, les compagnies de tabac font valoir que les faits allégués établissent l’existence d’un lien suffisamment étroit et direct, ou lien [TRADUCTION] « de proximité », d’une part, entre le Canada et les consommateurs (dans l’*Affaire Knight*) et, d’autre part, entre le Canada et les compagnies de tabac (dans les deux affaires) pour justifier une obligation de diligence à l’égard des déclarations du gouvernement au sujet des cigarettes légères et douces. Les compagnies de tabac ajoutent que le Canada aurait pu raisonnablement prévoir que les consommateurs et l’industrie du tabac se fieraient à ses déclarations au sujet des avantages des cigarettes légères au chapitre de la santé, et qu’il était raisonnable pour eux de se fier à ces déclarations. Le Canada rétorque qu’il agissait seulement à titre d’autorité de réglementation lorsqu’il a fait des déclarations à la population et à l’industrie, ce qui n’entraîne pas la création d’un lien suffisamment étroit pour

potential losses of the tobacco companies under that Act.

[41] Proximity and foreseeability are two aspects of one inquiry — the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

[42] Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a “special relationship” between the parties: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. In *Hercules Managements*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (*ibid.*). Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.

fonder l’obligation de diligence revendiquée. Dans l’*Affaire du recouvrement des coûts*, le Canada prétend aussi qu’il n’aurait pas pu raisonnablement prévoir que la législature de la Colombie-Britannique adopterait la *CRA*, et qu’il ne saurait donc être tenu responsable des pertes éventuelles des compagnies de tabac en application de cette Loi.

[41] Le lien de proximité et la prévisibilité sont deux aspects d’une même analyse — celle visant à déterminer si les faits révèlent l’existence d’un lien donnant lieu à une obligation de diligence *prima facie* en common law. La prévisibilité est l’élément fondamental du droit de la négligence. Par contre, ce ne sont pas tous les résultats prévisibles qui donnent lieu à une obligation de diligence comparable. La prévisibilité doit reposer sur un lien suffisamment étroit, ou lien de proximité suffisant, pour qu’il soit juste et raisonnable d’imposer à une partie l’obligation de prendre les mesures raisonnables pour ne pas porter préjudice à l’autre.

[42] On se soucie davantage du lien de proximité et de la prévisibilité dans les actions pour perte financière, comme celles pour déclaration inexacte faite par négligence : voir, de façon générale, *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021; *Bow Valley Husky (Bermuda) Ltd. c. Saint John Shipbuilding Ltd.*, [1997] 3 R.C.S. 1210. Ces deux conditions d’une obligation de diligence *prima facie* sont remplies dans le cadre d’une action pour déclaration inexacte faite par négligence lorsqu’un « lien spécial » unit les parties : *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165, par. 24. S’exprimant au nom de la Cour dans *Hercules Managements*, le juge La Forest a affirmé que l’existence d’un lien spécial est établie lorsque : (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration; et que (2) la confiance que le demandeur accorde à la déclaration serait raisonnable dans les circonstances (*ibid.*). Si pareil lien est établi, le demandeur peut être tenu responsable des pertes subies par le demandeur du fait d’une déclaration inexacte faite par négligence.

[43] A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

[44] The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).

[45] The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the

[43] Un élément complique les choses : la place que doit occuper la loi lorsqu'on détermine si un acteur gouvernemental avait une obligation de diligence *prima facie*. Il est possible de distinguer deux situations. Dans la première, l'obligation de diligence revendiquée découlerait explicitement ou implicitement du régime législatif. Dans la seconde, l'obligation de diligence découlerait des rapports entre le demandeur et le gouvernement et n'est pas exclue par la loi.

[44] Selon l'argument avancé dans la première catégorie de cas, la loi elle-même crée un rapport de proximité de nature privée qui donne lieu à une obligation de diligence *prima facie*. Il peut être difficile d'arriver au constat qu'une loi crée un lien suffisamment étroit pour donner lieu à une obligation de diligence. Certaines lois peuvent imposer à des représentants de l'État des obligations envers des demandeurs en particulier, mais plus souvent, les lois visent des objectifs d'intérêt public, tels la réglementation d'une industrie (*Cooper*), ou le retrait d'un enfant d'un milieu qui lui est préjudiciable (*Syl Apps*). Dans ces circonstances, il peut être difficile d'inférer que le législateur entendait créer des obligations de droit privé envers des demandeurs. Il est encore plus difficile d'inférer cette intention si l'établissement d'une obligation de nature privée irait à l'encontre des obligations d'une autorité publique envers la population : voir notamment *Cooper* et *Syl Apps*. Tel qu'il est mentionné dans *Syl Apps*, « [u]n conflit entre l'obligation de diligence revendiquée et une obligation primordiale de nature publique ou imposée par la loi peut constituer une raison de principe impérieuse pour refuser de conclure à la proximité » (par. 28; voir aussi *Fullowka c. Pinkerton's of Canada Ltd.*, 2010 CSC 5, [2010] 1 R.C.S. 132, par. 39).

[45] Dans la deuxième catégorie de cas, on prétend que le lien étroit essentiel à l'obligation de diligence de nature privée tire son origine d'une série de rapports précis entre le gouvernement et le demandeur. On fait valoir dans ces cas que le gouvernement, de par sa conduite, a tissé avec le demandeur un lien suffisamment spécial pour établir la proximité nécessaire à une obligation de

governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

[46] Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

[47] Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *Syl Apps*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

[48] As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie*

diligence. Dans ces cas, les lois applicables restent pertinentes pour l'analyse. Par exemple, si un constat de proximité irait à l'encontre du devoir général de nature publique imposé par la loi à l'État, le tribunal peut conclure que cette proximité n'existe pas : *Syl Apps*; voir aussi *Heaslip Estate c. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. Cependant, ce sont les rapports précis entre l'organisme gouvernemental et le demandeur qui font naître une obligation de diligence dans un cas de ce genre.

[46] Enfin, il est possible d'imaginer une action mettant en cause un lien étroit qui se fonde à la fois sur les rapports entre les parties et sur les obligations imposées au gouvernement par la loi.

[47] Puisqu'il s'agit en l'espèce d'une requête en radiation, la question qui nous est soumise est simplement de savoir si, à supposer que les faits allégués soient vrais, il est raisonnablement possible de réussir à établir la proximité en raison d'une loi ou d'un autre facteur. D'une part, dans les cas où on invoque uniquement la loi comme fondement du lien étroit, des obligations opposées de nature publique peuvent exclure toute possibilité d'établir ce lien sur le plan de l'interprétation législative : *Syl Apps*. D'autre part, dans les cas où on affirme que le lien étroit repose sur un acte et des rapports précis, il peut être difficile de rejeter une action à ce stade. Tant qu'il est raisonnablement possible que les rapports allégués, s'ils sont vrais, amènent à conclure à l'existence d'un lien suffisamment étroit, et que la loi n'exclut pas clairement cette possibilité, il faut permettre que l'affaire soit instruite, sous réserve de l'existence de quelque considération de politique générale susceptible d'écarter l'obligation de diligence *prima facie* à la deuxième étape de l'analyse.

[48] Comme je l'ai déjà mentionné, les allégations en l'espèce mettent en cause deux liens : celui entre le Canada et les consommateurs (dans l'*Affaire Knight*), et celui entre le Canada et les compagnies de tabac (dans les deux affaires). La question qui se pose à ce stade est de savoir s'il existe une obligation de diligence *prima facie* dans l'un ou l'autre de ces liens. À mon sens, compte tenu des

duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

[49] The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

[50] The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the *Tobacco Act*, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, R.S.C. 1985, c. 14 (4th Supp.), s. 3 [rep. 1997, c. 13, s. 64], only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

faits allégués, le Canada n'avait pas d'obligation de ce genre envers les consommateurs, mais il en avait une envers les compagnies de tabac.

[49] Les faits allégués dans l'avis de mise en cause d'Imperial dans l'*Affaire Knight* n'établissent aucun lien direct entre le Canada et les consommateurs de cigarettes légères. Le lien dans ce cas se limitait aux déclarations du Canada adressées au grand public selon lesquelles les cigarettes à faible teneur en goudron sont moins dangereuses pour la santé. Le Canada n'entretenait pas de rapports spéciaux avec les membres du groupe. Par conséquent, le constat qu'il s'agit d'un lien suffisamment étroit doit découler des lois applicables : *Cooper*, par. 43.

[50] Les lois pertinentes n'établissent que des obligations générales envers le public, et non des obligations de nature privée envers les consommateurs. Selon la *Loi sur le ministère de la Santé*, L.C. 1996, ch. 8, les obligations du ministre de la Santé ont trait à « la promotion et au maintien de la santé de la population » : par. 4(1). Dans la même veine, l'art. 4 de la *Loi sur le ministère de l'Agriculture et de l'Agroalimentaire*, L.R.C. 1985, ch. A-9, l'art. 4 de la *Loi sur le tabac*, L.C. 1997, ch. 13, et l'art. 3 de la *Loi réglementant les produits du tabac*, L.R.C. 1985, ch. 14 (4^e suppl.), art. 3 [abr. 1997, ch. 13, art. 64], ne prévoient eux aussi que des obligations envers le grand public. Ces obligations générales envers le public n'entraînent pas d'obligation de diligence de droit privé envers des personnes en particulier. Pour reprendre les termes utilisés par le juge Sharpe de la Cour d'appel de l'Ontario dans *Eliopoulos Estate c. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, [TRADUCTION] « [j]e ne vois pas en quoi il serait possible de transformer l'un des pouvoirs discrétionnaires de droit public du ministre, qui doivent être exercés dans l'intérêt public, en obligations de droit privé envers des personnes en particulier » : par. 17. Par contre, les lois applicables n'excluent pas la possibilité de reconnaître une obligation de diligence envers les compagnies de tabac. Le fait d'imposer au gouvernement une obligation de diligence lorsqu'il fait, à ces compagnies, des déclarations relativement aux effets des souches de tabac sur la santé ne serait pas incompatible avec son obligation générale de protéger la santé de la population.

[51] Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

[52] The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Managements*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

[53] What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, A.R., vol. II, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains

[51] Passons au lien entre le Canada et les compagnies de tabac qui est en litige dans les deux affaires soumises à la Cour. Selon les compagnies de tabac, les opérations qu'elles ont conclues avec le Canada au fil des ans ont imposé une obligation de diligence au Canada. D'après elles, le Canada a dépassé les limites de son rôle comme autorité de réglementation des membres de l'industrie et a entretenu des rapports avec les compagnies de tabac en les conseillant et en les aidant à réduire le préjudice causé aux consommateurs de leurs produits. Les compagnies de tabac espèrent démontrer que le Canada leur a donné des renseignements et des conseils erronés en sachant qu'elles s'y fieraient, ce qu'elles ont d'ailleurs fait.

[52] Il s'agit de déterminer si les actes de procédure mentionnés ci-dessus font en sorte que les compagnies de tabac répondent aux conditions d'un lien spécial selon le droit en matière de déclaration inexacte faite par négligence qui sont énoncées dans *Hercules Managements*. Comme je l'ai mentionné, un lien spécial est établi lorsque (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration, et que (2) la confiance accordée par le demandeur serait raisonnable dans les circonstances. En l'espèce, les faits allégués révèlent que le Canada et les compagnies de tabac entretiennent depuis longtemps des rapports qui peuvent remplir ces conditions.

[53] Ce qu'on reproche au Canada, c'est que Santé Canada a exercé des fonctions distinctes de celles prévues par sa loi habilitante, y compris des recherches sur le tabac et des produits du tabac ainsi que la conception et la promotion du tabac et des produits du tabac (déclaration de mise en cause d'Imperial dans l'*Affaire du recouvrement des coûts*, d.a., vol. II, p. 66). Il est aussi allégué qu'Agriculture Canada a mis en œuvre un programme de coopération et de soutien destiné aux producteurs de tabac et aux fabricants de cigarettes, notamment en avisant ces derniers de la teneur en nicotine que devrait avoir le tabac utilisé pour la fabrication des produits du tabac. On allègue que des fonctionnaires ont fait appel à leurs connaissances et à leur expertise dans les domaines de l'usage du tabac et de la santé pour fournir à la fois des avis et des

designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (*ibid.*, at pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

[54] What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

[55] The indicia of proximity offered in *Hercules Managements* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged

instructions aux fabricants, en les avisant notamment que les souches de tabac conçues et mises au point par des fonctionnaires d'Agriculture Canada, qui leur ont été vendues ou pour lesquelles des licences leur ont été octroyées, n'exposeraient pas les consommateurs à des dangers accrus pour leur santé, ni ne leur seraient autrement néfastes (*ibid.*, p. 109-110). Par conséquent, on allègue non seulement que l'exercice de larges pouvoirs de réglementation a eu des répercussions sur l'industrie du tabac, mais aussi que le Canada a joué un rôle de conseiller auprès d'un nombre déterminé de fabricants et a entretenu des rapports commerciaux avec les sociétés en cause compte tenu, en partie, des avis fournis à ces dernières par des fonctionnaires.

[54] Les allégations relatives aux rapports entre le Canada et les fabricants vont bien au-delà des déclarations que fait le Canada au grand public. Les rapports précis qu'aurait entretenus le Canada avec les fabricants se distinguent de l'absence de pareils rapports entre le Canada et les membres du groupe. Alors que les allégations relatives aux consommateurs doivent reposer sur un cadre législatif établissant des obligations fort générales envers le public, les allégations visant les fabricants découleraient principalement, non pas de tels obligations et pouvoirs généraux de réglementation, mais des fonctions exercées spécifiquement à l'égard des fabricants par le Canada, et ce, indépendamment de ses obligations légales. Il s'agit en l'occurrence de ses fonctions de concepteur, d'inventeur, et de promoteur de souches de tabac ainsi que de concédant de licence à l'égard de ces souches. Pour ce qui est de la confiance raisonnable, les pouvoirs de réglementation du Canada envers les fabricants, conjugués aux avis précis qu'il a donnés et à sa participation à des activités commerciales, pourraient être considérés comme étayant la conclusion que la confiance accordée était raisonnable dans les circonstances alléguées.

[55] Il se peut que les indices de proximité énoncés dans *Hercules Managements* dans le cas d'un lien spécial (intérêt financier direct, aptitudes ou connaissances professionnelles, avis donné dans le cours normal des affaires, délibérément ou en réponse à une demande précise) ne soient pas très

negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

[56] Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F., at para. 36).

[57] In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Managements*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysoe J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is sufficient that Canada could have reasonably foreseen in a general way that the appellants would

utiles dans le contexte de déclarations inexactes que le gouvernement aurait faites par négligence. Je signale toutefois que ces déclarations auraient été faites dans le cours des activités de réglementation et des autres activités de Santé Canada, et non dans le cadre de rapports informels. Elles ont été faites précisément aux fabricants assujettis aux pouvoirs de réglementation de Santé Canada, par des fonctionnaires prétendument dotés d'aptitudes, d'une capacité de discernement et de connaissances particulières.

[56] Il faut examiner deux autres arguments avant de passer à une autre question. Premièrement, dans l'*Affaire du recouvrement des coûts*, le Canada soutient ne pas avoir d'obligation de diligence *prima facie* envers les compagnies de tabac parce que les dommages que peuvent subir les compagnies de tabac au titre de la *CRA* n'étaient pas prévisibles. En outre, [TRADUCTION] « [l]e Canada ne pouvait pas raisonnablement s'attendre à ce qu'un gouvernement d'une province puisse créer une obligation de droit civil entièrement nouvelle pour rembourser les coûts engagés par un régime provincial de soins de santé au titre des fautes d'un fabricant définies dans une loi et qu'il confère à cette obligation une portée rétroactive et prospective illimitée » (m.a., par. 36).

[57] À mon sens, les juges majoritaires de la Cour d'appel ont eu raison de rejeter l'argument du Canada. Le Canada n'avait pas à prévoir la mesure législative précise qui engagerait la responsabilité des compagnies de tabac. Il suffit qu'il ait été à même de prévoir que ses déclarations inexactes faites par négligence causeraient un quelconque préjudice à ces compagnies : *Hercules Managements*, par. 25-26 et 42. Compte tenu des faits allégués, il n'est pas exclu que les compagnies de tabac réussissent à prouver que le Canada s'attendait à ce que l'industrie du tabac soit pénalisée de la sorte pour avoir vendu un produit plus dangereux. Comme l'a mentionné le juge Tysoe, le Canada n'avait pas à prévoir que la responsabilité viserait précisément les coûts des soins de santé, ou que des provinces créeraient un droit d'action d'origine législative pour recouvrer ces coûts. [TRADUCTION] « Il suffit que le Canada ait pu raisonnablement prévoir de

suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes” (*Costs Recovery* case, at para. 78).

[58] Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that “it could never have been the perception of the appellants that Canada was taking responsibility for their interests” (*Costs Recovery* case, at para. 51).

[59] In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Managements*. When the jurisprudence refers to “reasonable reliance” in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker’s statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada’s statements about the advantages of light or mild cigarettes. In my view, Canada’s argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Managements*, at para. 41.

[60] In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight*

façon générale que les appelantes subiraient un préjudice si les cigarettes légères et douces étaient plus néfastes pour la santé des fumeurs que les cigarettes ordinaires » (*l’Affaire du recouvrement des coûts*, par. 78).

[58] Deuxièmement, le Canada fait valoir que le lien en l’espèce ne satisfait pas à la condition de la confiance raisonnable parce que le Canada agissait non pas comme une entreprise commerciale, mais plutôt comme une autorité de réglementation d’une industrie. Il n’était donc pas raisonnable, selon le Canada, que les compagnies de tabac se soient fiées à lui en qualité de conseiller. Le juge Hall, dissident, a souscrit à cette opinion, concluant que [TRADUCTION] « les appelantes n’auraient jamais pu croire que le Canada prenait la responsabilité de leurs intérêts » (*l’Affaire du recouvrement des coûts*, par. 51).

[59] À mon avis, cet argument dénature la confiance nécessaire en cas de déclaration inexacte faite par négligence selon le critère établi dans *Hercules Managements*. Lorsque la jurisprudence parle de « confiance raisonnable » dans le contexte d’une déclaration inexacte faite par négligence, elle pose la question de savoir s’il était raisonnable pour l’interlocuteur de se fier à l’exactitude de la déclaration, et non pas celle de savoir s’il était raisonnable de croire que l’auteur de la déclaration garantissait l’exactitude de celle-ci. Il n’est pas manifeste et évident que les compagnies de tabac se sont fiées de manière déraisonnable aux déclarations du Canada relatives aux avantages des cigarettes légères ou douces. J’estime que l’argument du Canada selon lequel il agissait en qualité d’autorité de réglementation n’a rien à voir avec la confiance raisonnable, mais il fait ressortir des considérations de politique générale qui doivent être examinées au deuxième volet du critère établi dans les arrêts *Anns* et *Cooper* : *Hercules Managements*, par. 41.

[60] En résumé, je conclus que les allégations visant les compagnies de tabac et le Canada ne doivent pas être radiées à la première étape de l’analyse. À supposer qu’ils soient exacts, les actes de procédure révèlent l’existence d’une obligation de diligence *prima facie* d’éviter les déclarations

case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

(2) Stage Two: Conflicting Policy Considerations

[61] Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

[62] For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

(a) *Government Policy Decisions*

[63] Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes,

inexactes faites par négligence. Toutefois, les faits, tels qu'ils ont été plaidés dans l'*Affaire Knight*, ne démontrent pas l'existence, entre le Canada et les consommateurs, d'une relation qui donnerait naissance à une obligation de diligence. Cette allégation doit donc être radiée à cette étape de l'analyse.

(2) Deuxième étape de l'analyse : considérations de politique générale opposées

[61] Le Canada fait valoir qu'il ne peut y avoir d'obligation de diligence dans les présentes affaires en raison des considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse. Le Canada invoque à cet égard quatre considérations de cette nature : (1) les prétendues déclarations inexactes constituaient des décisions de politique générale du gouvernement; (2) la reconnaissance d'une obligation de diligence entraînerait la création d'une responsabilité indéterminée envers une catégorie indéterminée de personnes; (3) la reconnaissance d'une telle obligation aurait pour effet imprévu d'instaurer un régime d'assurance; et (4) si l'on fait droit à la demande d'Imperial, la responsabilité à l'égard des produits du tabac passerait du fabricant au gouvernement, et le fabricant [TRADUCTION] « est le mieux en mesure d'assumer la responsabilité des pertes financières » (m.a., par. 72).

[62] Pour les motifs exposés ci-après, je retiens la prétention du Canada selon laquelle les déclarations inexactes qu'il aurait faites par négligence à l'industrie du tabac dans les deux affaires ne doivent pas engager sa responsabilité délictuelle en raison des considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse. D'abord, les déclarations alléguées sont des expressions protégées de politique générale du gouvernement. Ensuite, la reconnaissance d'une obligation de diligence exposerait le Canada à une responsabilité indéterminée.

a) *Décisions de politique générale du gouvernement*

[63] Le Canada prétend qu'il avait pour politique générale d'encourager les fumeurs à consommer

and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, that “[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors” (p. 1240).

[64] The tobacco companies, for their part, contend that Canada’s actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada’s argument fails to account for the “facts” as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government’s actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

[65] In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial’s submissions, holding that “evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions” (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada’s initiatives were matters of government policy:

[Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of

des cigarettes à faible teneur en goudron, et qu’il a promu ce type de cigarette et développé des souches de tabac à faible teneur en goudron conformément à cette politique. Il ajoute que les déclarations faites en application de cette politique générale ne sauraient fonder une responsabilité délictuelle. Il s’appuie sur les propos suivants tenus par le juge Cory dans *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228 : « Les véritables décisions de politique devraient être à l’abri des poursuites en responsabilité délictuelle, de sorte que les gouvernements soient libres de prendre leurs décisions en fonction de facteurs sociaux, politiques ou économiques » (p. 1240-1241).

[64] Pour leur part, les compagnies de tabac prétendent que les actes du Canada ne relevaient pas de la politique générale; il s’agissait plutôt d’actes de mise en œuvre d’une politique générale qui engagent pour cette raison la responsabilité délictuelle du Canada. Selon elles, l’argument du Canada ne tient pas compte des « faits » allégués dans les avis de mise en cause, soit que le Canada exerçait une fonction opérationnelle en tant que membre de l’industrie du tabac. Les compagnies de tabac prétendent aussi qu’il faut plus d’éléments de preuve pour décider si les actes du gouvernement étaient de nature opérationnelle ou conformes à une politique générale, et que l’affaire doit être instruite pour cette raison.

[65] Dans l’*Affaire Knight*, les juges majoritaires de la Cour d’appel, sous la plume du juge Tysoe, ont souscrit aux prétentions d’Imperial, affirmant qu’[TRADUCTION] « une preuve est nécessaire pour déterminer lesquels des actes et déclarations du Canada en l’espèce constituaient des décisions de politique générale et lesquels étaient des décisions opérationnelles » (par. 52). Le juge Hall était dissident; à son avis, toutes les initiatives du Canada relevaient manifestement de la politique générale du gouvernement :

[TRADUCTION] Tel qu’il est allégué dans l’avis de mise en cause, [le Canada] avait la responsabilité de protéger la santé de la population canadienne, y compris les fumeurs. Toutes les mesures qu’il a prises pour développer des souches de tabac moins dangereuses, ou pour rendre publiques les teneurs en goudron et en nicotine

new strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government. [para. 100]

[66] In order to resolve the issue of whether the alleged “policy” nature of Canada’s conduct negates the *prima facie* duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

(i) Conduct at Issue

[67] The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct — one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada’s role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct — conduct relevant to statements and representations made by Canada — is at issue.

(ii) Relevance of Evidence

[68] This brings us to the second and related preliminary matter — the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be

de différentes marques de cigarettes, visaient cet objectif. Bien qu’Agriculture Canada ait participé au développement de nouvelles souches de tabac, j’estime que le gouvernement s’est livré à pareilles activités en qualité d’autorité de réglementation de l’industrie du tabac dans le but de protéger la santé de la population canadienne. Des considérations de politique générale sous-tendaient l’ensemble des diverses activités susmentionnées entreprises par les ministères fédéraux. [par. 100]

[66] Pour régler la question de savoir si la nature censément « politique » de la conduite du Canada a pour effet d’écarter l’obligation de diligence *prima facie* en matière de déclarations inexactes faites par négligence, une obligation dont l’existence a été établie à la première étape de l’analyse, il faut d’abord examiner plusieurs questions préliminaires.

(i) La conduite en cause

[67] La conduite en cause est la première question préliminaire à examiner dans le cadre de la présente analyse. Les avis de mise en cause traitent de deux types distincts de conduite : la conduite visée par l’allégation de déclaration inexacte faite par négligence et la conduite non visée par cette allégation. La première a trait aux déclarations du Canada selon lesquelles les cigarettes à faible teneur en goudron et les cigarettes légères étaient moins nuisibles pour la santé que les autres cigarettes. La deuxième conduite a trait au rôle joué par Agriculture Canada dans le développement et la culture d’une souche de tabac à faible teneur en goudron ainsi que dans la perception des redevances sur le produit. Les compagnies de tabac ont fusionné les deux types de conduite dans leur plaidoirie, en faisant ressortir des éléments qui campent le Canada dans un rôle de commerçant dans l’industrie du tabac. Toutefois, dans l’analyse des déclarations inexactes faites par négligence, seul est en cause le premier type de conduite, celui relatif aux déclarations du Canada.

(ii) La pertinence de la preuve

[68] Cela nous amène à la deuxième question préliminaire connexe : l’utilité de la preuve pour déterminer s’il convient de radier les demandes de mise en cause fondées sur les déclarations inexactes faites

struck. The majority of the Court of Appeal concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

[69] There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct — the development and marketing of a strain of low-tar tobacco — that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

[70] The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the

par négligence. La Cour d'appel a conclu à la majorité qu'une preuve était nécessaire pour établir si les déclarations inexactes attribuées au Canada avaient été faites conformément à une politique générale du gouvernement. Dans la même veine, les compagnies de tabac ont soutenu vigoureusement devant notre Cour que, dans la mesure où le Canada développait et cultivait du tabac à faible teneur en goudron et en tirait profit, il devrait être considéré non pas comme une autorité de réglementation du gouvernement ou un architecte des politiques publiques, mais comme un commerçant. Les compagnies de tabac ont fait valoir avec insistance qu'une preuve était nécessaire pour déterminer la mesure dans laquelle il s'agissait d'une activité commerciale.

[69] Cet argument pose problème à deux égards. Premièrement, comme je l'ai mentionné, il repose principalement sur des actes — le développement et la commercialisation d'une souche de tabac à faible teneur en goudron — qui n'ont pas de lien direct avec l'allégation de déclarations inexactes faites par négligence. La seule question qui se pose à ce stade de l'analyse est de savoir si les considérations de politique générale militent contre la conclusion que le Canada avait envers les compagnies de tabac l'obligation de prendre les mesures raisonnables pour énoncer correctement les avantages du tabac à faible teneur en goudron. La question de savoir si le Canada a produit des souches de tabac à faible teneur en goudron n'est pas directement pertinente pour cette analyse. Il s'agit plutôt de savoir si, dans la mesure où le Canada a fait des déclarations à cet égard, des considérations de politique générale nous empêcheraient de le tenir responsable de ces déclarations.

[70] Deuxièmement, comme je l'ai déjà indiqué, une requête en radiation ne dépend pas, de par sa nature, de la preuve. Les faits allégués doivent être tenus pour avérés. Le rejet de la requête en radiation s'impose, à moins qu'il ne soit évident et manifeste, d'après ces faits, que l'action n'a aucune possibilité raisonnable de succès. Autrement dit, s'il existe une possibilité raisonnable que la question alléguée s'avère en fait une question de politique générale, la requête en radiation doit alors être rejetée. Les doutes quant à ce que la preuve peut démontrer

evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

[71] Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune From Judicial Review?

[72] The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

[73] The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The “discretionary decision” approach was first adopted in *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

ne devraient pas empêcher la tenue d’un procès. La question dont nous sommes saisis est donc de savoir s’il ressort clairement des faits tenus pour avérés qu’une obligation de faire diligence afin d’éviter les déclarations inexactes faites par négligence serait écartée parce que la conduite à l’origine de la déclaration inexacte alléguée relève d’une politique générale du gouvernement et n’est donc pas susceptible d’engager la responsabilité délictuelle de son auteur.

[71] Pour être en mesure de répondre à cette question, nous devons examiner une troisième question préliminaire : en quoi consiste une décision de politique générale soustraite au contrôle judiciaire?

(iii) Les décisions de politique générale soustraites au contrôle judiciaire

[72] La question de savoir en quoi consiste une décision de politique générale qui écarte généralement toute responsabilité pour négligence est une question épineuse qui a fait couler beaucoup d’encre. Les tribunaux de common law de partout dans le monde s’entendent généralement pour dire que les décisions de politique générale des gouvernements ne sont pas justiciables et ne peuvent engager la responsabilité délictuelle de ces derniers. On s’entend aussi généralement pour dire que la responsabilité délictuelle de l’État peut être engagée lorsque ses mandataires exercent de façon négligente des fonctions prescrites. La difficulté tient à l’élaboration d’un critère qui permette de distinguer ces situations.

[73] La jurisprudence révèle l’existence de deux méthodes d’analyse utilisées pour résoudre cette difficulté, l’une étant axée sur la notion de pouvoir discrétionnaire, et l’autre sur la notion de politique générale, et chacune a ses propres variantes. La première méthode met l’accent sur la nature discrétionnaire de la conduite reprochée. La méthode fondée sur la [TRADUCTION] « décision discrétionnaire » a été retenue pour la première fois dans *Home Office c. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). Selon cette méthode, les autorités publiques doivent être exonérées de toute responsabilité lorsqu’elles agissent dans l’exercice de leur pouvoir discrétionnaire, à moins que la décision attaquée ne soit irrationnelle.

[74] The second approach emphasizes the “policy” nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called “true” or “core” policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which “true” policy decisions are distinguished from “operational” decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just; Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

[75] To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 754).

[76] There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, “the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions”: *Just*, at p. 1239. The challenge,

[74] La seconde méthode insiste sur la qualité de « politique générale » de la conduite de l’État bénéficiant d’une protection. On considère que les décisions de politique générale forment un sous-groupe de décisions discrétionnaires, qui font habituellement intervenir des considérations d’ordre social, économique et politique. Elles sont parfois qualifiées de « véritables » décisions de politique générale ou décisions de politique générale « fondamentale ». Les décisions de politique générale sont soustraites au contrôle judiciaire et ne peuvent engager la responsabilité délictuelle de l’État, sauf si elles sont irrationnelles ou ont été prises de mauvaise foi. Une variante de cette méthode est le critère politique générale-opérations, lequel fait la distinction entre les « véritables » décisions de politique générale et les décisions « opérationnelles », qui visent la mise en œuvre ou l’application d’une politique générale établie. De nos jours, c’est le critère politique générale-opérations qui prévaut au Canada : *Just; Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Lewis (Tutrice à l’instance de) c. Colombie-Britannique*, [1997] 3 R.C.S. 1145.

[75] Pour compliquer les choses, les notions de pouvoir discrétionnaire et de politique générale se chevauchent et sont parfois employées de manière interchangeable. Ainsi, dans *Anns*, lord Wilberforce a décrit la notion de politique générale comme étant synonyme de pouvoir discrétionnaire (p. 754).

[76] On admet généralement que le droit de la négligence doit prendre en compte le rôle unique des organismes gouvernementaux : *Just*. D’une part, il importe que les organismes publics soient responsables en général de leur négligence compte tenu du grand rôle qu’ils jouent dans tous les aspects de la vie en société. Soustraire les gouvernements à toute responsabilité pour leurs actes entraînerait des conséquences inacceptables. Par contre, « la Couronne n’est pas une personne et elle doit pouvoir être libre de gouverner et de prendre de véritables décisions de politique sans encourir pour autant une

to repeat, is to fashion a just and workable legal test.

[77] The main difficulty with the “discretion” approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

[78] The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

[79] The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision,

responsabilité civile délictuelle » : *Just*, p. 1239. La difficulté, encore une fois, consiste à formuler un critère juridique équitable et utile.

[77] La principale difficulté que pose la méthode d’analyse fondée sur la notion de « décision discrétionnaire » réside dans la possibilité qu’elle applique à la conduite des acteurs gouvernementaux une exemption trop générale. Bien des décisions peuvent être qualifiées de discrétionnaires dans une certaine mesure. Cette méthode d’analyse a donc parfois été peaufinée ou remplacée par des critères restreignant le pouvoir discrétionnaire qui dégage son titulaire de toute responsabilité.

[78] La principale difficulté que pose le critère politique générale-opérations tient au fait qu’il est notoirement difficile pour les tribunaux de décider si une décision gouvernementale donnée relève d’une politique générale ou des opérations. Même des fonctionnaires aux échelons inférieurs peuvent jouir d’un certain pouvoir discrétionnaire pour ce qui est d’établir le montant des fonds disponibles ou de décider quelle tâche parmi d’autres revêt le plus d’importance à un moment donné. La décision d’un travailleur social quant au moment de rendre visite à une famille perturbée, ou celle d’un conducteur de chasse-neige quant au moment d’épandre du sable sur une route glacée, sont-elles des décisions de politique générale ou des décisions opérationnelles? On peut soutenir que les deux réponses sont bonnes, selon les circonstances. Bien qu’elle illustre un facteur clé en raison duquel certains actes du gouvernement doivent généralement être à l’abri de toute responsabilité, la distinction politique générale-opérations ne constitue pas un critère juridique très utile.

[79] L’historique du traitement de la question par différents tribunaux illustre la difficulté que présente l’élaboration d’un critère utile pour décrire les décisions de politique générale soustraites au contrôle judiciaire. Commençons par la Chambre des lords, qui estimait au départ que toutes les décisions discrétionnaires du gouvernement qui ne sont pas irrationnelles sont soustraites au contrôle judiciaire : *Dorset Yacht*. Elle a ensuite appliqué un critère à deux volets, en se demandant en

in which case it was entirely exempt from judicial scrutiny: *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353. Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (H.L.), *per* Lord Hoffmann. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a “justiciability” test: *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550. The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or “whether the court should accept that it has no role to play” (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

[80] Australian judges in successive cases have divided between a discretionary/irrationality model and a “true policy” model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce’s definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J.

premier lieu si la décision était discrétionnaire et, dans l’affirmative, si elle était rationnelle; elle s’est demandé en second lieu s’il s’agissait d’une décision de politique fondamentale, et donc entièrement soustraite à l’examen judiciaire : *X c. Bedfordshire County Council*, [1995] 3 All E.R. 353. Moins d’un an après avoir retenu ce critère à deux volets, la Chambre des lords l’a laissé tomber en déclarant de manière retentissante que le critère politique générale-opérations était inapplicable dans les cas difficiles, ce dont témoignerait la jurisprudence canadienne : *Stovin c. Wise*, [1996] A.C. 923 (H.L.), lord Hoffmann. Lors de sa dernière incurSION dans ce domaine, la Chambre des lords a mentionné que tant le critère politique générale-opérations que l’analyse fondée sur la notion de décision discrétionnaire sont utiles pour déterminer les décisions du gouvernement qui engagent la responsabilité délictuelle de celui-ci, mais elle a jugé que le critère final en est un de « justiciabilité » : *Barrett c. Enfield London Borough Council*, [2001] 2 A.C. 550. Selon ce critère, il s’agit de savoir, en définitive, si le tribunal est habile, sur le plan institutionnel, à trancher la question ou [TRADUCTION] « si le tribunal doit reconnaître qu’il n’a pas à intervenir » (p. 571). Ainsi, à la fin de ce long périple jurisprudentiel, on se retrouve avec un critère qui ne fait que reformuler la question. Quand le tribunal doit-il juger qu’une décision gouvernementale ne donne pas prise à la responsabilité pour négligence? Quand le tribunal conclut que l’affaire est du ressort du gouvernement et non des tribunaux.

[80] Des juges australiens s’étant prononcés dans des décisions successives sont partagés entre le modèle décision discrétionnaire-décision irrationnelle et celui de la « véritable décision de politique générale ». Dans *Sutherland Shire Council c. Heyman* (1985), 157 C.L.R. 424 (H.C.), deux des juges (le juge en chef Gibbs et le juge Wilson) ont adopté la règle établie dans l’arrêt *Dorset Yacht*, selon laquelle toutes les décisions discrétionnaires échappent au contrôle judiciaire, pourvu qu’elles soient rationnelles (p. 442). Ils ont souscrit à la thèse que la distinction entre la politique générale et les opérations était un critère logique pour déterminer quelles décisions ne donnent pas prise à la responsabilité, et ils ont fait leur la description de lord

for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

[81] In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. (“FTCA”), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 430; *United States v. Neustadt*, 366 U.S. 696 (1961).

[82] Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions:

Wilberforce voulant que la politique générale soit synonyme de pouvoir discrétionnaire. Pour sa part, le juge Mason a affirmé que l’État bénéficiait de la protection uniquement à l’égard des décisions de politique générale fondamentale, qu’il considérait comme un sous-groupe plus restreint de décisions discrétionnaires (p. 500). Le juge Deane a souscrit à l’opinion du juge Mason, mais pour des raisons quelque peu différentes. Quant au juge Brennan, il n’a pas dit quel critère devrait être retenu, laissant cette question en suspens. La Haute Cour d’Australie était encore une fois divisée dans *Pyrenees Shire Council c. Day*, [1998] HCA 3, 192 C.L.R. 330, où trois juges ont conclu qu’une mesure gouvernementale discrétionnaire n’engage la responsabilité de l’État que si elle est irrationnelle, et deux juges ont retenu des versions différentes du critère politique générale-opérations.

[81] Aux États-Unis, la responsabilité du gouvernement fédéral est régie par la *Federal Tort Claims Act* de 1946, 28 U.S.C. (« *FTCA* »), qui écarte l’immunité absolue à l’égard de la responsabilité délictuelle, mais crée une exemption en faveur des décisions discrétionnaires. L’alinéa 2680a) écarte la responsabilité du gouvernement à l’égard de

[TRANSLATION] [t]oute poursuite fondée sur l’acte ou l’omission d’un fonctionnaire dans l’exécution diligente d’une loi ou d’un règlement, que ces derniers soient ou non valides, ou fondée sur l’exercice ou le défaut d’exercice d’une fonction ou d’un pouvoir discrétionnaire de la part d’un organisme fédéral ou d’un fonctionnaire, qu’il y ait eu ou non exercice abusif de ce pouvoir discrétionnaire.

Fait important, l’al. 2680h) de la *FTCA* soustrait le gouvernement fédéral à toute poursuite pour déclaration inexacte, faite délibérément ou par négligence : *Office of Personnel Management c. Richmond*, 496 U.S. 414 (1990), p. 430; *United States c. Neustadt*, 366 U.S. 696 (1961).

[82] Sans entrer dans les détails de l’historique complexe de la jurisprudence américaine en la matière, il suffit de dire que les tribunaux ont restreint le concept de pouvoir discrétionnaire énoncé dans la *FTCA* en invoquant la notion de politique générale. Dans certaines décisions, ils développent

e.g., *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as “not operational”, in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (1991), White J. faulted the Court of Appeals for relying on “a nonexistent dichotomy between discretionary functions and operational activities” (p. 326). He held that the “discretionary function exception” of the *FTCA* “protects only governmental actions and decisions based on considerations of public policy” (at p. 323, citing *Berkovitz v. United States*, 486 U.S. 531 (1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

[83] In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as “not operational”, but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that “there is something to the planning vs. operational dichotomy — though . . . not precisely what the Court of Appeals believed” (p. 335). That “something” is that “[o]rordinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions”. For Scalia J., a government decision is a protected policy decision if it “ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations”.

cette analyse en distinguant les décisions de politique générale des décisions opérationnelles : p. ex. *Dalehite c. United States*, 346 U.S. 15 (1953). La Cour suprême des États-Unis s’est depuis distancée de l’approche qui consiste à décrire de façon négative une véritable décision de politique générale comme une décision [TRADUCTION] « n’étant pas de nature opérationnelle » et favorise une approche visant à déterminer si la conduite contestée de l’État reposait sur des considérations d’intérêt public. Dans *United States c. Gaubert*, 499 U.S. 315 (1991), le juge White a reproché à la Court of Appeals de se fonder sur une [TRADUCTION] « dichotomie inexistante entre les fonctions discrétionnaires et les activités opérationnelles » (p. 326). Selon lui, l’« exception relative aux fonctions discrétionnaires » prévue par la *FTCA* « ne vise que les mesures et les décisions du gouvernement qui reposent sur des considérations d’intérêt public » (p. 323, citant *Berkovitz c. United States*, 486 U.S. 531 (1988), p. 537 (je souligne)), comme celles faisant intervenir des considérations sociales, économiques ou politiques; voir aussi *United States c. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

[83] Dans *Gaubert*, seul le juge Scalia trouvait encore attrayante l’idée de définir les décisions de politique générale comme des décisions [TRADUCTION] « n’étant pas de nature opérationnelle », mais seulement au sens strict selon lequel les employés au niveau opérationnel prennent rarement des décisions de politique générale. Selon lui, [TRADUCTION] « un facteur intervient dans la dichotomie entre la planification et les opérations [. . .] mais ce n’est pas tout à fait ce que les cours d’appel avaient en tête » (p. 335). Ce « facteur », c’est que, « [h]abituellement, un employé au niveau opérationnel n’a pas à prendre des décisions de politique générale, même si ses actes peuvent être étroitement liés à des considérations de cette nature ». D’après le juge Scalia, une décision du gouvernement constitue une décision de politique générale bénéficiant de protection si elle « doit tenir compte de considérations sociales, économiques ou politiques et si elle est prise par un fonctionnaire dont l’une des responsabilités officielles consiste à évaluer ces considérations ».

[84] A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

[85] The second observation is that there is considerable support in all jurisdictions reviewed for the view that “true” or “core” policy decisions should be protected from negligence liability. The current Canadian approach holds that only “true” policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent “justiciability” test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

[86] A third observation is that defining a core policy decision negatively as a decision that is not an “operational” decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments — policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

[87] Instead of defining protected policy decisions negatively, as “not operational”, the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and

[84] Les observations suivantes s'imposent comme suite à l'analyse de la jurisprudence. Premièrement, un critère fondé uniquement sur l'exercice du pouvoir discrétionnaire du gouvernement est maintenant perçu par la plupart des tribunaux comme étant trop général. Même les tâches courantes, comme la conduite d'un véhicule du gouvernement, peuvent requérir l'exercice d'un certain pouvoir discrétionnaire. Soustraire à l'examen judiciaire tous les actes de l'administration publique qui font intervenir un pouvoir discrétionnaire, pourvu qu'ils ne soient pas irrationnels, a pour effet de donner une portée trop large à l'immunité.

[85] Deuxièmement, un grand nombre de tribunaux dans tous les ressorts visés par l'analyse s'entendent pour dire que l'État devrait être soustrait à toute responsabilité pour négligence dans les cas de « véritables » décisions de politique générale ou de décisions de politique générale « fondamentale ». Selon le point de vue qui prévaut au Canada, seules les « véritables » décisions de politique générale (par opposition aux décisions opérationnelles) ne devraient pas donner prise à cette responsabilité : *Just*. La difficulté liée à la détermination des décisions de cette nature ne change rien au fait que les tribunaux s'en remettent encore à ces indications essentielles. Même le critère de « justiciabilité » établi tout récemment au Royaume-Uni s'inspire de ce concept pour déterminer ce qui doit être perçu comme étant justiciable.

[86] Troisièmement, le fait de définir négativement une décision de politique générale fondamentale comme une décision n'étant pas de nature « opérationnelle » ne constitue peut-être pas un critère distinct utile dans tous les cas. Ce critère suppose une nette dichotomie entre deux compartiments étanches : les décisions de politique générale et les décisions opérationnelles. Dans les faits, il est possible que les décisions n'appartiennent pas clairement à l'une ou l'autre de ces catégories.

[87] Au lieu de définir négativement les décisions de politique générale à l'abri de l'examen judiciaire comme des décisions [TRADUCTION] « n'étant pas de nature opérationnelle », les juges majoritaires dans *Gaubert* les décrivent positivement comme

political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a “policy” in the sense of a general rule or approach, applied to a particular situation. It represents “a course or principle of action adopted or proposed by a government”: *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

[88] Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

[89] While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a “course” or “principle” of action with respect to a particular problem facing the government? Without suggesting that

étant des décisions et des mesures discrétionnaires d’ordre législatif ou administratif qui se fondent sur des considérations sociales, économiques ou politiques. Les décisions de politique générale sont habituellement prises par le législateur ou un fonctionnaire tenu officiellement d’évaluer et de mettre en balance des considérations d’intérêt public. La décision est réfléchie et traduit une « politique générale » dans le sens d’une règle ou orientation générale appliquée dans une situation précise. La politique désigne une « ligne de conduite adoptée par un organisme [. . .] public » : *Multidictionnaire de la langue française*, p. 1261. Les juges saisis d’une pareille ligne de conduite adoptée par un organisme public estiment généralement qu’il s’agit d’une décision de politique générale. Il appartient véritablement au gouvernement, et non aux tribunaux, de mettre en balance des considérations sociales, économiques et politiques pour en arriver à une ligne de conduite. C’est pourquoi les décisions et les actes reposant sur ces considérations ne sauraient fonder une action en responsabilité délictuelle.

[88] Utilisée dans ce sens, la notion de politique générale diffère de la notion de pouvoir discrétionnaire. Un tel pouvoir dépend de la question de savoir si un acteur donné a la faculté de choisir d’agir d’une façon ou d’une autre. Les politiques générales forment un sous-ensemble restreint de décisions discrétionnaires, et n’englobent que les décisions fondées sur des considérations d’intérêt public, comme des considérations d’ordre économique, social ou politique. Toutes les décisions de politique générale sont discrétionnaires, en ce sens qu’une politique différente aurait pu être retenue. Toutefois, les décisions discrétionnaires du gouvernement ne sont pas toutes des décisions de politique générale.

[89] Bien que l’approche préconisée dans *Gaubert* mette l’accent sur la nature de la décision, le rôle du décideur peut se révéler utile. Ce dernier était-il chargé d’étudier les facteurs sociaux, économiques ou politiques et d’élaborer une « ligne de conduite » à l’égard d’un problème auquel fait face le gouvernement? Sans prétendre qu’il est possible de répondre à la question en invoquant

the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

[90] I conclude that “core policy” government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being “non-operational”. It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of “policy” involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[91] Applying this approach to motions to strike, we may conclude that where it is “plain and obvious” that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

simplement le niveau hiérarchique du décideur, on peut s'inspirer de l'observation faite par le juge Scalia dans *Gaubert* selon laquelle les employés au niveau opérationnel ne participent habituellement pas à la prise de décisions de politique générale.

[90] Je conclus que les décisions de « politique générale fondamentale » du gouvernement à l'égard desquelles ce dernier est soustrait aux poursuites se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Cette approche concorde avec le message essentiel de la jurisprudence canadienne à cet égard, bien qu'elle fasse ressortir des caractéristiques positives des décisions de politique générale, au lieu de se fonder exclusivement sur le fait qu'elles ne sont pas de « nature opérationnelle ». Elle est aussi étayée par les réflexions faites dans la nouvelle jurisprudence canadienne et étrangère. Cela dit, elle n'est pas censée constituer un critère décisif. On peut s'attendre à ce que surviennent de temps à autre des situations délicates où il n'est pas facile de décider si le degré de « politique générale » en cause suffit à mettre une décision à l'abri de toute responsabilité pour négligence. Il serait illusoire de vouloir établir un critère absolu qui donnerait rapidement et infailliblement une réponse à l'égard de toute décision parmi la gamme infinie de celles que peuvent prendre les acteurs gouvernementaux. On pourra néanmoins facilement cerner la plupart des décisions gouvernementales qui représentent une ligne de conduite fondée sur une mise en balance de considérations économiques, sociales et politiques.

[91] L'application de l'approche exposée ci-dessus aux requêtes en radiation nous permet de conclure que, dans les cas où il est « évident et manifeste » qu'une décision contestée du gouvernement constitue une décision de politique générale, l'allégation peut à juste titre être radiée au motif qu'elle ne saurait fonder une action en responsabilité délictuelle. S'il n'est pas évident et manifeste qu'il s'agit d'une décision de politique générale, il faut permettre l'instruction de l'affaire.

(iv) Conclusion on the Policy Argument

[92] As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

[93] The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

[94] The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

[95] In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a “true” or “core” policy, in the sense of a course or principle of action that the government

(iv) Conclusion sur l’argument relatif à la politique générale

[92] Comme je l’ai indiqué, il s’agit de savoir si les déclarations qu’aurait faites le Canada aux compagnies de tabac, selon lesquelles les cigarettes à faible teneur en goudron sont moins nuisibles pour la santé, sont des questions de politique générale, en ce sens qu’elles constituent une ligne de conduite du gouvernement. Dans l’affirmative, ces déclarations ne peuvent fonder une action en responsabilité délictuelle.

[93] On soutient dans les avis de mise en cause que le Canada a mis en garde la population (et les compagnies de tabac) contre les dangers de l’usage du tabac et a affirmé que les cigarettes à faible teneur en goudron sont moins nocives que les cigarettes ordinaires. On soutient aussi que ces déclarations étaient fausses et que, dans la mesure où l’usage du tabac a causé aux consommateurs un préjudice additionnel dont sont tenues responsables les compagnies de tabac, le Canada doit indemniser celles-ci ou épouser une partie de leurs pertes.

[94] Les avis de mise en cause concèdent implicitement que Santé Canada a fait les déclarations qu’on lui attribue par souci pour la santé des Canadiens et Canadiennes, conformément à sa politique d’inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. Ils mentionnent en fait que Santé Canada avait pour politique de mettre en garde la population contre les effets nocifs de l’usage du tabac, et d’encourager les Canadiens et Canadiennes à fumer plus sainement. Les demandes de mise en cause reposent sur l’allégation que Santé Canada s’est résigné à ce que certaines personnes continuent de fumer malgré les effets nuisibles de cette habitude sur leur santé, et a décidé qu’il convenait de les inciter à fumer des cigarettes à faible teneur en goudron.

[95] En bref, les déclarations sur lesquelles s’appuient les demandes de mise en cause faisaient partie intégrante d’une politique générale du gouvernement visant à inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron. Il s’agissait d’une « véritable »

adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

[96] Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) *Indeterminate Liability*

[97] Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

[98] The tobacco companies respond that Canada faces extensive, but not indeterminate liability.

politique générale ou d'une politique générale « fondamentale » au sens d'une ligne de conduite adoptée par le gouvernement. La ligne de conduite gouvernementale alléguée a été adoptée par les plus hautes instances du gouvernement canadien et mettait en jeu des considérations sociales et économiques. Selon les actes de procédure, le Canada a élaboré cette politique par souci pour la santé des Canadiens et Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac. Il m'apparaît évident et manifeste que les déclarations alléguées relevaient de la politique générale du gouvernement, de sorte que les allégations de déclarations inexactes faites par négligence qu'ont formulées les compagnies de tabac à l'encontre du Canada doivent être radiées.

[96] Vu ma conclusion que les allégations de déclarations inexactes faites par négligence ne peuvent fonder une action parce que les déclarations alléguées relevaient de la politique générale du gouvernement, point n'est besoin de passer en revue les autres motifs de politique générale — liés à la deuxième étape de l'analyse — qu'a invoqués le Canada à l'encontre des demandes de mise en cause pour déclarations inexactes faites par négligence. Mais, comme l'argument relatif à la responsabilité indéterminée a été débattu à fond, je vais l'analyser brièvement. À mon avis, cet argument confirme que la responsabilité délictuelle du Canada ne doit pas être reconnue à l'égard des déclarations inexactes qu'il aurait faites.

b) *Responsabilité indéterminée*

[97] Le Canada soutient que, si l'on accepte les allégations des défenderesses en matière de déclaration inexacte faite par négligence, cela entraînerait une responsabilité indéterminée de sa part, et qu'il faut donc les rejeter. Le Canada affirme que le nombre de cigarettes vendues était indépendant de sa volonté. En outre, dans les cas de perte financière, les tribunaux ne doivent conclure à la responsabilité du mis en cause que lorsque celui-ci est à même d'en contrôler la portée.

[98] Les compagnies de tabac répondent que la responsabilité à laquelle s'expose le Canada est

They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

[99] I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

[100] The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

[101] Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco

considérable, mais non indéterminée. Selon les compagnies de tabac, la responsabilité du Canada envers elles se limite au délit de déclaration inexacte faite par négligence. Le Canada ne serait responsable qu'envers les fumeurs de cigarettes légères et les compagnies de tabac.

[99] Je suis d'accord avec le Canada pour dire que la possibilité d'une responsabilité indéterminée porte un coup fatal aux allégations des compagnies de tabac relatives aux déclarations inexactes faites par négligence. Dans la mesure où les allégations reposent sur des déclarations faites aux consommateurs, le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères. Cette situation est analogue à celle dans l'arrêt *Cooper* dans lequel notre Cour a affirmé qu'elle aurait refusé d'attribuer au registraire des courtiers en hypothèques une obligation de diligence à l'égard des pertes financières subies par les investisseurs, parce que « [l]a Loi elle-même n'impose aucune limite au nombre des investisseurs et aux montants d'argent investis dans le système de courtage en hypothèques, et le registraire ne dispose d'aucun moyen pour les contrôler » (par. 54). Cette affirmation constituait une remarque incidente, mais il s'agit d'un argument convaincant.

[100] Le risque de responsabilité indéterminée est aggravé par le caractère purement financier de la perte alléguée. Dans *Design Services Ltd. c. Canada*, 2008 CSC 22, [2008] 1 R.C.S. 737, sous la plume du juge Rothstein, la Cour a mentionné que « dans les cas de perte purement financière, il faut, pour paraphraser le juge en chef Cardozo, prendre soin de ne reconnaître une obligation que dans la mesure où l'on peut déterminer la catégorie des demandeurs, la période et les montants en cause » (par. 62). Si le Canada avait une obligation de diligence envers les fumeurs de cigarettes légères, le nombre potentiel de demandeurs et l'ampleur de la responsabilité seraient indéterminés.

[101] Dans la mesure où les allégations reposent sur des déclarations faites aux compagnies de tabac, elles semblent plus limitées à première vue. Cette distinction ne résiste toutefois pas à l'analyse. Si l'on reconnaissait une obligation de diligence à

companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

(c) *Summary on Stage-Two Policy Arguments*

[102] In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

D. *Failure to Warn*

[103] The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

(1) Labelling Claim

[104] B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure

l'égard des déclarations faites aux compagnies de tabac, cela reviendrait effectivement à reconnaître une obligation envers les consommateurs, vu que le montant des dommages-intérêts dus aux compagnies de tabac dans les deux cas dépendrait du nombre de fumeurs et du nombre de cigarettes vendues. Il s'agit d'allégations de déclaration inexacte faite par négligence par lesquelles les compagnies de tabac détournent leur responsabilité potentielle vers les consommateurs et la province de la Colombie-Britannique. À mon avis, il faut rejeter ces allégations dans les deux cas, parce que le Canada n'avait aucune prise sur l'ampleur de sa responsabilité potentielle.

c) *Résumé quant aux arguments de politique générale soulevés à la deuxième étape de l'analyse*

[102] J'estime que notre Cour doit radier les allégations de déclarations inexactes faites par négligence dans les deux pourvois en raison de considérations de politique générale soulevées à la deuxième étape de l'analyse, à savoir l'immixtion dans les décisions de politique générale du gouvernement et la possibilité de responsabilité indéterminée.

D. *Le défaut de mise en garde*

[103] Les compagnies de tabac formulent deux allégations au sujet du défaut de mise en garde : B.A.T. prétend que le Canada a interdit aux compagnies de tabac d'apposer sur les paquets de cigarettes des mises en garde (l'allégation relative à l'étiquetage) à l'égard des dangers que présentent les cigarettes pour la santé; Imperial, quant à elle, prétend que le Canada a fait défaut de mettre les compagnies de tabac en garde contre les dangers que présentent les souches de tabac conçues par le Canada et pour lesquelles il a octroyé des licences.

(1) L'allégation relative à l'étiquetage

[104] B.A.T. allègue que, en donnant à l'industrie la directive de ne pas apposer de mise en garde sur ses paquets de cigarettes, le Canada a engagé sa responsabilité délictuelle pour défaut de mise en

to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

[105] The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

(2) Failure to Warn Imperial About Health Hazards

[106] The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

[107] Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to

garde. Dans l'*Affaire Knight*, le juge Tysoe n'a pas abordé les allégations relatives au défaut de mise en garde. Pour sa part, le juge Hall, exprimant l'opinion de la minorité, aurait rejeté ces allégations pour des motifs liés à l'étape deux de l'analyse, estimant que la décision du Canada était une décision de politique générale et que la responsabilité du Canada serait indéterminée. Il a aussi conclu qu'imposer cette responsabilité au gouvernement irait à l'encontre des obligations du Canada envers la population (par. 99). Dans l'*Affaire du recouvrement des coûts*, le juge Tysoe a souscrit à l'analyse faite par le juge Hall dans l'*Affaire Knight* en rejetant l'allégation relative au défaut du Canada de mettre en garde les compagnies de tabac (par. 89). B.A.T. conteste ces conclusions.

[105] L'élément crucial de cette allégation relative au défaut de mise en garde est essentiellement le même que celui des allégations de déclarations inexactes faites par négligence, et il y a lieu de la rejeter pour les mêmes considérations de politique générale. Les recommandations du ministre de la Santé sur les mises en garde faisaient partie intégrante de la politique générale du gouvernement visant à inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. En tant que telles, elles ne peuvent fonder une action pour défaut de mise en garde.

(2) Le défaut de mettre Imperial en garde contre les dangers pour la santé

[106] S'exprimant au nom de la Cour d'appel, le juge Tysoe a conclu que l'on n'avait pas suffisamment plaidé, dans les avis de mise en cause, que le Canada avait fait défaut de mettre l'industrie en garde contre les dangers pour la santé que présentaient ses souches de tabac. Imperial prétend que cette conclusion était erronée, car les éléments de l'allégation de défaut de mise en garde sont identiques à ceux de l'allégation de négligence qui, elle, avait suffisamment été plaidée.

[107] Le Canada souligne que les deux paragraphes des avis de mise en cause où il est question du défaut de mise en garde ne font allusion qu'aux allégations concernant l'étiquetage, et non à l'allégation

warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

[108] I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, *per* Drossos J.; see also *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133 (Ont. S.C.J.), *per* Macdonald J. (paras. 6 to 9).

[109] Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

E. *Negligent Design*

[110] The tobacco companies have brought two types of negligent design claims against Canada

que le Canada a fait défaut de mettre Imperial en garde contre les dangers possibles pour la santé que présentaient les souches de tabac. Le Canada soutient également que pour étayer une allégation de défaut de mise en garde, le demandeur doit non seulement démontrer que le défendeur a fait preuve de négligence, mais aussi que celui-ci avait l'obligation positive d'agir. Toujours selon le Canada, les avis de mise en cause ne donnent aucunement matière à croire qu'il avait une telle obligation en l'espèce.

[108] Je conviens avec le Canada que le délit de défaut de mise en garde requiert la preuve d'une obligation positive envers le demandeur. En droit des délits, les obligations positives constituent l'exception et non la règle. Dans *Childs c. Desormeaux*, la Cour a affirmé ce qui suit :

Bien qu'il ne fasse aucun doute qu'une omission peut emporter négligence, la common law, en règle générale, est une fervente protectrice de l'autonomie individuelle. L'obligation de prendre des mesures concrètes face à un risque ou à un danger n'est pas une obligation distincte. Généralement, le simple fait qu'une personne court un danger ou constitue un danger pour autrui n'impose pas en soi une quelconque obligation aux personnes susceptibles d'intervenir. [par. 31]

Qui plus est, aucune des décisions citées par Imperial n'étaye l'argument qu'une allégation de négligence, sans plus, est suffisante pour imposer une obligation de mise en garde : *Day c. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, le juge Drossos; voir aussi *Elias c. Headache and Pain Management Clinic*, 2008 CanLII 53133 (C.S.J. Ont.), le juge Macdonald (par. 6 à 9).

[109] Même si l'on considérait qu'il suffit de plaider la négligence pour formuler une allégation d'obligation de mise en garde, ce que je ne puis accepter, l'allégation serait rejetée pour les considérations de politique générale liées à la deuxième étape de l'analyse et qui s'appliquent à l'allégation de déclaration inexacte faite par négligence.

E. *La conception négligente*

[110] Les compagnies de tabac ont soulevé à l'encontre du Canada deux types d'allégations

that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

[111] In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

(1) *Prima Facie* Duty of Care

[112] I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

[113] In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the

de conception négligente qu'il reste à examiner. Premièrement, elles affirment que le Canada a manqué à son obligation de diligence envers elles en concevant de manière négligente ses souches de tabac à faible teneur en goudron. La Cour d'appel a jugé que les actes de procédure appuyaient une obligation de diligence *prima facie* à cet égard, mais que cette obligation était écartée par la considération de politique générale liée à la responsabilité indéterminée, soulevée à la deuxième étape de l'analyse. Deuxièmement, Imperial fait valoir que le Canada a manqué à son obligation de diligence envers les consommateurs de cigarettes légères et douces dans l'*Affaire Knight*. La Cour d'appel a conclu à la majorité que cette allégation est matière à procès.

[111] J'estime que ces deux allégations de conception négligente établissent l'existence d'une obligation de diligence *prima facie*, mais doivent être rejetées à la deuxième étape de l'analyse parce qu'elles ont trait à des décisions de politique générale fondamentale du gouvernement.

(1) *Obligation de diligence prima facie*

[112] Je commence par l'allégation que le Canada avait une obligation de diligence *prima facie* envers les compagnies de tabac. Se fondant sur les mêmes arguments qu'il avance à l'encontre des allégations de déclarations inexactes faites par négligence, le Canada affirme ne pas avoir d'obligation de cette nature, parce qu'il n'existe pas de lien de proximité entre lui et les compagnies de tabac.

[113] À mon sens, la Cour d'appel a conclu avec raison que le Canada avait une obligation de diligence *prima facie* envers les compagnies de tabac relativement à la conception des souches de tabac à faible teneur en goudron. Je suis d'accord avec le juge Tysoe pour dire que les rapports invoqués en l'espèce répondent aux conditions de proximité :

[TRADUCTION] Si les rapports entre le concepteur et l'acheteur d'un produit sont suffisamment étroits, il s'ensuit, à mon avis, qu'il existe un lien suffisamment étroit entre le concepteur d'un produit et celui qui s'en sert pour fabriquer des biens vendus au public. En outre, dans le contexte de la présente affaire, le concepteur du

product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

[114] The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

[115] For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

(2) Stage-Two Policy Considerations

[116] For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on

produit devrait raisonnablement s'attendre à ce que sa conception ait une incidence sur le fabricant. Le concepteur pouvait raisonnablement prévoir qu'un fabricant de biens auxquels le produit est intégré serait tenu de rembourser le prix d'achat payé par des consommateurs si la conception du produit n'atteignait pas l'objectif qu'elle était censée atteindre. [*L'Affaire Knight*, par. 67]

[114] On allègue que le Canada se comportait comme une société commerciale privée et entretenait des rapports étroits avec les compagnies de tabac. Le prétendu lien de proximité se fonde non pas sur une obligation prévue par la loi, mais sur les rapports entre le Canada et les compagnies de tabac. L'argument du Canada selon lequel une obligation de diligence donnerait lieu à un conflit entre des obligations de droit privé et des obligations de droit public n'écarte pas la possibilité qu'un lien de proximité découle de sa conduite, mais il peut constituer une considération de politique générale pertinente à la deuxième étape de l'analyse.

[115] Pour des motifs semblables et compte tenu des faits allégués, je conclus que le Canada avait une obligation de diligence *prima facie* envers les consommateurs de cigarettes légères et douces dans l'*Affaire Knight*. Vu ces faits, il est au moins possible de soutenir que le Canada agissait comme une entreprise commerciale lorsqu'il a conçu ses souches de tabac. Comme l'a affirmé le juge Tysoe de la Cour d'appel, [TRADUCTION] « le concepteur d'un produit destiné à être vendu au public a une obligation de diligence *prima facie* envers ceux et celles qui achètent ce produit » (par. 48).

(2) Considérations de politique générale soulevées à la deuxième étape de l'analyse

[116] Pour les motifs fournis à l'égard des allégations de déclarations inexactes faites par négligence, j'estime que les considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse écartent l'obligation de diligence *prima facie* à l'égard des allégations de conception négligente. La décision de concevoir des souches de tabac à faible teneur en goudron parce qu'on croit que les cigarettes fabriquées avec ce tabac seraient

social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage-two policy objection to the claim of negligent design.

F. *The Direct Claims Under the Costs Recovery Acts*

[117] The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 (“*HCCRA*”); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges (“RBH”) and Philip Morris only).

[118] Section 2 of the *CRA* establishes that “[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong”. The words “manufacture” and “manufacturer” are defined in s. 1(1) of the Act as follows:

1 (1) . . .

“**manufacture**” includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

moins nuisibles pour la santé constitue une ligne de conduite fondée sur la politique générale du Canada en matière de santé. Il s’agissait d’une décision reposant sur des facteurs sociaux et économiques. Cette décision de politique générale fondamentale du gouvernement ne saurait fonder une poursuite pour conception négligente. Vu cette conclusion, point n’est besoin d’examiner l’argument relatif à la responsabilité indéterminée, opposé lui aussi à l’allégation de conception négligente en tant que considération de politique générale à la deuxième étape de l’analyse.

F. *Les allégations directes faites en vertu des lois sur le recouvrement des coûts*

[117] Selon les compagnies de tabac, la Cour d’appel a conclu à tort qu’il était manifeste et évident que le Canada ne pouvait pas être un fabricant au sens de la *CRA*. Elles présentent également trois arguments subsidiaires : (1) si la responsabilité du Canada n’est pas engagée en application de la *CRA*, elle l’est aux termes de la *Health Care Costs Recovery Act*, S.B.C. 2008, ch. 27 (« *HCCRA* »), récemment édictée; (2) si la responsabilité du Canada n’est pas engagée aux termes de l’une de ces deux lois, il est néanmoins tenu de verser aux défenderesses une contribution aux termes de la *Negligence Act*; et (3) enfin, le Canada peut être tenu en common law de verser une contribution (mémoire conjoint de Rothmans, Benson & Hedges (« RBH ») et de Philip Morris seulement).

[118] Aux termes de l’art. 2 de la *CRA*, [TRADUCTION] « [l]e gouvernement a contre un fabricant un droit d’action direct et distinct pour le recouvrement du coût des services de soins de santé occasionnés ou favorisés par une faute du fabricant ». Les termes « fabrication » et « fabricant » sont définis comme suit à l’art. 1(1) de la *CRA* :

[TRADUCTION]

1 (1) . . .

« **fabricant** » Personne qui fabrique ou a fabriqué un produit du tabac, y compris la personne qui, selon le cas :

“manufacturer” means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

- (a) causes, directly or indirectly, through arrangements with contractors, sub-contractors, licensees, franchisees or others, the manufacture of a tobacco product,
- (b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,
- (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or
- (d) is a trade association primarily engaged in
 - (i) the advancement of the interests of manufacturers,
 - (ii) the promotion of a tobacco product, or
 - (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada “promoted” the use of mild or light cigarettes to the industry and the public. These facts, they say, bring Canada within the definition of “manufacturer” of the *CRA*.

[119] Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

[120] For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed,

- a) directement ou indirectement, fait ou a fait fabriquer un produit du tabac dans le cadre d’ententes conclues avec des entrepreneurs, des sous-traitants, des titulaires de licence, des franchisés ou d’autres personnes;
- b) au cours d’un de ses exercices, tire ou a tiré au moins 10 % de ses revenus, calculés sur une base consolidée conformément aux principes comptables généralement reconnus au Canada, de la fabrication ou de la promotion de produits du tabac par elle-même ou par d’autres personnes;
- c) se livre ou s’est livrée à la promotion d’un produit du tabac ou fait ou a fait, directement ou indirectement, que d’autres personnes s’y livrent;
- d) est une association commerciale se consacrant principalement :
 - (i) à l’avancement des intérêts des fabricants,
 - (ii) à la promotion d’un produit du tabac, ou
 - (iii) à faire faire, directement ou indirectement, la promotion par d’autres personnes d’un produit du tabac.

« **fabrication** » Est assimilé à la fabrication d’un produit du tabac sa production, son assemblage ou son emballage;

On allègue dans les avis de mise en cause que le Canada a cultivé (fabriqué) du tabac et octroyé des licences visant celui-ci à l’industrie du tabac à des fins lucratives, et qu’il a « fait la promotion » des cigarettes douces ou légères auprès de l’industrie et de la population. Selon les compagnies de tabac, ces faits font en sorte que le Canada répond à la définition de « fabricant » qui figure dans la *CRA*.

[119] Le Canada dit ne pas être un fabricant au sens de la *CRA*. Subsidiairement, il affirme être soustrait à l’application de cette loi provinciale en vertu de la common law et, sinon, en vertu de la Constitution.

[120] Pour les motifs exposés ci-après, je conclus que le Canada n’est pas un fabricant au sens de la

holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

(1) Could Canada Qualify as a Manufacturer Under the *Tobacco Damages and Health Care Costs Recovery Act*?

[121] The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

(a) *Text of the Statute*

[122] The definition of manufacturer in s. 1(1) "manufacturer" (b) of the Act includes a person who "for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

CRA. En effet, si l'on tenait le Canada responsable en application de la *CRA*, cela contrecarrerait l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une « faute d'un fabricant ». Vu cette conclusion, nul n'est besoin d'étudier les arguments du Canada voulant qu'il soit en tout état de cause exonéré de toute responsabilité en vertu de la loi provinciale. Je suis également d'avis de rejeter l'argument des compagnies de tabac en faveur d'une contribution au titre de la *HCCRA* et de la *Negligence Act*, ainsi que l'argument en faveur d'une contribution en common law.

(1) Le Canada peut-il être un fabricant au sens de la *Tobacco Damages and Health Care Costs Recovery Act*?

[121] La Cour d'appel a affirmé que le gouvernement canadien ne pouvait pas être visé par la définition de « fabricant ». Je suis du même avis. L'argument selon lequel le Canada peut être un fabricant au sens de la *CRA* a un attrait superficiel, mais, lorsqu'on interprète la *CRA* dans son contexte eu égard à l'ensemble de ses dispositions, il appert que la législature de la Colombie-Britannique ne voulait pas imposer au Canada la responsabilité d'un fabricant. C'est ce que confirment le texte de la loi, l'intention qu'avait le législateur au moment d'adopter la *CRA* et le contexte plus général des rapports entre la province et le gouvernement fédéral.

a) *Le texte de la loi*

[122] Aux termes de l'al. b) de la définition de [TRADUCTION] « fabricant » qui se trouve à l'art. 1(1) de la *CRA*, ce terme s'entend d'une personne qui, « au cours d'un de ses exercices, tire ou a tiré au moins 10 % de ses revenus, calculés sur une base consolidée conformément aux principes comptables généralement reconnus au Canada, de la fabrication ou de la promotion de produits du tabac par elle-même ou par d'autres personnes ». Le juge Hall a conclu que, selon cette définition, le législateur souhaitait que la *CRA* s'applique aux compagnies membres de l'industrie du tabac, et non aux gouvernements.

[123] The tobacco companies respond that the definition of “manufacturer” is disjunctive since it uses the word “or”, such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

[124] Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

[125] The fact that one of the statutory definitions is based on revenue percentage suggests that the term “manufacturer” is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that “each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product”. This language cannot be stretched to include the Government of Canada.

[126] I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a “manufacturer” under the Act.

[123] Les compagnies de tabac répondent que la définition du mot « *manufacturer* » (« fabricant ») est disjonctive, vu qu’elle renferme le mot « *or* » (habituellement rendu en français par l’expression « selon le cas »), de telle sorte qu’une personne sera considérée comme un fabricant si elle répond à l’une des quatre définitions qui figurent aux al. a) à d). Même si le Canada ne peut répondre à la définition de l’al. b) de la *CRA* (tirer 10 % de ses revenus de la fabrication ou de la promotion de produits du tabac), elles soutiennent que, à la lumière des faits allégués, le Canada répond aux définitions des al. a) (fait fabriquer un produit du tabac) et c) (fait ou fait faire la promotion d’un produit du tabac).

[124] À l’instar de la Cour d’appel, je suis d’avis de rejeter l’argument susmentionné. Il est vrai qu’il faut interpréter de façon disjonctive la définition de fabricant à l’article premier, et qu’un particulier sera assimilé à un fabricant s’il répond à l’une ou l’autre des quatre définitions des al. a) à d). Il faut néanmoins interpréter de manière téléologique la *CRA* dans son ensemble. Par conséquent, une interprétation adéquate de la *CRA* tient compte de chacune des quatre définitions. Elle prend aussi en considération le reste du régime législatif et le contexte législatif. Interprétée ainsi, la *CRA* indique clairement que la législature de la Colombie-Britannique ne voulait pas faire du gouvernement fédéral un fabricant potentiel au sens de cette loi.

[125] Le fait qu’une des définitions de la *CRA* repose sur un pourcentage des revenus donne à penser que le mot « fabricant » est censé viser des entreprises ou des particuliers qui tirent profit des activités liées au tabac. Les dispositions de la *CRA* établissant la responsabilité des défenderesses renforcent cette interprétation. Aux termes de l’al. 3(3)b), [TRADUCTION] « chaque défendeur auquel s’appliquent les présomptions [créées par le par. 3(2) de la *CRA*] est responsable du coût global visé à l’alinéa a) au prorata de sa part de marché du type de produit du tabac ». On ne saurait considérer cette disposition comme visant le gouvernement du Canada.

[126] J’estime que, interprété dans son ensemble, le texte de la *CRA* n’étaye pas la thèse selon laquelle le Canada est un « fabricant » au sens de cette loi.

(b) *Legislative Intention*

[127] I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of “manufacturer”. When the *CRA* was introduced in the legislature, the Minister responsible stated that “the industry” manufactured a lethal product, and that “the industry” composed of “tobacco companies” should accordingly be held accountable (B.C. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

[128] Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff’s claim. Courts may consider all evidence relevant to statutory interpretation in order to achieve this purpose.

(c) *Broader Context*

[129] The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473:

b) *L’intention du législateur*

[127] Je suis d’accord avec le Canada pour dire que les considérations liées à l’intention du législateur appuient davantage la thèse voulant que la définition de [TRADUCTION] « fabricant » ne vise pas le Canada. Quand la *CRA* a été présentée à l’assemblée législative, le ministre responsable a affirmé que [TRADUCTION] « l’industrie » fabriquait un produit mortel, et que les « compagnies de tabac » qui en faisaient partie devraient en être tenues responsables pour cette raison (C.-B., *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4^e sess., 36^e lég., 7 juin 2000, p. 16314). Il est évident et manifeste que le gouvernement du Canada n’appartient pas à cette catégorie.

[128] Selon Imperial, il ne convient pas d’invoquer des extraits du *Hansard* dans le cadre d’une requête en radiation d’une allégation, étant donné que des éléments de preuve ne peuvent être présentés à l’occasion d’une telle demande. Il y a toutefois une distinction entre une preuve produite pour établir un fait et une preuve de l’intention du législateur qui est produite pour aider la cour à déterminer l’interprétation que doit recevoir une loi. La première n’est pas pertinente dans le cadre d’une requête en radiation, mais la seconde peut l’être. Les requêtes en radiation visent à économiser les ressources judiciaires dans les cas où la loi n’appuie pas une demande compte tenu des faits allégués. Les tribunaux peuvent prendre en considération tous les éléments de preuve pertinents à l’interprétation de la loi pour arriver à cette fin.

c) *Le contexte plus général*

[129] Le contexte plus général de la loi étaye fortement la conclusion que la législature de la Colombie-Britannique n’avait pas l’intention d’imposer au gouvernement fédéral la responsabilité d’un fabricant de produits du tabac. La *CRA* a pour objet le recouvrement du coût des soins de santé fournis aux Britanno-Colombiens auprès des compagnies qui leur ont vendu des produits du tabac. Comme l’a affirmé notre Cour dans *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473 :

[T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

[130] The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these long-standing fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

[131] Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

[L']élément déterminant de la cause d'action créée par la Loi demeure l'indemnisation des coûts engagés par le gouvernement de la Colombie-Britannique au titre des soins de santé, et non la correction des manquements aux obligations des fabricants de produits du tabac. La Loi fait de l'existence d'une violation d'une obligation une des diverses conditions préalables à l'établissement de la responsabilité du fabricant envers le gouvernement, mais ce n'est pas cette faute que vise la cause d'action créée par la Loi. [par. 40]

La législature cherchait à transférer la responsabilité des frais médicaux des contribuables provinciaux aux entreprises privées qui vendaient un produit nocif. Cet objectif serait gravement compromis si l'on recouvrait simplement les fonds auprès du gouvernement fédéral, qui tire son revenu des mêmes contribuables.

[130] L'assujettissement du Canada à la *CRA* que font valoir les compagnies de tabac est particulièrement problématique compte tenu des rapports de longue date entre le gouvernement fédéral et les provinces en matière de financement des soins de santé. Depuis des décennies, le gouvernement fédéral verse aux provinces des paiements de transfert relatifs à la santé. Comme l'a mentionné le juge Hall :

[TRADUCTION] Si l'on interprétait la *Costs Recovery Act* comme permettant de qualifier le Canada de fabricant visé aux fins du recouvrement des coûts engagés par les provinces au titre des soins de santé, il serait possible pour la Colombie-Britannique d'exercer un recours pécuniaire direct contre le Canada en vue d'obtenir des fonds supplémentaires au titre des soins de santé. Étant donné ces accords fiscaux de longue date entre les gouvernements, je ne puis imaginer que la législature de la Colombie-Britannique ait pensé à quelque moment que ce soit à la possibilité que le Canada soit poursuivi en vertu de la *Costs Recovery Act*. [par. 33]

[131] Imperial soutient que le seul moyen de réaliser l'objet de la *CRA* est d'autoriser la province à recouvrer le coût des soins de santé auprès de tous les participants à l'industrie du tabac, dont le gouvernement fédéral. Je ne puis retenir cet argument. Si l'on tenait le gouvernement fédéral responsable en vertu de la *CRA*, cela contrecarrerait l'intention du législateur de transférer le coût des traitements médicaux des contribuables à l'industrie du tabac.

(d) *Summary*

[132] For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

(2) Could Canada Be Found Liable Under the *Health Care Costs Recovery Act*?

[133] The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as “tobacco related wrong[s]” under the *CRA* (s. 24(3)(b)). RBH and Philip Morris respond that a “tobacco related wrong” under the *CRA* may only be committed by a “manufacturer”. Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

[134] In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in cases “arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*” (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

d) *Résumé*

[132] Pour les motifs qui précèdent, j’estime qu’il est manifeste et évident que le gouvernement fédéral n’est pas un fabricant de produits du tabac au sens de la *CRA*. Cette allégation doit donc être radiée.

(2) Le Canada peut-il être tenu responsable en vertu de la *Health Care Costs Recovery Act*?

[133] Les compagnies de tabac affirment que si la responsabilité du Canada n’est pas engagée au titre de la *CRA*, elle le serait en vertu de la *HCCRA*, qui confère à la province un droit d’action pour recouvrer auprès de l’auteur d’une faute le coût des soins de santé dans la plupart des cas (par. 8(1)). Selon le Canada, la *HCCRA* est inapplicable parce qu’elle dispose que le droit d’action ne peut être exercé dans les cas de [TRADUCTION] « faute d’un fabricant » au sens de la *CRA* (al. 24(3)b)). RBH et Philip Morris rétorquent qu’une [TRADUCTION] « faute d’un fabricant » au sens de la *CRA* ne peut être commise que par un [TRADUCTION] « fabricant ». Par conséquent, si la *CRA* ne s’applique pas au Canada parce que ce dernier ne peut être un fabricant, il n’est pas loisible au Canada de faire valoir que la *HCCRA* — une loi plus générale — ne trouve pas application non plus.

[134] À mon avis, les compagnies de tabac ne peuvent s’appuyer sur la *HCCRA* dans le cadre d’une action intentée en vertu de la *CRA* pour obtenir une contribution. Certes, le Canada n’est pas en mesure de commettre lui-même une faute d’un fabricant s’il n’est pas un fabricant, mais la cause d’action sous-jacente en l’espèce est la faute d’un fabricant qu’auraient commise les défenderesses. Il est précisé dans la *HCCRA* que cette loi ne s’applique pas dans les affaires [TRADUCTION] « découlant d’une faute d’un fabricant au sens de la *Tobacco Damages and Health Care Costs Recovery Act* » (al. 24(3)b)), ce qui fait obstacle aux demandes de contribution présentées en application de cette loi.

(3) Could Canada Be Liable for Contribution Under the *Negligence Act* if It Is Not Directly Liable to British Columbia?

[135] RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

[136] As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

[137] Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

[138] RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, in which this Court recognized claims of contribution which were not permitted by statute.

[139] I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (per McLachlin C.J.), which stated that a "common law right of contribution between tortfeasors may exist" (para. 68

(3) Le Canada peut-il être tenu à une contribution en application de la *Negligence Act* s'il n'est pas directement responsable envers la Colombie-Britannique?

[135] RBH et Philip Morris affirment que, même si le Canada n'est pas responsable envers la Colombie-Britannique, il peut néanmoins être tenu à une contribution au titre de la *Negligence Act*. Elles font valoir que le défendeur n'a pas à être directement responsable envers le demandeur pour être condamné à verser une contribution.

[136] Comme je l'ai déjà mentionné, je souscris à l'argument du Canada que, depuis l'arrêt *Giffels*, une partie ne peut être condamnée à verser une contribution que si elle est aussi directement responsable envers le demandeur.

[137] Je suis donc d'avis de rejeter l'argument selon lequel la *Negligence Act* de la Colombie-Britannique permet de recouvrer des sommes d'argent auprès d'un tiers qui ne pouvait pas être responsable envers le demandeur.

(4) Le Canada peut-il être tenu en common law de verser une contribution?

[138] D'après RBH et Philip Morris, si notre Cour rejette la demande de contribution présentée en vertu de la *Negligence Act*, elle devrait faire droit à une telle demande en common law. Elles invoquent les arrêts *Bow Valley* et *Blackwater c. Plint*, 2005 CSC 58, [2005] 3 R.C.S. 3, où notre Cour a accueilli des demandes de contribution non permises par la loi.

[139] Je suis d'avis de rejeter cet argument. Les décisions citées par RBH et Philip Morris me semblent n'appuyer les demandes de contribution en common law que dans les cas où le tiers est directement responsable envers le demandeur. Dans *Bow Valley*, la Cour a reconnu un droit restreint à la contribution « entre coauteurs d'un délit », et a fait remarquer que les défenderesses étaient « solidairement responsables envers la demanderesse » (par. 101 et 102). Notre Cour a fait une observation semblable dans *Blackwater* (la juge en chef

(emphasis added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

G. *Liability Under the Trade Practice Act and the Business Practices and Consumer Protection Act*

[140] In the *Knight* case, Imperial alleges that Canada satisfies the definition of a “supplier” under the *Trade Practice Act* (“TPA”) and the *Business Practices and Consumer Protection Act* (“BPCPA”). The TPA was repealed and replaced by the BPCPA in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

[141] In my view, Canada could not qualify as a “supplier” under the Acts on the facts pled. Section 1 of the TPA defined “supplier” as follows:

1 . . .

“**supplier**” means a person, other than a consumer, who in the course of the person’s business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

Section 1(1) of the BPCPA defines “supplier” as follows:

1 (1) . . .

“**supplier**” means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

McLachlin), affirmant que, « en common law, les coauteurs d’un délit pouvaient se réclamer mutuellement une contribution » (par. 68 (je souligne)). Rien dans notre jurisprudence ne permet d’accueillir des demandes de contribution en l’absence de responsabilité du tiers envers le demandeur.

G. *Responsabilité en vertu de la Trade Practice Act et de la Business Practices and Consumer Protection Act*

[140] Dans l’affaire *Knight*, Imperial prétend que le Canada répond aux définitions de « *supplier* » (« fournisseur ») qui figurent dans la *Trade Practice Act* (« TPA ») et la *Business Practices and Consumer Protection Act* (« BPCPA »). La TPA a été abrogée et remplacée par la BPCPA en 2004. Imperial fait valoir que la Cour d’appel a radié à tort la poursuite qu’elle avait intentée contre le Canada en vertu de ces lois.

[141] À mon avis, le Canada ne peut être un « fournisseur » au sens de ces deux lois compte tenu des faits allégués. L’article 1 de la TPA définissait ainsi le mot « fournisseur » :

[TRADUCTION]

1 . . .

« **fournisseur** » Une personne autre qu’un consommateur qui, dans le cours de ses affaires, sollicite, offre ou annonce l’aliénation ou la fourniture de l’objet d’une opération commerciale ou se livre à des activités promotionnelles à cet égard, prend part à une opération commerciale, l’exécute ou y participe autrement, qu’il y ait ou non un lien contractuel entre cette personne et le consommateur. Sont également visés par la présente définition le successeur du fournisseur et le cessionnaire de ses droits et obligations.

Pour sa part, l’art. 1(1) de la BPCPA le définit ainsi :

[TRADUCTION]

1 (1) . . .

« **fournisseur** » Une personne, se trouvant en Colombie-Britannique ou ailleurs qui, dans le cours de ses affaires, prend part à une opération commerciale

- (a) supplying goods or services or real property to a consumer, or
- (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of “consumer transaction”,

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 [*Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit*], includes a person who solicits a consumer for a contribution of money or other property by the consumer;

[142] The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken “in the course of business”. The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (*Knight* case, para. 35).

[143] Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a “supplier” under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

[144] I accept that Canada’s purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting “in the course of business” or “in the course of the person’s business” as those phrases are used in

- a) soit en fournissant des biens ou des services à un consommateur,
- b) soit en sollicitant, en offrant ou en annonçant l’opération visée à l’alinéa a) de la définition d’« opération commerciale » ou en se livrant à des activités promotionnelles à cet égard,

qu’il y ait ou non un lien contractuel entre cette personne et le consommateur. Sont également visés par la présente définition le successeur de cette personne, le cessionnaire de ses droits et obligations et, sauf aux parties 3 à 5 [*Droits des cessionnaires et garants en matière de crédit au consommateur; Contrats de consommation; Communication du coût du crédit au consommateur*], la personne qui demande une somme d’argent ou un bien à un consommateur;

[142] La Cour d’appel a jugé à l’unanimité qu’aucune de ces définitions ne pouvaient s’appliquer au Canada, parce que celui-ci n’a pas commis les actes qu’on lui reproche [TRADUCTION] « dans le cours de ses affaires ». Selon la Cour d’appel, il est allégué dans les actes de procédure que le Canada a encouragé la consommation de cigarettes douces et légères, mais uniquement dans le but de réduire les risques que présente l’usage du tabac pour la santé, et non dans le cadre d’une activité exercée en vue de réaliser un profit (*l’Affaire Knight*, para. 35).

[143] Imperial soutient que le Canada n’avait pas à être motivé par le profit pour être un « fournisseur » au sens des lois applicables, pourvu qu’il ait conçu et fabriqué un produit défectueux et fait des recherches à cet égard. Le Canada répond que son intention d’améliorer la santé des Canadiens et Canadiennes démontre qu’il n’agissait pas dans le cours de ses affaires. Il n’était pas question en l’espèce d’un organisme public exerçant les activités d’une entreprise du secteur privé, mais plutôt d’un organisme public qui cherche à réglementer l’industrie en faisant la promotion d’un type de cigarette.

[144] Je reconnais que le but recherché par le Canada lorsqu’il a développé et promu le tabac, comme l’indique l’avis de mise en cause, tend à indiquer que le Canada n’agissait pas [TRADUCTION] « dans le cours de ses affaires », dans le sens où

the *TPA* or the *BPCPA*, and therefore that Canada could not be a “supplier” under either of those statutes. The phrases “in the course of business” and “in the course of the person’s business” may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of “supplier” in both Acts refer to “consumer transaction[s]”, and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

[145] Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

H. *The Claim for Equitable Indemnity*

[146] RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for “equitable indemnity” on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

cette expression est employée dans la *TPA* ou la *BPCPA*, et que le Canada ne peut donc être un « fournisseur » au sens de l’une ou l’autre de ces lois. L’expression [TRADUCTION] « dans le cours de ses affaires » peut avoir des significations différentes selon le contexte. D’une part, il est possible de considérer qu’elle englobe toutes les activités auxquelles se livre un particulier durant sa carrière professionnelle : voir notamment l’analyse ci-dessus des indices de confiance raisonnable. D’autre part, elle peut être interprétée comme visant seulement les activités exercées à une fin commerciale. J’estime que les contextes dans lesquels cette expression est employée dans la *TPA* et la *BPCPA* appuient la deuxième interprétation. Les définitions de [TRADUCTION] « fournisseur » figurant dans les deux lois renvoient à des [TRADUCTION] « opérations commerciales » et font la distinction entre les fournisseurs — qui poursuivent une fin commerciale — et les consommateurs. Il ressort de façon évidente et manifeste des faits allégués que le Canada a promu la consommation de cigarettes à faible teneur en goudron non pas à une fin commerciale, mais à une fin liée à la santé. Le Canada n’est donc pas un fournisseur au sens de la *TPA* ou de la *BPCPA*, et la demande de contribution fondée sur ce motif et sur la *Negligence Act* doit être radiée.

[145] Vu ma conclusion que la responsabilité du Canada n’est pas engagée en application de la *TPA* ou de la *BPCPA*, point n’est besoin de déterminer si le Canada serait, dans l’affirmative, protégé par l’immunité de l’État.

H. *La demande d’indemnité fondée sur l’equity*

[146] RBH et Philip Morris soutiennent que, si les compagnies de tabac sont tenues responsables dans l’*Affaire du recouvrement des coûts*, le Canada doit verser une [TRADUCTION] « indemnité en equity » compte tenu des faits allégués. Selon elles, chaque fois qu’une personne demande ou ordonne à une autre de faire quelque chose qui engage la responsabilité de cette dernière, la personne qui demande ou ordonne de faire cette chose est tenue d’indemniser l’autre pour sa responsabilité. C’est ce que fait valoir Imperial dans l’*Affaire Knight*.

[147] Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity “proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so” (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.

[148] In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

[I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. [*Costs Recovery* case, para. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

I. *Procedural Considerations*

[149] In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should

[147] La doctrine de l'indemnité fondée sur l'équité est une doctrine restreinte qui ne s'applique que dans les cas où le mandant s'engage expressément ou implicitement à indemniser son mandataire pour avoir agi conformément à ses directives. Comme le mentionne l'arrêt *Parmley c. Parmley*, [1945] R.C.S. 635, les demandes d'indemnité fondées sur l'équité [TRADUCTION] « reposent sur l'idée qu'une personne fait une demande dans des circonstances où la loi présume que les deux parties sont conscientes de l'obligation d'indemniser la personne donnant suite à la demande » (p. 648, citant le juge Bowen, *Birmingham and District Land Co. c. London and North Western Railway Co.* (1886), 34 Ch. D. 261, p. 275.

[148] À mon avis, le juge Hall de la Cour d'appel avait raison de conclure que les compagnies de tabac n'étaient pas en mesure d'établir cette condition de la demande :

[TRADUCTION] [S]i l'on demandait à l'observateur raisonnable hypothétique si, dans les rapports qu'il a entretenus pendant de nombreuses décennies avec les appelantes, le Canada s'était engagé à les indemniser pour une quelconque responsabilité ultérieure susceptible de découler de leurs activités, l'observateur répondrait que cette attente ne pourrait être rationnelle, eu égard à la relation entre les parties. De même, si les représentants des appelantes avaient demandé explicitement ou suggéré au Canada, par l'entremise de ses mandataires, d'indemniser les appelantes pour une telle responsabilité ou d'engager pareille responsabilité, le Canada aurait répondu fermement par la négative. [*L'Affaire du recouvrement des coûts*, par. 57]

Lorsque le Canada a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Dans ces circonstances, il est déraisonnable de déduire que le Canada avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

I. *Considérations d'ordre procédural*

[149] Les compagnies de tabac ont fait valoir devant les juridictions inférieures que, même si les demandes d'indemnisation présentées à l'encontre

remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

[150] The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

V. Conclusion

[151] I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Recovery* case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

Appeals allowed and cross-appeals dismissed with costs.

Solicitor for the appellants/respondents on cross-appeal (33559-33563): Attorney General of Canada, Ottawa.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559):

du Canada étaient radiées, la mise en cause du Canada devrait se poursuivre en l'espèce pour des motifs d'ordre procédural. Toujours selon les compagnies de tabac, leur capacité de se défendre contre la Colombie-Britannique dans l'*Affaire du recouvrement des coûts* ainsi que contre le groupe dans l'*Affaire Knight* serait gravement compromise si la mise en cause du Canada prenait fin. Les juges Wedge et Satanove, qui siégeaient en cabinet, ont toutes deux rejeté cet argument. La Cour d'appel a conclu à la majorité qu'il était inutile d'examiner la question, alors que le juge Hall était d'avis de confirmer les conclusions des juges siégeant en cabinet.

[150] Les compagnies de tabac n'ont pas débattu cette question dans le pourvoi. Je suis d'avis de confirmer les conclusions des juges Wedge, Satanove et Hall, et de radier les demandes de jugement déclaratoire.

V. Conclusion

[151] Je conclus qu'il est manifeste et évident que les allégations des compagnies de tabac visant le Canada n'ont aucune possibilité raisonnable d'être retenues et doivent être radiées. Les appels interjetés par le Canada dans l'*Affaire du recouvrement des coûts* et l'*Affaire Knight* sont accueillis, et les appels incidents sont rejetés. Imperial est condamnée aux dépens devant toutes les cours dans l'*Affaire Knight*, et les compagnies de tabac sont condamnées aux dépens devant toutes les cours dans l'*Affaire du recouvrement des coûts*. Aucuns dépens ne sont adjugés contre la Colombie-Britannique ou en faveur de celle-ci dans l'*Affaire du recouvrement des coûts*.

Pourvois accueillis et pourvois incidents rejetés avec dépens.

Procureur des appelants/intimés au pourvoi incident (33559-33563) : Procureur général du Canada, Ottawa.

Procureurs de l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée

Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitors for the respondent Her Majesty the Queen in Right of British Columbia (33563): Bull, Housser & Tupper, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563): Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563): Affleck Hira Burgoyne, Vancouver.

Solicitors for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563): Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563): Sugden, McFee & Roos, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563): Harper Grey, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563): Davis & Company, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris International Inc. (33563): McCarthy Tétrault, Montréal.

Solicitor for the intervener the Attorney General of Ontario (33559-33563): Attorney General of Ontario, Toronto.

Solicitors for the intervener Her Majesty the Queen in Right of the Province of New Brunswick (33563): Bennett Jones, Toronto.

(33559): Hunter Litigation Chambers Law Corporation, Vancouver.

Procureurs de l'intimée Sa Majesté la Reine du chef de la Colombie-Britannique (33563) : Bull, Housser & Tupper, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33563) : Osler, Hoskin & Harcourt, Toronto.

Procureurs des intimées/appelantes au pourvoi incident Rothmans, Benson & Hedges Inc. et Rothmans Inc. (33563) : Affleck Hira Burgoyne, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident JTI-MacDonald Corp., R.J. Reynolds Tobacco Company et R.J. Reynolds Tobacco International Inc. (33563) : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident B.A.T. Industries p.l.c. et British American Tobacco (Investments) Limited (33563) : Sugden, McFee & Roos, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Carreras Rothmans Limited (33563) : Harper Grey, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Philip Morris U.S.A. Inc. (33563) : Davis & Company, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Philip Morris International Inc. (33563) : McCarthy Tétrault, Montréal.

Procureur de l'intervenant le procureur général de l'Ontario (33559-33563) : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante Sa Majesté la Reine du chef de la province du Nouveau-Brunswick (33563) : Bennett Jones, Toronto.

Solicitor for the intervener the Attorney General of British Columbia (33559-33563): Attorney General of British Columbia, Victoria.

Procureur de l'intervenant le procureur général de la Colombie-Britannique (33559-33563) : Procureur général de la Colombie-Britannique, Victoria.

TAB 16

Court of Queen's Bench of Alberta

Citation: Re: SemCanada Crude Company (Orleans Energy Ltd.), 2012 ABQB 495

Date: 20120731
Docket: 0801 08510
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended
and In the Matter of a Plan of Compromise or Arrangement of SemCanada Crude Company,
SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc. And
1380331 Alberta ULC

(Re: Orleans Energy Ltd.)

**Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine**

Introduction

[1] SemCAMS ULC seeks an order declaring that:

- a) any claims that RMP Energy Inc. (formerly Orleans Energy Ltd.) ("Orleans") may have against SemCAMS with respect to contractual equalization adjustments to volumes of natural gas delivered by Orleans to SemCAMS (the "Price Adjustment Claim") pursuant to an inlet gas purchase agreement dated July 1, 2007 (the "IGPA") were compromised and released by the SemCAMS Plan of Arrangement dated July 24, 2009 (the "Plan") and the Plan Sanction Order granted on October 27, 2009;
- b) in accordance with the Claims Process Order of October 22, 2008, Orleans is barred from asserting or enforcing the Price Adjustment Claim, and that such claim is extinguished; and
- c) the Statement of Claim filed by Orleans on November 29, 2011 is in breach of the Plan and the Plan Sanction Order and should be struck.

[2] Orleans cross-applies for a declaration that the Price Adjustment Claim was not compromised or released by the Plan and that SemCAMS owes it \$1,616,412.28.

[3] The Price Adjustment Claim relates to an accounting process (the “Rework”) issued by SemCAMS in June 2011 that adjusted the amount payable by SemCAMS for natural gas purchased by it from Orleans pursuant to the IGPA in the year 2007.

[4] The Rework relates to natural gas purchases that occurred prior to SemCAMS filing proceedings under the CCAA. SemCAMS submits that a claim that arises from such Rework is thus caught and released by the Claims Process Order (which provided for a Claims Bar Date of December 1, 2008). the Plan and the Plan Sanction Order. SemCAMS also submits that Orleans was aware in early 2008, even before the CCAA proceedings had commenced, that Orleans’ own reporting error had caused SemCAMS to under-allocate a substantial portion of natural gas product to Orleans in its accounting, and that credit for this under-allocation would be included in the 2007 Rework.

[5] Orleans submits that when the Plan Sanction Order was granted, it was uncertain whether Orleans would be in a net credit or net debit position as a result of the Rework, or in what amount. Thus, Orleans submits, Orleans could not predict the outcome of the Rework, and any estimate it may make would be entirely speculative. Orleans submits that it had no cause of action against SemCAMS at the time of the Plan Sanction Order, and that thus, the Price Adjustment Claim did not fall within the definition of “claim” in the CCAA and could not be compromised.

[6] Orleans submits that, to the extent that the Plan, the Plan Sanction Order and the Claims Process Order provide otherwise, these documents and orders should be interpreted to allow the Price Adjustment Claim to be unaffected, or the offending portions of the Plan and Plan Sanction Order should be severed, amended or disregarded.

Relevant Facts

[7] On July 22, 2008, SemCAMS was granted an Initial Order pursuant to s. 11(1) of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”). In a separate application on the same date, SemCanada Crude Company was also granted an Initial Order under the CCAA. On July 24, 2008, CEG Energy Options Inc. commenced proposal proceedings in bankruptcy. On July 30, 2008, the CCAA proceedings of SemCAMS and SemCanada and the bankruptcy proceedings of CEG were procedurally consolidated with other proceedings commenced under the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 by affiliated or related companies for the purpose of administrative convenience.

[8] The CCAA proceedings, including the stay that was imposed by the Initial Order, continued until plans of arrangement and reorganization of SemCAMS and other related entities, both in Canada and in the United States, were implemented on November 30, 2009.

[9] On October 22, 2008, the Court granted a Claims Process Order that set out the process for determining claims of creditors in the CCAA proceedings. Pursuant to this order, any creditor who failed to file a claim by December 1, 2008 (the “Claims Bar Date”) was barred from asserting or enforcing any pre-filing claim.

[10] This application relates only to SemCAMS. SemCAMS is the Operator of four natural gas processing plants and natural gas gathering systems and pipelines in Alberta including the facilities at the KA Plant. Orleans is a gas producer and uses the processing facilities at the KA Plant.

[11] The KA Plant operates pursuant to a construction, ownership and operation agreement entered into among the joint owners of the plant and SemCAMS as the Operator (the “CO&O Agreement”). SemCAMS is both a joint owner and the Operator of the plant. Orleans is not a joint owner. The KA Plant is used to gather and process raw natural gas for joint owners and for third party producers.

[12] Typically, a party may have its natural gas processed at the KA Plant in two ways:

- a) as a joint owner under the CO&O Agreement; or
- b) as a third party user under a gas handling and processing agreement (a “Gas Processing Agreement”).

[13] However, under the CO&O Agreement, joint owners are entitled to use throughput capacity in the plant in proportion to their ownership interest. Joint owners deliver raw natural gas to the plant for processing by the Operator, and when processing is complete, either take or sell the processed gas (“Sales Gas”) and related products to purchasers. Joint owners retain title to their raw gas, Sales Gas and products at all times during processing.

[14] If a joint owner does not use its throughput capacity, the excess capacity can be used by other joint owners or reallocated to third party producers under Gas Processing Agreements, but joint owners have the highest priority for processing. Third party users can be shut out of the plant if joint owners use all their capacity in a given month.

[15] Under a Gas Processing Agreement between a third party user and the Operator, the third party user delivers raw natural gas to the plant for processing, and when processing is complete, either takes or sells Sales Gas and products. Third party users retain title to their raw gas, Sales Gas and products at all times.

[16] Monthly payments made by joint owners and third party users are based on projected use of the plant. Projected throughput typically varies from actual throughput, and at the end of a calendar year, there is a “thirteenth month adjustment” that reconciles projected throughput to

actual throughput (the “Thirteenth Month Adjustment”). The Thirteenth Month Adjustment is often further reconciled for each year with revised information provided by owners and third party users, thus the Rework. The main distinction between the Thirteenth Month Adjustment and the Rework is that the focus of the Thirteenth Month Adjustment is on information available to SemCAMS in its capacity as the Operator of the KA Plant, while the Rework process requires more involvement from parties that deliver gas and related products to the plant.

[17] On July 1, 2007, SemCAMS and Orleans entered into the IGPA. Under the IGPA:

- a) Orleans sold raw natural gas to SemCAMS in its individual capacity at the KA Plant inlets;
- b) SemCAMS agreed to pay Orleans a premium for its raw natural gas, less certain amounts (as described below);
- c) SemCAMS took title to the gas at the KA Plant inlets; and
- d) the raw natural gas sold by Orleans to SemCAMS would be processed at the KA Plant using the capacity and priority rights held by SemCAMS by virtue of its joint ownership interest in the KA Plant.

[18] Since SemCAMS took title to the raw natural gas at the plant inlets, it could use its throughput capacity as a joint owner and Orleans would not be at risk of losing throughput capacity.

[19] The pricing for the raw natural gas under the IGPA establishes through a “netback” pricing mechanism, which provides that SemCAMS would purchase the raw natural gas from Orleans at a specified price, less the costs associated with the subsequent processing of the gas (the “Processing Costs”). SemCAMS as one of the joint owners of the KA Plant paid lower capital fees to process gas. Since the netback pricing mechanism under the IGPA is based in part on the Processing Costs, and the Processing Costs are based in part on the operating expenses paid by SemCAMS to process SemCAMS’ raw natural gas at the KA Plant, the purchase price paid by SemCAMS to Orleans was subject to contractual price adjustments. The IGPA also provided Orleans with a contractual right to request an audit to verify actual throughput and adjust the purchase price accordingly. The IGPA provides that adjustments as a result of audits or otherwise shall be applied to gas purchased by SemCAMS under the IGPA as follows:

- a. The Processing Agreement includes a thirteenth month adjustment clause which is hereby incorporated into this agreement so that any adjustments made pursuant to that clause, or otherwise, including, without limitation, any adjustments arising from any audits as provided for in the Processing Agreement or in the . . . CO&O Agreement . . . shall be applied to all gas purchased by SemCAMS under this Agreement. [emphasis added]

[20] SemCAMS entered into inlet gas purchase agreements similar to the IGPA with other producers. The Orleans IGPA was terminated on July 22, 2008.

[21] The Rework, like the Thirteenth Month Adjustment, is a redistribution by SemCAMS as Operator of the KA Plant of funds paid by joint owners and third party users throughout the year at the KA Plant. The joint owners and third party users that have underpaid (i.e. who have been allocated excess production or invoiced insufficient share of the costs) are invoiced by the Operator, for the amount they underpaid. The invoiced amount is paid to the Operator, for the sole purpose of redistribution by it, on a pro-rata basis, to the joint owners and third party users that have overpaid.

[22] SemCAMS asserts that the Rework is not solely within the control of the Operator, noting that it is performed in conjunction with third parties and joint owners to verify their respective costs and throughput. As described by SemCAMS, conducting a Rework is a slow process. The revised information that results in a Rework typically comes from joint owners and third parties conducting audits or from making adjustments for actual volumes delivered. SemCAMS has submitted that audits can occur up to 26 months after the end of the production year. As part of an audit, the auditor forwards its queries to the Operator who responds to such queries. The auditor can then accept or reject the Operator's response. Once the Operator has the actual throughput from joint owners and third parties (including any changes from audits), the Operator has the information to calculate the Rework.

[23] SemCAMS as Operator expects that it will likely complete a Rework for the KA Plant for all production years. It has completed a Rework for the KA Plant for 2005, 2006 and 2007 and is in the process of completing a Rework for 2008. SemCAMS as Operator will be completing a Rework for 2009, based on the revised information that the Operator has already received.

[24] SemCAMS asserts that Orleans did not properly report the production volumes that it delivered to the KA Plant during 2007 and early 2008 because it did not include analysis and volumes for the hydrocarbon liquids. In a January 31, 2008 email, SemCAMS advised Orleans that it had been apparently under-allocated the hydrocarbon liquid known as condensate. Specifically, SemCAMS advised Orleans that it appeared that Orleans has been under allocated 400.6 m3 of condensate for the production month of December 2007 alone. In an e-mail dated February 6, 2008, SemCAMS advised that it had investigated this issue and determined that the under-allocation had occurred because Orleans had not provided the required information that would allow SemCAMS to properly determine the volumes of hydrocarbon liquids delivered under the IGPA.

[25] On February 13, 2008, accounting staff from SemCAMS and Orleans met to discuss the reporting issues. SemCAMS informed Orleans that it needed to provide revised production volumes to rectify the reporting issues going forward. Orleans submits that it provided the necessary revised reports the next day, although SemCAMS submits that only some of the information was delivered at that time.

[26] The email evidence establishes that Orleans knew in April of 2008 that SemCAMS would be conducting a Rework for 2008 that would include the issue of hydrocarbon under-allocation, but that the Rework would take some time, probably over a year.

[27] Orleans concedes that it would have prepared an estimate of what it would be owed by SemCAMS to Orleans for the six months of under-allocation of hydrocarbons in 2007 under the IGPA, although its Chief Financial Officer indicated he would not recall this with certainty. Orleans submits that, until SemCAMS finalized the Rework, it had no way to quantify what the actual results would be, whether the adjustment would be positive or negative, but concedes that it would have been able to estimate the credit that Orleans would get under the Rework associated with the shortfall for condensate, subject to having to rely on the information provided by the third-party owner of the gathering system that Orleans was using to get its gas into the KA Plant. SemCAMS submits, and Orleans does not dispute, that the financial impact of the condensate under-allocation for December, 2008 was approximately \$233,000. If that was typical for the six months of 2007 during which condensate was under-reported, Orleans would be entitled to credit of approximately \$1.4 million.

[28] In the fall of 2008, Orleans received the Claims Process Order and became aware of the Claims Bar Date of December 1, 2008. It prepared a Proof of Claim relating to gas purchased from SemCAMS in June and July of 2008 and for Thirteenth Month Adjustments for previous time periods, but with no contingent claim for the condensate under-allocation.

[29] On August 11, 2009, the Monitor sent Orleans a Notice of Revision increasing its claim to include an unsecured claim for a price adjustment resulting from the 2008 Thirteenth Month Adjustment. Orleans challenged this treatment, alleging that the Thirteenth Month Adjustment price adjustment should be treated as an “Unaffected Claim” under the Plan. After the decision in *Re: SemCanada Crude Company (Celtic Exploration Ltd.)*, 2010 ABQB 531, leave to appeal dismissed in *Celtic Exploration Ltd. v. SemCAMS ULC*, 2010 ABCA 403 (the “Celtic Decision”), Orleans withdrew its Notice of Dispute. In the Celtic Decision, I found that the Thirteenth Month Adjustment was part of Celtic’s unsecured claim for the unpaid portion of what SemCAMS as purchaser under the Celtic IGPA owed for the raw gas it purchased from Celtic prior to the CCAA filing: para. 78.

[30] In September of 2010, there was communication between SemCAMS and a consultant retained by Orleans with respect to the Rework. Orleans’ consultant told SemCAMS that Orleans would provide further information to SemCAMS. SemCAMS provided revised figures to Orleans and asked Orleans to confirm them.

[31] On June 30, 2011, SemCAMS sent Orleans the details of the Rework for 2007. The Rework indicated that Orleans was owed \$1,616,4012.68 by SemCAMS pursuant to the IGPA as a price adjustment for gas sold by Orleans to SemCAMS from the commencement of the IGPA

through December 31, 2007. SemCAMS takes the position that this is a debt compromised by the Plan and extinguished by the Plan Sanction Order.

[32] With respect to the Orleans gas that was processed at the KA Plant in 2007 prior to the commencement of the IGPA, the Rework details indicate that Orleans is owed \$383,408.03. Orleans' claim for such amount was not compromised by the Plan and the Plan Sanction Order because SemCAMS as Operator of the KA Plant processed such gas pursuant to a Gas Processing Agreement with Orleans. Orleans has been paid this amount.

[33] SemCAMS has prepared a chart that details the Rework for 2007 relating to SemCAMS and the other companies that sold gas to SemCAMS prior to the CCAA proceedings under inlet gas purchase agreements. This chart indicates that SemCAMS overpaid the Operator of the KA Plant a net amount of \$645,282.95 for aggregate gas purchases from inlet gas purchase agreement customers during 2007. Absent the CCAA proceedings, this amount of overpayment would be paid back to SemCAMS and redistributed to those customers, leaving SemCAMS in a net-zero position. However, SemCAMS takes the position that the price adjustments (whether overpayments or underpayments) are stayed payables and that any claims the inlet gas purchase agreement customers may have for underpayments were compromised and released by the Plan. Similarly, it takes the position that it cannot collect back any overpayments made to such customers as identified by the Rework. Consequently, SemCAMS is in a better position by the amount of \$645,282.95 than it would have been had the CCAA proceedings not intervened.

[34] The 2008 Rework has not been completed.

Issues

1. Is the Price Adjustment Claim a "claim" that can be compromised under the CCAA?
2. Was the Price Adjustment Claim released and discharged by the Plan and barred by the Plan Sanction Order?
3. Should the Orleans Statement of Claim be struck out?

Analysis

Statutory Provisions and Case Law

[35] Section 2 of the CCAA defines a "claim" as being "any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*."

[36] Section 2 of the *BIA* defines a "claim provable in bankruptcy", "provable claim" or "claim provable" as including any claim or liability provable in proceedings under the *Act*.

[37] Section 121 of the *BIA* defines a “claim provable” as follows:

Claims provable

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.

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
[emphasis added]

[38] Thus, claims provable in bankruptcy include contingent and unliquidated liabilities if the bankrupt is subject to such a liability on the day on which the bankrupt becomes bankrupt or becomes subject to such liability before the bankrupt’s discharge by reason of an obligation incurred before bankruptcy, if such claims are determined to be probable claims by a trustee and valued as such pursuant to Section 135 of the *BIA*. An appeal from such determination may be made to a Court.

[39] The language of Section 121 of the *BIA* is echoed in part in the language of Section 19 of the CCAA as follows:

Claims

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

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

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

...

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

Section 19(1)(a)(ii) does not apply in this case.

[40] Case law discussing whether particular claims are “provable claims” under the *BIA* is therefore relevant to the same issue under the *CCAA*.

[41] Orleans relies on *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 (Sask.Q.B.) for the proposition that, if all of the elements establishing liability for a debt are not known or proven or if a claim is too speculative or difficult to prove it will not be a “provable claim”. *Claude Resources* involved a statement of claim alleging breach of fiduciary duty and negligence and a claim by some of the defendants against the bankrupt company for indemnity. The Court found that there must be some element of probability about the contingent liability arising from the litigation before the Court should recognize a claim as a “provable claim”, and without such element of probability, the claim was too remote or speculative: para. 30.

[42] The reasoning in *Claude Resources* was rejected by the Ontario Court of Appeal in *Confederation Treasury Services Ltd., Re* (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75 (C.A.).

[43] That case similarly involved a claim arising from the potential liability of the bankrupt’s auditors and former directors and officers arising from litigation against them and their claim for contribution and indemnity against the bankrupt company. The Court noted that the need for probability of liability arising from court proceedings articulated in *Claude Resources* was too high a threshold for the establishment of such a claim. It commented at para. 4 that, “(w)hile there may be claims so remote and speculative in nature that they could not properly be considered contingent claims”, the claim of the auditors did not fall within the category. The claim was remitted back to the trial court for valuation pursuant to Section 121(2) of the *BIA* “upon such evidence as may be adduced by the parties in respect of such valuation”.

[44] The reasoning in *Confederation Treasury Services*, including the rejection of the test set out in *Claude Resources*, was adopted in *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583, 294 A.R. 15 aff’d 2002 ABCA 5, 96 Alta. L.R. (3d) 1 at para. 77 by LoVecchio J., who noted that Section 121 of the *BIA* does not specify the degree of certainty required to make a claim provable. The *Confederation Treasury Services* reasoning was also adopted in *Experienced Equipment Sales & Rentals Inc., Re*, 2001 ABQB 461, 208 A.C.W.S. (3d) 453, in a situation where a claim was made pursuant to a statement of claim alleging damages for slander of title. Belzil, J. noted that the statement of claim in question disclosed a recognized cause of action that had the legal potential to be reduced to a judgment, and commented that “(i)t would be incongruous in the extreme if a Trustee rejected a claim as being too remote and speculative only to have a Court later conclude that the claim was valid and quantifiable”: para. 25.

[45] In *Auctioneers’ Assn. (Alberta) v. Hunter*, 2002 ABQB 28, 309 A.R. 290, Master Funduk undertook a thorough review of existing case law on this issue in an application for summary judgment where the plaintiff’s lawsuit was started after the date that the defendant was discharged from bankruptcy and the issue was whether the defendant’s liability on the guarantee

that was the basis for the lawsuit was released by the order of discharge. Master Funduk thus had to consider whether the plaintiff's claim was a claim "provable in bankruptcy".

[46] The Master found that it was, relying on *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.*, [1992] 4 W.W.R. 309 (Alta.C.A.) and *Confederation Treasury Services*. He noted at para. 46 that *Abacus Cities* held that facts occurring after the date of bankruptcy based on a pre-bankruptcy contract can give rise to a claim provable in bankruptcy. The claim in *Abacus Cities* was for costs incurred by a mortgagee after the date of the bankruptcy based on indemnities set out in pre-bankruptcy mortgages.

[47] In *Abacus Cities*, the Court dealt with the argument that Section 121(2) limits future liabilities to those that can be valued before they arise. The Court conceded that future claims can be limited if they are not provable "when the trustee calls for proof", but commented that "(o)ne must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process." page 317. The Court thus found that Section 121(2) did not necessary defeat the mortgagees, commenting at page 319 that:

In conclusion, no rule of law forbids simpliciter the enforcement of a pre-bankruptcy cost indemnity given by the bankrupt to a creditor for expenses incurred after bankruptcy. But a bankruptcy court may refuse to enforce that indemnity. It might refuse when enforcement would countenance abuse of the bankruptcy process; or where a creditor incurred costs other than in a "commercially reasonable fashion."

[48] Master Funduk noted in his review of case authority the comment in *Re Paine; Ex parte Read*, [1897] 1 Q.B. 122 that "it is now established . . . that the contingent liability of a surety who has not been called upon to pay, or has not in fact paid, forms a debt provable in the bankruptcy of the principal debtor": para. 50, citing *Re Froment*, [1925] 2 W.W.R. 415.

[49] The Master preferred the reasoning in *Confederation Treasury Services* to that of *Claude Resources*. He also considered the case of *Ontario New Home Warranty Program v. Jordan Homes Ltd.* (1999), 43 O.R. (3d) 756 (Ont.Gen.Div.), where a claimant had made a claim against a new home warranty program relating to a discharged bankrupt and the program sued the discharged bankrupt on the basis of an indemnity provision under a guarantee. The Master pointed out that the Court in *Ontario New Home Warranty* had been incorrectly advised by counsel that there were no cases on point, and had made its decision in the absence of existing authority. Master Funduk distinguished *Ontario New Home Warranty* on the facts, but he also questioned the Court's statement that a bankrupt is not "subject to a liability" until and unless the New Home Warranty Program pays a claim. The Master noted that this statement "overlooks the fact that the bankrupt's liability is a contingent liability and section 121 recognizes contingent liabilities": para. 62. He therefore found that the *Ontario New Home Warranty* case had no precedential value, noting that the issue in the case before him was whether the contingent claim could be valued and, if so, what value should be given to it: para. 68. He directed that the case go to trial solely to determine the value of the liability, noting that if the liability could not be valued

pursuant to Section 135 of the BIA, the defendant would not be released from any liability based on the guarantee.

[50] Orleans points out that the Master did not refer to the Queen's Bench decision of *Peters v. Remington* (2001), 291 AR 189 in his discussion of authorities, and submits that, thus, the Master's decision suffers from the same kind of deficiency that he criticized in *Jordan Homes*. However, it is notable that while the Court of Appeal upheld the result in *Peters* (2004 ABCA 5), it did so on the basis of *res judicata* arising from a previous determination of the issue by a trustee in bankruptcy, and found the trial judge in error for considering the issue afresh. The issue identified by the Court of Appeal in *Peters* was a narrow one on facts that are distinguishable from this case: if a claim has already been denied in bankruptcy as offending the "rule against double proofs", can it be pursued after the proposal has been accepted: para. 1. This is a different issue from this case, where a claim was not made in the CCAA proceedings.

[51] In *Harvey, Re*, 2004 ABQB 773, 373 A.R. 373, a trustee in bankruptcy sought a declaration that the indebtedness of the bankrupt to Human Resources and Development Canada ("HRDC") was a claim provable in bankruptcy. HRDC took the position that its claim for recovery of an employment insurance overpayment became a debt due only when the Canada Employment Insurance Commission made a decision under Section 52 of the *Employment Insurance Act* that a person had received money to which he was not entitled. At para. 19 of the decision, Master Smart concluded that the claim was provable, noting that Section 121 of the *BIA* clearly provides that a contingent as unliquidated claim may be a provable claim. He commented that, even if Section 52 of the *Employment Insurance Act* created a true condition precedent to the claim, it was still a provable claim as long as it was not too remote or speculative, citing *Confederation Treasury Services*. Master Smart noted that:

(a)ll of the events which gave rise to the liability to HRDC occurred prior to the bankruptcy. All that need be done by HRDC is to review its file, calculate the amount and give notice. Indeed, in this case it has already been done but in any case it cannot be said that these tasks are so difficult so as to cause one to conclude that the claim is too speculative or remote.

1. Is the Price Adjustment Claim a "claim" that can be compromised under the CCAA?

A. Was SemCAMS "subject to" the Price Adjustment Claim prior to the Plan Sanction Order?

[52] Orleans submits that SemCAMS was not "subject to" the Price Adjustment Claim at the time of the Plan Sanction Order, and that the claim is thus not a "claim" under the CCAA, since both Section 121 of the *BIA* and Section 19 of the CCAA requires the debt or liability to be one, present or future, that the debtor is "subject to" on the day proceedings are commenced or before discharge or plan sanction.

[53] Orleans relies on the fact that it could not have submitted an invoice for the Price Adjustment Claim prior to the completion of the Rework. This argument ignores the distinction between “debt” and “liability”, both of which are included in the definition of provable claims.

[54] A “liability” is a term that can be used to describe “an unliquidated or unspecified legal obligation”. A “debt” is a narrower term that refers to “a specific kind of obligation for a liquidated or certain sum”: *Royal Trust Co. v. H.A. Roberts Group Ltd.*, [1995] 4 W.W.R. 305 (Sask.Q.B.) at para. 119, cited with approval in *Re West Bay SonShip Yachts Ltd.*, 2009 BCCA 31, 306 D.L.R. (4th) 294 at para. 22. While the Price Adjustment Claim may not have been a liquidated debt at the time of the Plan Sanction Order, it was certainly a liability that arose from the IGPA. The Price Adjustment Claim, like the Thirteenth Month Adjustment, represents a claim for the unpaid portion of what SemCAMS as purchaser under the IGPA owed to Orleans for the gas and associated liquids it purchased from Orleans prior to the CCAA filing: see the *Celtic* Decision at para. 78.

[55] Orleans relies on *Ontario New Home Warranty* for the submission that a claim is a provable claim only if the debtor actually becomes liable before his discharge. I have already referred to the lack of precedential value of that case, but note that, in any event, the Court in *Ontario New Home Warranty* conceded that Section 121(1) included liabilities that may come due at a future time after discharge, as long as they arose prior to discharge : para. 11. The claim in issue in *Ontario New Home Warranty* was an indemnity agreement that the Court found had not become a liability until after the bankrupt was discharged, a different fact scenario from the one in this case. The Court in *Ontario New Home Warranty* did not turn its mind to whether the claim in that case was a contingent claim.

[56] Orleans concedes that all of the obligations under the IGPA, including the Rework, existed upon the execution of the IGPA, but submits that SemCAMS was not “subject to” the Price Adjustment Claim until after the Plan Sanction Order, because no-one knew with any certainty that any liability would arise from SemCAMS to Orleans as a result of the Rework. The issue of certainty will be subject to further analysis in this decision, but this argument fails because SemCAMS was, in fact, subject to a contingent liability, future and unliquidated, arising from the under-allocation of condensation in 2007.

B. *Is it necessary that Orleans have a cause of action that could lead to a judgment before a claim is a “provable claim”?*

[57] Orleans submits that it had suffered no injury and had no cause of action to recover the Price Adjustment Claim at the time that SemCAMS obtained the Plan Sanction Order. It suggests that the *West Bay* decision stands for the proposition that a “provable claim” must be something for which the creditor could have filed a lawsuit and obtained judgment at the time of the CCAA proceedings.

[58] I find that Orleans had suffered an “injury” at the time of the CCAA proceedings that related to the Price Adjustment Claim: it was under-allocated condensate for the six months in 2007, giving rise to a liability even though the debt was not liquidated until the Rework. The non-performance of the contract (to the extent that such non-performance existed since the under-allocation arose from Orleans’ failure to properly report volumes of condensate to SemCAMS) occurred prior to the CCAA filing. The injury “matured” when the amount of the debt was ascertained with finality through the Rework.

[59] At any rate, *West Bay* does not stand for the bald proposition suggested by Orleans. *West Bay* involved a common law claim for damages for wrongful dismissal. West Bay had filed for protection under the CCAA on December 16, 2005. The employee claimant was given notice on January 17, 2006 that his employment would be terminated effective June 6, 2006. A plan was sanctioned on June 23, 2006. The claimant did not file a Proof of Claim.

[60] The Court found that this wrongful dismissal claim did not accrue from the outset of the claimant’s employment, and thus did not represent a contingent liability of *West Bay* of the date of filing under the CCAA. It was thus not a pre-filing claim. In coming to this conclusion, Levine, J.A., commented at para. 21 that:

The question that arises in this case is whether the existence of a contractual obligation, and the corresponding potential for a claim for damages for its breach, is a contingent liability of the party who may commit the breach. I conclude that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where this is no present cause of action. That is, until there is a breach of contract, there is no legal basis for any claim or any corresponding liability.

[61] She noted at para. 24 that, until termination of the contract of employment without notice, there was no injury, and that the mere possibility of a breach of contract is not sufficient to give rise to a contingent liability.

[62] The Court ultimately determined the matter on the basis that the claim for damages fell within the definition of “claim” for other reasons relating to the language of the Plan, and there was no consideration of whether the claim fell within s. 19(1)(b) of the CCAA.

[63] Interpreting section 19 in the manner suggested by Orleans, that claims must be liabilities that could be sued to judgment before the end of the CCAA proceeding, does not accord with a common sense interpretation of section 19 and the definition of “claims” under the CCAA, as these sections on their face encompass future liabilities, contingent and unliquidated that may not be payable until the future, if at all, depending on the occurrence of the contingent event.

[64] This interpretation also leads to absurd results: the original \$8.6 million claim for gas sold before the Initial Order was granted would be compromised, the Thirteenth Month Adjustment would be compromised, but the Rework amount would survive the CCAA

proceedings, even though it arose from the same set of circumstances. If the Rework had resulted in an amount owing by Orleans, it would have received a compromised amount on the debt owing to it by SemCAMS but would have to pay the entire amount of any overpayment back.

[65] In this case, the Price Adjustment Claim arose from an “injury” that occurred prior to the CCAA filing, a pre-filing liability that existed at the time of the CCAA filing. It gave rise to a contingent, unliquidated liability prior to the Plan Sanction Order.

C. *Was the Price Adjustment Claim too uncertain at the time of the Plan Sanction Order for it to fall within the definition of “claim” under the CCAA?*

[66] Orleans submits that, prior to the receipt of the Rework details, it did not know and could not have known if SemCAMS had to pay Orleans or vice-versa. That may be so, but Orleans knew that SemCAMS had under-paid it for condensate. It knew it was entitled to a credit in the Rework for the under-allocated condensate and it could, and likely did, calculate the value of that credit. If that calculation could not be made with absolute finality, it could be made with a fair degree of certainty.

[67] SemCAMS concedes that the amount owed by it to Orleans for 2007 was not finally ascertained until the Rework, as the process could result in adjustments with respect to other parties that could counter or reduce the credit, but submits that Section 19 allows a plan to compromise future and contingent claims. It is the very nature of a contingent claim that it is “a claim which may or may not ever ripen into a debt, according as some future event does or does not happen”: *Gardner v Newton* (1916), 29 D.L.R. 276 at 281, cited by the Court of Appeal in *Peters* at para. 25.

[68] The Price Adjustment Claim was not too speculative to be a provable claim. It was sufficiently certain that a) SemCAMS had an obligation to pay for a price adjustment credit for 2007 arising out of the under-allocation of the condensate; b) that this would be addressed in a Rework; and c) the amount of the credit could have been calculated with some degree of certainty. Even claims made under indemnities that give rise to double contingencies have been found to be provable claims, subject to valuation, and the Price Adjustment Claim had a greater degree of certainty than this type of claim. The fact situation in this case is similar to that in *Re Harvey*; as in that case, the relevant underlying transaction occurred before the insolvency event, even though the debt did not come due until the occurrence of a required event.

[69] I cannot agree with Orleans’ submission that requiring Orleans and other inlet gas purchase agreement customers to file contingent claims with respect to the Rework would be impractical and unworkable. As was the case in *Confederation Treasury, Auctioneers’ Association* and *Experienced Equipment Sales and Rentals*, the claim may have required valuation by the Monitor or the Court, but again, that is the nature of a contingent unliquidated claim.

[70] In summary, I find that the Price Adjustment Claim is a claim that can be compromised under the CCAA.

2. Was the Price Adjustment Claim released and discharged by the Plan and barred by the Plan Sanction Order?

[71] The Claims Process Order of October 22, 2008, which was served on Orleans, makes it clear that “claim” includes contingent claims, defining “claim” as including:

. . . any . . . claim . . . made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation . . . by reasons of any breach of contract or other agreement (oral or written) . . . and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown . . . and whether or not any right or claim is executory or anticipatory in nature including . . . with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future . . . [emphasis added]

Orleans did not file a Proof of Claim for the Price Adjustment Claim, or any credit owing to it arising from the under-allocation of condensate, before the Claims Bar Date of December 1, 2008, and does not apply to file a late claim.

[72] The relevant portions of Section 8.1 of the Plan are as follows:

On the Plan Implementation Date . . . the Company . . . shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages . . . on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert . . . whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, the business and affairs of the Company whenever or however conducted . . . the Plan, the CCAA Proceedings, any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law; . . . [emphasis added]

[73] As I have found that the Price Adjustment Claim is a claim that may be subject to compromise under Section 19(1) of the CCAA, it is clear that it is caught by Section 8.1 of the Plan. Paragraphs 28 and 45 of the Plan Sanction Order give effect to Section 8.1 as follows:

28. Pursuant to and in accordance with the Plan, any and all Affected Claims of any nature against the Company, . . . shall be forever compromised, discharged and released, and the ability of any Person to proceed against the Company in respect of or relating to any Affected Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims are hereby permanently stayed, subject only to the right of Affected Creditors to receive the distributions pursuant to the Plan and this Plan Sanction Order in respect of their Affected Claims.

. . .

45. Pursuant to and in accordance with Section 8.1 of the Plan, on the Plan Implementation Date the Released Parties shall be released and discharged from any and all demands, claims, actions, causes of action . . . on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert. . . whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, the business and affairs of the Company whenever or however conducted . . . any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law.

The Price Adjustment Claim was thus released and discharged by the Plan and has become barred and extinguished by the Plan Sanction Order.

[74] Given that I find that the Price Adjustment Claim falls within the definition of a “claim” under the CCAA, it is not necessary that I address whether the Plan Sanction Order exceeds the jurisdiction of the Court, nor is it necessary that I address whether allowing the Price Adjustment Claim to succeed would result in unequal treatment among creditors and work a prejudice on SemCAMS and the CCAA process.

3. Should the Orleans Statement of Claim be struck out?

[75] In its Statement of Claim, Orleans claims damages for breach of the IGPA, specifically amounts stated to be owing by the Rework. It was filed in breach of paragraph 25 of the Plan Sanction Order, which stays all proceedings with respect to such a claim.

[76] The Statement of Claim is accordingly struck out.

Conclusion

[77] In summary, I find that Orleans' Price Adjustment Claim is a "claim" that can be compromised under the CCAA, that it was released and discharged by the Plan and barred and extinguished by the Plan Sanction Order.

[78] I find the Statement of Claim relating to the Price Adjustment Claim to be a breach of the Plan Sanction Order and, accordingly, I strike it.

[79] If the parties are unable to agree on costs, that issue may be addressed through written submissions, filed within 45 days.

Dated at the City of Calgary, Alberta this 31st day of July, 2012.

B.E. Romaine
J.C.Q.B.A.

Appearances:

A. Robert Anderson, Q.C.
Doug Schweitzer and Daniel Yaverbaum
Osler, Hoskin & Harcourt LLP
for SemCAMS ULC

Trevor A. Batty and Doug S. Nishimura
Burnet, Duckworth & Palmer LLP
for RMP Energy Inc. formerly Orleans Energy Ltd.

TAB 17

CITATION: Re TOYS “R” US (CANADA) LTD., 2018 ONSC 609
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20180125

**ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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
TOYS “R” US (CANADA) LTD. TOYS “R” US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey and Bradley Wiffen*, counsel for the applicant
Jane Dietrich, counsel for Grant Thornton Limited, the Monitor
Linc Rogers, counsel for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton, counsel for Crayola Canada
Linda Galessiere, counsel for various landlords
Timothy R. Dunn, counsel for CentreCorp Management Services Limited
Adam Slavens and Jonathan Silver, counsel for LEGO
Sean Zweig, counsel for the Unsecured Creditors Committee of Toys “R” Us Inc.
and other debtors in Chapter 11 proceedings before the United States Bankruptcy
Court for the Eastern District of Virginia

HEARD: January 25, 2018

ENDORSEMENT

[1] Toys “R” Us (Canada) Ltd. Toys “R” Us (Canada) Ltee asks the court to extend the time that it remains under protection of the CCAA while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

[2] No significant stakeholder opposed the relief sought and I have granted it accordingly.

[3] I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant’s financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern

restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

[4] The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the CCAA requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

[5] In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

[6] In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

[7] In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The CCAA, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the CCAA. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[9] The claims processes in bankruptcy do not necessarily fit well in a CCAA proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the BIA statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout CCAA processes.

[10] Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

[11] Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

[12] The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

[13] This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

[14] This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

[15] Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

[16] Order signed accordingly.

F.L. Myers J.

Date: January 25, 2017

TAB 18

In the Court of Appeal of Alberta

Citation: RMP Energy Inc. v. SemCAMS ULC, 2012 ABCA 312

Date: 20121105

Docket: 1201-0220-AC

Registry: Calgary

Between:

**RMP Energy Inc.
formerly Orleans Energy Ltd.**

Applicant
(Respondent/Cross-Applicant)

- and -

SemCAMS ULC

Respondent
(Applicant/Cross-Respondent)

**Reasons for Decision of
The Honourable Madam Justice Constance Hunt**

Application for Leave to Appeal

**Reasons for Decision of
The Honourable Madam Justice Constance Hunt**

[1] The applicant, RMP Energy Inc. formerly Orleans Energy Ltd. (Orleans), seeks leave to appeal *Re SemCanada Crude Company (Orleans Energy Ltd)*, 2012 ABQB 495 (available on CanLII). The judge found that Orleans' claim was compromised, released and discharged by the Plan of Arrangement of the respondent, SemCAMS ULC (SemCAMS), issued pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

[2] Counsel for the Monitor appeared at the application but took no position.

[3] The application is dismissed.

Requirements for Leave

[4] To obtain leave to appeal a supervising *CCAA* judge's decision, the applicant must establish serious and arguable grounds of appeal of real and significant interest to the parties. This test subsumes four factors: the point on appeal is significant to the practice; the point is of significance to the action itself; the appeal is *prima facie* meritorious; and the appeal will not unduly hinder progress of the action: *Liberty Oil & Gas Ltd (Companies Creditors Arrangement Act)*, 2003 ABCA 158 at paras 15-16, 44 CBR (4th) 96.

[5] The appropriate standard of review is considered as part of the third factor: *Liberty* at paras 19-20. Absent an error of law or principle, this Court will only interfere with a supervising *CCAA* judge's decision if there has been a palpable and overriding error in an exercise of discretion or fact finding: *Resurgence Asset Management LLC v Canadian Airlines Corporation*, 2000 ABCA 149 at para 29, 261 AR 120.

Facts

[6] On July 22, 2008, SemCAMS was granted an Initial Order pursuant to section 11(1) of the *CCAA*. On October 22, a Claims Process Order was granted, setting out the process for determining creditors' claims. December 1, 2008 was set as the Claims Bar Date. The *CCAA* proceedings, including the stay imposed by the Initial Order, continued until SemCAMS' Plan of Arrangement and reorganization were implemented on November 30, 2009.

[7] SemCAMS is the operator of a natural gas processing plant which processes gas for its joint owners and third parties. SemCAMS is also a joint owner. Joint owners are entitled to use the plant's throughput capacity in proportion to their ownership interest and have the highest priority for processing capacity.

[8] Excess plant capacity can be used by other joint owners or allocated to third parties under a gas processing agreement. Orleans was not a joint owner.

[9] Under a gas processing agreement the third party delivers raw gas to the plant for processing, then takes or sells the processed products. Third parties retain title to their products at all times.

[10] Monthly payments for gas processing agreements are based on projected use of the plant. At the end of the year, projected and actual throughput are reconciled through a “Thirteenth Month Adjustment”. This Adjustment is often further reconciled for each year with revised information provided by joint owners and third party users under a “Rework”. The Thirteenth Month Adjustment is based on information available to SemCAMS in its capacity as operator while the Rework requires more information from various parties and can take more than two years to complete. Orleans acknowledges that Reworks were common.

[11] On July 1, 2007, SemCAMS (in its capacity as joint owner) and Orleans entered into an Inlet Gas Processing Agreement (IGPA). Under the IGPA, SemCAMS took title to Orleans’ raw gas in order to use SemCAMS’ joint owner priority throughput capacity. This would ensure that Orleans would not risk losing throughput capacity.

[12] The price paid by SemCAMS to Orleans was subject to various adjustments, including the Thirteenth Month Adjustment and the Rework.

[13] The IGPA was terminated on July 22, 2008.

[14] According to SemCAMS, Orleans did not correctly report production volumes delivered in 2007 and early 2008 because it did not include hydrocarbon liquid volumes. In January 2008, SemCAMS advised Orleans that it (Orleans) had been under-allocated certain hydrocarbon liquids called condensate (“Under-allocation”). A few days later, SemCAMS advised Orleans that the Under-allocation occurred because Orleans had not provided the required information regarding hydrocarbon liquid deliveries.

[15] The following week, accounting staff from SemCAMS and Orleans met to discuss the Under-allocation. The next day Orleans provided some of the information required to calculate the Under-allocations. Orleans knew in April 2008 that SemCAMS would be conducting a Rework for 2007 that would probably take more than a year.

[16] Orleans also knew it would have to estimate what it would be owed by SemCAMS for the Under-allocation. SemCAMS had estimated the December 2007 impact at \$233,000. If that estimate was typical for each of the six months in 2007, Orleans would have received a credit of approximately \$1.4 million.

[17] In the fall of 2008, Orleans filed a Proof of Claim relating to gas purchased from SemCAMS in June and July of 2008 and for Thirteenth Month Adjustments from previous time periods. However, Orleans made no contingent claim for the Under-allocation or the Rework (collectively, “Price Adjustment Claim”). As mentioned earlier, the Claims Bar Date was December 2008.

[18] On June 30, 2011, the 2007 Rework, sent by SemCAMS to Orleans, revealed Orleans was owed over \$1.6 million.

[19] The parties disagreed as to whether the Price Adjustment Claim was compromised and extinguished by the Plan of Arrangement and Plan Sanction Order.

The Supervising CCAA Judge’s Decision

[20] Essentially, the judge had to decide whether Orleans’ Price Adjustment Claim was barred because it had not been submitted under the CCAA claims process.

[21] She considered the relevant statutory provisions, stating that “claims provable in bankruptcy [which definition governs CCAA claims as well] include contingent and unliquidated liabilities if the bankrupt is subject to such a liability on the day on which the bankrupt becomes bankrupt, or becomes subject to such liability before the bankrupt’s discharge”: para 38.

[22] The judge discussed the relevant jurisprudence at length. She held that the Price Adjustment Claim was a liability that arose from the IGPA: para 54. Like the Thirteenth Month Adjustment, it was a claim for what SemCAMS owed Orleans under the IGPA. She rejected the notion that Orleans had to be in the position to file a lawsuit by the time of the CCAA proceedings. Instead, she found Orleans had suffered an injury giving rise to a liability at the time of the CCAA proceedings, even though the debt could not be liquidated until the Rework was completed: para 58.

[23] She rejected Orleans’ argument that it could not know until the end of the Rework whether it was owed money: para 66. She also pointed out that Orleans knew about the Under-allocation and that it had been under-paid for condensate. Although the claim was contingent and might never mature into a debt, that is the very nature of a contingent claim: para 67. It was not too speculative and could have been valued. From this, she determined that the Orleans’ claim was barred by the CCAA proceedings.

Issues Proposed for the Appeal

- (i) Did the judge err in finding that Orleans’ knowledge of the Under-allocation made the Price Adjustment Claim sufficiently certain to require it to be included in Orleans’ Proof of Claim?

- (ii) Did the judge err in her interpretation and application of *Peters v Remington*, 2001 ABQB 584, 291 AR 189 and *Ontario New Home Warranty Program v Jiordan Homes Ltd* (1999), 43 OR (3d) 756, 10 CBR (4th) 1 (Ct J (Gen Div))?

Analysis

[24] I accept, and SemCAMS acknowledges, that the issues are significant to the parties, especially to Orleans. I am not persuaded, however, that the other parts of the test for leave have been made out.

Appeal is Prima Facie Meritorious

[25] I begin with whether the two issues raised by Orleans are *prima facie* meritorious.

[26] Orleans first asserts that the judge overemphasized its knowledge about the Under-allocation, pointing out that it was but one factor in the Rework. It argues that it could not possibly know whether or not it was owed money until completion of the Rework.

[27] Orleans acknowledges that this issue is reviewable on the palpable and overriding error standard. It says, however, that the Under-allocation was irrelevant and that the judge should not have taken Orleans' knowledge into account. I disagree.

[28] The judge was alive to the test for a provable claim which, as Orleans concedes, is that it must not be too remote or speculative: para 44. She also noted a claim can be provable even if it is future or contingent, so long as it can be valued: para 47. She was aware of Orleans' argument that it could not know whether there was a positive or negative balance until after the Claims Bar Date, but concluded that "the relevant underlying transaction occurred before the insolvency event, even though the debt did not come due until the occurrence of a required event": para 68.

[29] I cannot accept that her consideration of Orleans' knowledge of the Under-allocation was irrelevant in deciding whether the claim was too remote or speculative. It was an appropriate factor to take into account in deciding whether the claim was too remote.

[30] Especially given the standard of review on this issue, I doubt that Orleans' argument has *prima facie* merit.

[31] Second, Orleans contends that the judge misinterpreted and misapplied *Jiordan* and *Peters*. Neither was binding on her. As she noted, *Peters* was overturned by the Alberta Court of Appeal on

another point, namely, that the claim was not compromised because it had been held by the Bankruptcy Court to not be provable. The issue was *res judicata* because a claim cannot be both provable and not provable at the same time. Given this outcome, I cannot fault the judge's treatment of *Peters*.

[32] As for *Jiordan*, I agree with the judge to the extent that she intimated this was weak authority. The Court in *Jiordan* was wrongly informed that there were no relevant cases to consider. Moreover, its analysis of the problem was fleeting.

[33] Thus, her treatment of these two cases does not raise a *prima facie* meritorious argument.

Of Significance to CCAA Practice

[34] Orleans maintains that this case is significant to CCAA practice because there are conflicting cases throughout Canada about what constitutes a contingent claim provable in a CCAA or bankruptcy proceeding. It says this Court has never ruled on that topic and could provide guidance by doing so.

[35] I am not convinced that there are conflicting cases about the test, although there are clearly conflicting cases about how to apply the test to facts. Indeed, Orleans concedes that the test is whether the claim is too remote or speculative: *Confederation Treasury Services Ltd, Re* (1997), 96 OAC 75 at para 4, 43 CBR (3d) 4, (*sub nom* *Confederation Treasury Services Ltd (Bankrupt), Re*) (CA); *International Institute of Management Inc v Edmonton Co-operative Association Ltd*, 2000 ABQB 181 at para 18, 263 AR 326. What we are left with is the application of that test to the terms of a particular contract. I cannot see how such an exercise has broad significance to the practice.

Appeal Will Not Unduly Hinder the CCAA Proceeding

[36] Orleans says the CCAA proceedings will not be compromised if leave is granted because SemCAMS' Plan of Arrangement has been implemented and the CCAA proceedings have already been completed.

[37] I am not persuaded that permitting the appeal would not necessarily interfere with the CCAA process. As SemCAMS submits, other creditors voted for the Plan of Arrangement which contained an extremely broad release provision (see clause 8.1, reproduced at para 72 of the judge's reasons). Orleans also voted. It now asserts that its IGPA claim is outside the CCAA. If it were successful, others might be able to make the same argument. But the time for doing that is long past. To permit such an argument at this late stage (especially when, as discussed above, it had many opportunities to submit its claim in a more timely manner) could well throw the entire CCAA process in this case into chaos.

Conclusion

[38] For the above reasons, the application for leave is dismissed.

Application heard on October 3, 2012

Reasons filed at Calgary, Alberta
this 5th day of November, 2012

Hunt J.A.

Appearances:

T.A. Batty
for the Applicant

A.R. Anderson, Q.C.
D.L.R. Yaverbaum
for the Respondent

M. Lemmens
for the Interested Party Ernst & Young Inc.

TAB 19

Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2011 ABQB 223

Date: 20110405
Docket: 1003 11241, 1003 05560
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendant's

And Between:

Docket: 1003 05560
BKCY Action No: 24-115359

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

In the Matter of 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 Cow Harbour
Construction Ltd.**

**Memorandum of Decision
of the
Honourable Mr. Justice K.D. Yamauchi**

I. Introduction

[1] Cow Harbour Construction Ltd. ("Cow Harbour") sought relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). By an order dated April 7, 2010, as amended by further order dated July 6, 2010 (collectively, the "Initial Order"), this Court granted Cow Harbour the relief it was seeking. The Initial Order appointed Deloitte & Touche Inc. as monitor with respect to those proceedings (the "Monitor").

[2] Matthews Equipment Limited, operating as Hertz Equipment Rental ("Hertz") is one of Cow Harbour's creditors. Hertz has applied to this Court seeking an order granting it leave to file a proof of claim in a critical suppliers' claims process that this Court established by way of court order. Hertz missed the court-ordered deadline for filing its proof of claim.

[3] PricewaterhouseCoopers Inc., in its capacity as Cow Harbour's court-appointed receiver, along with other creditors, oppose Hertz's application.

II. Facts

[4] The Initial Order imposed a stay of proceedings on all of Cow Harbour's creditors. Specifically, the Initial Order prohibited creditors, defined by the Initial Order to be "Critical Suppliers," from filing builders' liens against lands on which Cow Harbour did work or furnished materials in respect of improvements. Were it not for the Initial Order, these Critical Suppliers would have been entitled to file valid and enforceable builders' liens. To protect the Critical Suppliers' claims, the Initial Order granted them a charge over Cow Harbour's property, not to exceed \$8,000,000 (the "CS Charge").

[5] Hertz rented to Cow Harbour various equipment including heaters, loaders, light towers and generators. Hertz issued invoices to Cow Harbour for those rentals between December 23, 2009 and April 1, 2010. As at April 1, 2010, Cow Harbour owed Hertz \$178,598.47, representing rental arrears for that period (the "Debt"). The Debt was unsecured.

[6] On May 19, 2010, the Monitor circulated its Fifth Report to the Court (the "Monitor's Fifth Report") among Cow Harbour's creditors. The Monitor's Fifth Report contained, among other things, a list of those creditors that the Monitor classified to be the holders of true leases with Cow Harbour, as opposed to capital, or financing, leases. Hertz was among those creditors that the Monitor classified as holding a true lease.

[7] The Monitor's Fifth Report also recommended that this Court establish a formal claims process pursuant to which those creditors claiming to be Critical Suppliers could assert their claims. By an order dated May 21, 2010 (the "May 21 Order"), this Court established a process by which the Monitor's counsel would circulate a proof of claim form to those claimants who wanted to establish themselves as a Critical Supplier (a "Proof of Claim"). The Monitor's counsel would send the Proof of Claim form to Cow Harbour's equipment lessors and persons to whom Cow Harbour owed money as at April 1, 2010. All recipients had to complete and deliver

the Proof of Claim to the Monitor by June 16, 2010 ("Claims Bar Date"). The May 21 Order paras. 11(c) and 11(d) said:

- (c) any lessor or claimant of a payable failing to deliver to the Monitor by [the Claims Bar Date], a completed Proof of Claim, shall be disqualified as a Critical Supplier and not entitled to the benefit of the [CS Charge], unless otherwise ordered by the Court; and
- (d) so soon as practical following [the Claims Bar Date], the Monitor shall report to this Honourable Court, with respect to the Proofs of Claim received and other matters relating to claimants under the [CS Charge].

[8] Hertz retained Parlee McLaws LLP ("Parlee McLaws") in or about April, 2010, to act as its legal counsel in Cow Harbour's CCAA proceedings. Marilyn Ann White, Credit Manager for Hertz ("Ms. White"), was the "sole point of contact" between Hertz and Parlee McLaws. All of Hertz's communications with Parlee McLaws ultimately went through Ms. White. Ms. White filed an affidavit and a supplementary affidavit in support of Hertz's application and subjected herself to questioning on her affidavit. Ms. White's supplemental affidavit specifically responded to the matters arising out of her questioning

[9] Ms. White stated that as a "routine matter," Parlee McLaws forwarded to her emails and court documents that were filed and which Parlee McLaws received from the Monitor with respect to the Cow Harbour's CCAA proceedings.

[10] On May 28, 2010, the Monitor's counsel sent, via email (the "May 28 Email"), a copy of the May 21 Order, to the service list, which included Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws.

[11] On June 1, 2010, the Monitor's counsel sent to Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws, via email (the "June 1 Email"), a copy of the Proof of Claim "package" that claimants would use if they wanted to make a claim as a Critical Supplier, and setting out the Claims Bar Date.

[12] Ms. White does not recall whether she received the May 28 Email or the June 1 Email. She has reviewed her email archives and has found no record of the May 28 Email or the June 1 Email. As well, Hertz's systems department informed Ms. White that once an email received by anyone at Hertz has been deleted, it cannot be retrieved.

[13] There was nothing that prevented Ms. White from asking Parlee McLaws to check their "sent items" to see whether (contrary to their "routine" practice) they failed to forward either the May 28 Email or the June 1 Email to Hertz or to Ms. White. She did not make that inquiry.

[14] Hertz did not file a Proof of Claim with the Monitor by the Claims Bar Date.

[15] On August 25, 2010, this Court granted an order in which it appointed PricewaterhouseCoopers Inc. as receiver (the "Receiver") of all of Cow Harbour's and 1134252 Alberta Ltd.'s current and future assets, undertakings and properties (the "Receivership Order"). This Court granted the Receivership Order pursuant to the *Judicature Act*, RSA 2002, c. J-2, s. 13(2) and the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 243(1) ("BIA").

[16] Parlee McLaws provided Hertz's Proof of Claim to the Receiver on January 12, 2011, together with the supporting invoices.

[17] On January 12, 2011, this Court granted a further order (the "January 12 Order"), in which it ordered, among other things, that in accordance with the May 21 Order, any creditor who did not file a Proof of Claim by June 16, 2010, shall, unless otherwise ordered, be conclusively deemed not to be a Critical Supplier.

[18] Hertz now requests this Court to grant it leave to file its Proof of Claim, even though it failed to file it on or before the Claims Bar Date.

III. Issue

[19] Whether this Court should grant Hertz leave to file its Proof of Claim subsequent to the Claims Bar Date.

IV. Discussion

[20] ***Blue Range Resource Corp. (Re)***, 2000 ABCA 285 at para. 26, held that courts, in a CCAA proceeding, respond to the following questions when they are determining whether they will permit a claimant to file its claim after the expiry of a deadline for filing claims:

- (a) Was the delay caused by inadvertence and if so, did the claimant act in good faith?
- (b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
- (c) If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
- (d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

1. Inadvertence and Good Faith

[21] **Blue Range** held that "inadvertent" includes carelessness, negligence, accident, and is unintentional (para. 27).

[22] Hertz argues that the inadvertence in this case is attributable to Parlee McLaws failing to advise Hertz to file its Proof of Claim in advance of the Claims Bar Date. In fact, Hertz argues that it did not receive the Proof of Claim at all and did not recognize the need to file its Proof of Claim until Parlee McLaws advised it to do so on January 12, 2011. Hertz completed its Proof of Claim and had Parlee McLaws submit it to the Receiver on the day that Parlee McLaws brought this requirement to its attention. Finally, Hertz argues that its failure to file its Proof of Claim was not the result of any deliberate act attributable to Hertz.

[23] The Receiver argues that while "inadvertence" sets a seemingly low standard, it is not sufficient for a party to claim inadvertence if there is no explanation for its failure to file its claim on time. In the absence of conduct evidencing "inadvertence," a period of inadvertence will have "ceased to run" when a claimant's solicitor is given specific notice of a claims bar date.

[24] The Receiver further argues that Hertz has not provided sufficient or any evidence of conduct amounting to inadvertence, whether on Hertz's behalf, or on behalf of Parlee McLaws. In fact, it argues, there is no evidence to indicate why Hertz did not file its Proof of Claim in a timely manner. While Hertz argues that this was a result of Parlee McLaws's inadvertent failure to provide the documents to Hertz, there is no evidence to support this assertion. This is so, despite the fact that Ms. White was specifically asked this question during questioning and subsequently filed a supplemental affidavit.

[25] The Receiver argues that this Court may provide the relief Hertz seeks only if Hertz proves "exceptional circumstances." This term comes from **Ivorylane Corp. v. Country Style Realty Ltd.**, 2004 CarswellOnt 2567 at para. 47. The court, in that case, cites **Blue Range** for this proposition. This Court does not agree that **Blue Range** made this a part of the test. Instead, it requires this Court to examine the facts before it in the light of the 4 questions it posed. Whether the result of that analysis is exceptional or unexceptional matters not.

[26] The description of "inadvertent" in **Blue Range**, says that the action is "unintentional." It is difficult to imagine a situation where carelessness, negligence or accident could be "intentional" and still be inadvertent, unless the court in that case was envisaging a situation where a claimant is wilfully blind or procrastinating. Nonetheless, to determine inadvertence, one must look at the circumstances in which the claimant found itself. For example, was there an advantage to Hertz "lying in the weeds" until the Claims Bar Date passed? Although we must examine this question, as well, when deciding whether any prejudice flows, it is important to answer that question at this stage.

[27] Hertz's statement that it was not lying in the weeds is not sufficient. Further, the Receiver argues that there is no evidence before this Court to indicate why Hertz did not file its Proof of

Claim in a timely manner. While this Court agrees with the Receiver that it is Hertz's onus to show why it requires an extension, Romaine J. in *BA Energy Inc. (Re)*, 2010 ABQB 507, 70 C.B.R. (5th) 24, tells us that "the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case" (para. 34).

[28] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), the court would not grant the claimant leave to pursue his claim after the creditors had approved a plan of arrangement and the court sanctioned it. He became aware of the CCAA proceedings at some point during the proceedings and at various stages throughout the proceedings, his solicitors contacted the debtor's solicitors to inquire about the process. He, however, did not pursue his claim until a point where he could recover potentially more than the debtor's other creditors. The court in *Blue Range* said of the *Lindsay* case:

18 ... [T]he case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the CCAA proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

[29] The Receiver forcefully argued that, on the evidence, we still do not know whether Parlee McLaws ever forwarded the May 28 Email or the June 1 Email to Hertz. Ms. White's supplemental affidavit says nothing more than that Hertz is unable to retrieve emails once they are deleted. That may be so, but this lack of evidence does not completely answer the question. We must look at "the specific circumstances of the case" to answer it. In this case, there would be no advantage for any creditor to simply lie in the weeds. They could lose their claim completely or they could be subject to a costs claim. The only advantage could be that they would not have to incur the cost of having to file a Proof of Claim. As well, there could be a practical advantage, such as the one outlined in *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.). That situation does not apply in this case. This Court finds that there would be no advantage to Hertz by its lying in the weeds and the only explanation for it not filing its Proof of Claim was inadvertence on its part or on the part of Parlee McLaws.

[30] The Receiver rightly points out that service on a solicitor of record is service on the claimant. In fact the *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 11.16, 11.17 and 11.20 permit this. Does the *Blue Range* test of unintentional negligence, carelessness and accident apply equally to the claimant's solicitors, as well as the claimant itself? Or is the *Blue Range* test limited only to claimants? If it is the latter, then the claimant's remedy would be as against the Alberta Lawyers Insurance Association. With respect to the former, the court in *Air Canada (Re)* (2004), 49 C.B.R. (4th) 175 (Ont. S.C.J. [Commercial]), allowed the claimant to file its late notice when counsel had acknowledged that it was through its inadvertence that the notice had not been filed on time, and that corrective action was taken promptly and that the extension of time would not cause a hardship to any interested party or prejudice the debtor company's reorganization.

[31] This Court does not countenance solicitors' negligence, but in the unique circumstances of this case where there are 3 solicitors from the same firm dealing with numerous clients involved in a CCAA matter, one can see how the solicitors might be inadvertent. In fact, throughout this Court's involvement in this matter, Parlee McLaws has made submissions which, at the same time, support and contest a particular approach to a matter. One would have thought that solicitors with the experience of those involved in this matter would never allow something like this to happen.

[32] This Court must also assess whether Hertz was acting in good faith in these circumstances. A simple assertion that it was acting in good faith is not enough. This analysis can be done by answering what appears to be two sides of the same coin. Was Hertz acting in bad faith and was it acting in good faith? With respect to the former, the "lying in the weeds" analysis will answer that question. With respect to the latter, a court will find that a claimant is acting in good faith if it submits its claim as soon as it becomes aware of the situation. See *e.g. Blue Range* at paras. 28 and 30. In the case at bar, Hertz, through Parlee McLaws, provided its Proof of Claim to the Receiver immediately on being advised of the need so to do.

[33] This Court finds that Hertz's failure to file its Proof of Claim was the result of Parlee McLaws' "inadvertence." To this end, this Court chooses to follow the approach that the court took in *Air Canada*. In the alternative, if Hertz did receive the Proof of Claim, it failed to file the Proof of Claim through its own inadvertence. As well, Hertz, by providing the Receiver with its Proof of Claim immediately on being advised, or reminded, as the case may be, of its need to provide it, shows that it acted in good faith.

2. *Prejudice*

[34] Hertz argues that having this Court granting it leave to file its Proof of Claim after the Claims Bar Date, and the claim itself, would have a negligible impact on the Critical Supplier claims process. The Receiver has not yet (1) completed its review of the previously submitted Proofs of Claim; (2) completed the appeals process in respect of the Receiver's review of the previously submitted Proofs of Claim; or (3) made any distribution in respect of the CS Charge. Hertz has not been "lying in the weeds."

[35] It further argues that its claim was known to the Monitor and the other creditors. The Monitor categorized Hertz as a true lessor. The Monitor communicated that categorization to all creditors in the Monitor's Fifth Report. Hertz was also known to the Receiver and is listed as having an unsecured claim in the amount of \$196,966.29, in the Notice and Statement of Receiver dated August 31, 2010, that the Receiver circulated to all of Cow Harbour's creditors, pursuant to the BIA.

[36] Furthermore, Cow Harbour's creditors were aware that there were other creditors who had filed late Proofs of Claim. This Court has not yet adjudicated on the validity of the other late-filed proofs of claim.

[37] Finally, Hertz argues that none of Cow Harbour's creditors will have lost a realistic opportunity to do anything that they otherwise might have done. Conversely, had Hertz submitted its Proof of Claim on time, each of the other creditors would have proceeded in exactly the same fashion as they did.

[38] The Receiver argues that in any consideration of prejudice, this Court should weigh the prejudice to the Receiver or a monitor in a CCAA proceeding on its ability carry out its duties and effect a level of predictability and finality in CCAA or receivership proceedings.

[39] **Blue Range** (para. 36) tells us that timing is a key element when determining whether Hertz or the other Critical Suppliers will suffer any prejudice if this Court were to grant Hertz leave to file its claim. What does this mean? Had the Receiver completed its analysis of the Critical Suppliers' issue and distributed funds then this Court might be less inclined to allow Hertz to file its Proof of Claim. As well, Cow Harbour's other creditors were aware of Hertz's potential claim through many of the Monitor's reports: **Blue Range** at para. 39. This Court has not adjudicated on the admissibility of any of the other late Proofs of Claim, as yet.

[40] **Blue Range** at para 37, also tells us that materiality is relevant to the issue of prejudice. Assuming that Hertz's claim is the agreed-upon amount of \$178,598.47, its claim, as against the total amount of the Proofs of Claim of \$49,962,687.68 is .357%. In **Blue Range**, the court found a .435% claim to be immaterial. Surely, .357% is even less material.

[41] Even if materiality is not *sine qua non* of this Court's analysis, the fact that the Critical Suppliers will receive less money, should this Court grant Hertz leave to file its Proof of Claim, is not something this Court need consider:

37 In a CCAA context ... the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31.

[42] Because of the immateriality of Hertz's claim relative to the Proofs of Claim as a whole, Cow Harbour's other creditors' awareness of Hertz's potential claim, and the fact that nothing has been done concerning these claims to this point, this Court finds that neither the Critical Suppliers nor the Receiver will suffer any prejudice if this Court were to grant leave to Hertz to file its claim.

[43] Because this Court finds that there would be no "relevant prejudice" that flows as a result of its approving Hertz's late filing, this Court does not intend to deal with the third and fourth **Blue Range** questions.

V. Conclusion

[44] Proceedings under the CCAA are meant to deal with compromises and arrangements among a debtor company and its creditors. If a creditor fails to file its claim in those proceedings because of its solicitors' negligence or its own inadvertence, as defined in **Blue Range**, it should be permitted to argue that, nonetheless, a court should permit it to file its claim. That is the reason why **Blue Range** outlined the four questions and why this Court inserted the "unless otherwise ordered by the court" provision in the May 21 Order and the January 12 Order.

[45] The objective of a claims procedure order was set out by Romaine J. in **BA Energy** as follows:

41 The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

42 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

[46] It is important to note that each case depends on its unique facts. This Court finds that Hertz was not attempting to seek an unjustified advantage by not filing its claim or that it was improperly manipulating the process. Its failure to file its claim was inadvertent. Accordingly, this Court grants Hertz leave to file its Proof of Claim subsequent to the June 16, 2010 deadline.

Heard on the 25th day of March, 2011.

Dated at the City of Edmonton, Alberta this 65th day of April, 2011.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Bryan Maruyama

Parlee McLaws

for the Applicant Matthews Equipment Limited, operating as Hertz Equipment Rental

Randall S. Van de Mosselaar

Macleod Dixon

for the Respondent PricewaterhouseCoopers Inc., receiver of Cow Harbour Construction Ltd.

TAB 20

SUPREME COURT OF NOVA SCOTIA
Citation: ScoZinc Ltd. (Re), 2009 NSSC 136

Date: 20090403
Docket: Hfx No.305549
Registry: Halifax

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 ScoZinc
Ltd.

Applicant

Judge: The Honourable Justice Duncan R. Beveridge

Heard: April 3, 2009 in Halifax, Nova Scotia

**Written Reasons of
Oral Decision:** April 28, 2009

Counsel: John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the
applicant
Robert MacKeigan, Q.C., for Grant Thornton

By the Court:

[1] On December 22, 2008 ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s.11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s.11.7 of the CCAA.

[2] The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

[3] The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

BACKGROUND

[4] The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

[5] The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

[6] The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

[7] ScoZinc is 100% owned by Acadian Mining Corp. These two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

[8] Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately \$2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately \$23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

[9] Royal Roads claim was for \$579,964.62. The claim by Acadian Mining was for \$23,761,270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

[10] Mr. Rawding incorrectly attributed \$1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was \$2,772,734.19.

[11] The appropriate claim that should have been submitted by Acadian Mining was \$22,041,234.82, a reduction of \$1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

[12] The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of \$4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

[13] The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised “if it is determined by the court that the Monitor has the power to do so”.

[14] The request for directions and the circumstances pose the following issue:

ISSUE

[15] Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

ANALYSIS

[16] The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s.11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.

(2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.

(3) The monitor shall

(a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;

(b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5, or

(iii) at such other times as the court may order;

(c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

(d) carry out such other functions in relation to the company as the court may direct.

...

[17] It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

[18] Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

[19] The only guidance provided by the CCAA is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the Act provides:

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

[20] The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

[21] Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s.135(2) *BIA*). A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

[22] In contrast, the *CCAA* does not set out the procedure beyond the language in s.12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on “summary application”.

[23] The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor’s records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor’s claim is barred.

[24] If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

[25] The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont.S.C.J.); *Triton Tubular Components v. Steelcase Inc.*, [2005] O.J. No. 3926 (Ont.S.C.J.); *Muscletech Research & Development Inc.,(Re)*, [2006] O.J. No. 4087 (Ont.S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp., Re* 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

[26] I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article “The *CCAA* and the Claims Bar Process”, (2000), 13 Commercial Insolvency Reporter 6, endorsed the utilization

of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the CCAA. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the CCAA (See: *Clear Creek Contracting v. Skeena Cellulose Inc.*, (2003), 43 C.B.R. (4th) 187 (B.C.C.A.) and *Stelco Inc.(Re)*, [2005] O.J. No. 1171 (CA.)).

[27] Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.

p. 32-33

[28] The CCAA gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the Act that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Re Freeman Estate*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c.158. Harris C.J. wrote:

[17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.

[18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities-- done with despatch.

[19] In the case of the Western &c R. Co. v. Atlanta (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544:--

"In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."

[20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

[29] In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

[30] The CCAA gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s.11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s.11.7(3)(d)).

[31] In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

POWER OF THE MONITOR

[32] The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

[33] The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

9. Upon receipt of a Proof of Claim:

- a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
- b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and

...

10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

[34] Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

[35] The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

[36] Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp.* 2000 ABCA 285. As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

[37] The chambers judge allowed the late and amended claims to be filed. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?

Re Blue Range Resources Corp., 2000 ABCA 16

[38] Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Order that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

[26] Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

2000 ABCA 285

[39] The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is

not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Re Cohen* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

[40] In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.).

[41] In a different context Turnbull J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3rd) 1 commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

[42] In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to **the manner** to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to **completion** and the **execution** of a Proof of Claim.

[43] Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

[44] In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

[45] Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the CCAA?

[46] To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

[47] The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

[48] In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to conform with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

[49] If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

Beveridge, J.

TAB 21

Editor's Note: Corrigendum released on December 3, 2012. Original judgment has been corrected with text of corrigendum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re)*,
2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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

And

**In the Matter of a Plan of Compromise or Arrangement of
0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.**

Petitioner

**Corrected Judgment: The text of the judgment was corrected at paragraph 28
where changes were made on December 3, 2012.**

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner: D.E. Gruber

Counsel for the Monitor, McMillan LLP: P.J. Reardon

Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.: D. Hyndman

Counsel for Henry Company Canada Inc. and Stone Industries Inc.: J. McLean, Q.C.

Place and Date of Hearing: Vancouver, B.C.
September 19, 2012

Place and Date of Judgment: Vancouver, B.C.
October 11, 2012

[1] The question raised on this application is whether certain unsecured creditors should obtain funding within this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceeding for the purpose of investigating the claims of other creditors who are related to the petitioner, 0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd. ("Steels").

Background Facts

[2] Steels was a supplier of construction materials in British Columbia and Alberta. It operated from various leased premises across those provinces. On April 5, 2012, Steels sought protection from its creditors pursuant to the CCAA. On that same date, I granted an initial order staying proceedings and granting other ancillary relief. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[3] The ancillary relief included the appointment of Wayne Wood as Chief Restructuring Officer ("CRO") of Steels, since all the directors had resigned. Mr. Wood was the Vice-President, Finance and Administration of Steels. It was intended that he would be assisted in his duties relating to the restructuring to some extent by Steels' financial advisor, Ernst & Young Inc. ("E&Y").

[4] Steels resolved fairly quickly, with the assistance of E&Y and with the concurrence of the Monitor, to commence a sale and investment solicitation process toward selling its assets. On July 30, 2012, I approved a sale of the majority of Steels' assets to Brock White Canada Company, LLC. That sale has now completed and net proceeds of sale, which are discussed in more detail below, are being held for the benefit of unsecured creditors.

[5] In anticipation of a sale of the assets, I approved a Claims Process Order on June 8, 2012.

[6] By the date of the granting of the Claims Process Order, it was apparent that a substantial portion of the claims would be advanced by related parties. In fact, Mr. Wood discussed these claims in his affidavit sworn April 5, 2012 in support of the granting of the Initial Order.

[7] Mr. Wood's evidence indicated that Steels is a wholly owned subsidiary of S.I.P. Holdings Ltd. ("S.I.P. Holdings") and that S.I.P. Holdings is, in turn, a wholly owned subsidiary of Fama Industrial Supplies Ltd., a privately owned company. Mr. Wood's evidence further indicated that S.I.P. Holdings also owns Steels Holdings (BTC) Ltd. ("Holdings BTC"). Mr. Wood attached various financial documentation in respect of claims against Steels by both S.I.P. Holdings and another company, Fama Holdings Ltd. ("Fama Holdings"):

- a) S.I.P. Holdings' audited consolidated financial statements for the 12 months ending December 31, 2010. These consolidated financial statements included both Steels and Holdings BTC;
- b) Unaudited financial statements for Steels for the 12 months ending December 31, 2011; and
- c) Steels' unaudited financial statements for the two months ending February 29, 2012.

[8] Mr. Wood stated that there is a shareholder loan in the amount of approximately \$17.3 million owed to Fama Holdings. He stated:

The Shareholder Loan is owed to Fama Holdings Ltd. ("FHL"). It does not bear interest, and there are no repayment terms. In 2005, Steels consolidated with Gasmaster Industries Ltd. ("Gasmaster") for the purposes of utilizing Gasmaster's tax losses to offset Steels' profits. Gasmaster owed the amount of \$17.3 million to FHL. Gasmaster is no longer a division of Steels, having been spun off, but the amount owing from Gasmaster to FHL remains on Steels' books.

[9] Indeed, Note 9 of the consolidated balance sheet in the 2010 audited financial statements (entitled "Related Party Balances and Transactions") does reference an amount owing to Fama Holdings in the amount of approximately \$17.3 million as at the end of 2010. The statements refer to Fama Holdings as a "company under common control", although the relationship between Fama Holdings, on the one hand, and S.I.P. Holdings and Steels, on the other, is not apparent.

[10] Similarly, the unaudited financial statements as at December 31, 2011 indicate a “shareholder loan” owing in the amount of approximately \$17.3 million.

[11] In his April 5 affidavit, Mr. Wood also referred to a balance due to “affiliated companies” of approximately \$7.9 million. With respect to this amount, he stated as follows:

The balance owing to affiliated companies is due to SIP Holdings. This amount relates to certain proceeds from the sale of the Lands. Some of the Lands were transferred to Steels before the sale, so the amount owing to SIP [Holdings] is in respect of the purchase price paid for the Lands.

[12] Given that the 2010 audited financial statements are consolidated and include both Steels and S.I.P. Holdings, there is no reference in those statements to the amount said to be due to S.I.P. Holdings by Steels. Nevertheless, the unaudited financial statements of Steels as at December 31, 2011 do reference an amount owing to “affiliated companies” of \$7,018,037.

[13] Despite the above evidence of Mr. Wood relating to these claims at the outset of this proceeding, there was no question in the minds of Steels, and in particular that of Mr. Wood as the CRO, that issues might be raised with respect to these related party claims. The Claims Process Order, in paragraph 21, provided that filed Proofs of Claim were to be reviewed by Steels with the assistance of both the Monitor and E&Y. The Claims Process Order further provided:

25. Any Creditor (a “Disputing Creditor”) may apply to this Court to dispute any such accepted Claim by filing a Notice of Application ... Upon receipt of any such filed application, the Petitioner shall provide the Disputing Creditor with any Proof of Claim and other material documents in its possession in respect of the disputed Claim, and paragraphs 26, 27 and 28 of this Order apply.

26. In the event that the Petitioner, with the assistance of the Monitor, is unable to resolve a dispute regarding any Claim with a Creditor or between two Creditors, the Petitioner shall so notify the Monitor and the Creditor, and either of the Petitioner, Monitor, or Creditor may apply to the Court to resolve the dispute. ...

27. In the event an application is filed pursuant to paragraphs 25 or 26 of this Order, there shall be a preliminary hearing before the Court to determine

the procedure for the application and to determine whether the matter will be decided based on the material before the Petitioner or on a *de novo* basis.

[14] This additional procedure by which another creditor could challenge any claim was a matter raised by the Monitor in relation to these third party claims. The Monitor stated in its Third Report dated June 6, 2012, in support of the application for the Claims Process Order, that “any creditor(s) will have the right, possibly at its (their) own cost, to challenge the claims of others”:

... in order to provide additional stakeholder protection before any distribution is made to creditors ...

[15] Accordingly, the Claims Process Order specifically contemplated a procedure by which other unsecured creditors, who might be affected by the acceptance of the related party claims, were entitled to take steps to independently review those proofs of claim and have the dispute heard by the Court if it could not be resolved otherwise.

[16] In July 2012, S.I.P. Holdings and Fama Holdings filed their Proofs of Claim with Steels.

[17] Fama Holdings’ Proof of Claim is in the amount of \$13,159,689.25. Few particulars are provided. The amount is said to be derived from the \$17.3 million figure from the 2010 audited financial statements (which are attached) less reductions in the amounts of \$1,776,634, which is identified as a credit from a portion of the proceeds of sale of real estate owned by S.I.P. Holdings, and \$4,101,845. This latter figure is stated to have “occurred as reflected in the financial statements of Steels, as prepared by Steels and accordingly, details of the constitution of the loan repayment are known to Steels”. No other documentation is provided in support of this claim.

[18] S.I.P. Holdings’ Proof of Claim is in the amount of \$5,954,155.75. Documents in support include the 2010 consolidated financial statements (which do not in fact disclose any amount owed to S.I.P. Holdings, as noted above), together with various promissory notes dated January 1, February 1, March 1 and July 1, 2011. As with

the Fama Holdings Proof of Claim, some particulars are also provided. Specifically, the Proof of Claim refers to Steels being indebted to S.I.P. Holdings in the amount of \$7,018,036.85 as of July 1, 2005. This is the amount reflected on the 2011 unaudited financial statements. The Proof of Claim also indicates:

... Subsequent to that date, SIP sold real estate in Surrey, Kamloops, Calgary and Edmonton occupied by Steels as tenant to Steels in consideration of preferred shares and \$7,924,498.29 evidenced by promissory notes as follows:

(i)	Surrey property:	\$2,150,780.64
(ii)	Kamloops property:	\$573,539.00
(iii)	Calgary property:	\$2,016,181.46
(iv)	Edmonton property:	\$3,183,989.19

for a total indebtedness of \$14,942,527.14. This indebtedness was reduced during the course of 2011 and 2012 by \$8,988,372.26 through payment by Steels of lease payments and other real estate related indebtedness. The particulars of such payments are known to Steels and are reflected in the financial statements of Steels.

[19] No detail is provided by S.I.P. Holdings with respect to the origins of the original \$7,018,036.85 said to be owed as of July 1, 2005.

[20] In its Fifth Report dated July 26, 2012, the Monitor states that Steels and the CRO had accepted the claims of S.I.P. Holdings and Fama Holdings, together with a small claim by another related party. Importantly, the Monitor also stated that Steels did not request the assistance of E&Y with respect to the review and evaluation of these claims. Nor did the Monitor perform any further work on these claims - beyond a review of the documentation provided - pending a determination as to whether any other creditors wished to challenge the claims under paragraph 25 of the Claims Process Order.

[21] The significance of these related party claims cannot be understated. The amount available for distribution to unsecured creditors is expected to be in the range of \$4 to \$4.2 million. The total claims filed to date pursuant to the Claims Process Order amount to approximately \$31 million, which indicates an estimated recovery of between 13% and 14%. Given that the amounts claimed by both Fama

Holdings and S.I.P. Holdings total approximately \$19.2 million, these two creditors alone stand to recover approximately 62% of the total monies that will be available for distribution to unsecured creditors.

Discussion

[22] This application is brought by two unsecured creditors: Henry Company Canada Inc. and Canadian Stone Industries Inc. These two creditors are owed approximately \$900,000. They say Wolrige Mahon Ltd., a forensic accountant, should be retained to assist them in reviewing and assessing the claims of Fama Holdings and S.I.P. Holdings. They are applying for an order that the reasonable fees and expenses of Wolrige Mahon Ltd.'s services be secured by a priority charge on Steels' assets ranking in priority to all other charges except for the existing Administrative Charge. They seek a priority charge not to exceed \$50,000.

[23] It appears that other unsecured creditors of Steels have joined with the applicants. At this time, the total unsecured creditor group (who I will refer to as the "Disputing Creditors") who wish to have these related claims investigated have aggregated claims of approximately \$2.6 million, which represents 8% of the present claims.

[24] The Disputing Creditors assert that given the nature of the Fama Holdings and S.I.P. Holdings claims, it is not possible to assess them without the assistance of an accountant with forensic experience. The expertise of Michael Cheevers, President of Wolrige Mahon Ltd., is well known to this Court. In fact, Mr. Cheevers has been appointed by this Court in many instances as a receiver, trustee and bankruptcy monitor. In addition, Mr. Cheevers practices as a forensic accountant and his qualifications in that area are not in question.

[25] Mr. Cheevers indicates that he expects that if appointed, he would review the accounting records of Steels, including banking records and relevant contracts, going back as far as 2005 (which is a date referred to in the S.I.P. Holdings Proof of Claim). He estimates that the fees of Wolrige Mahon Ltd. to undertake this engagement would be between \$25,000 and \$50,000.

[26] As mentioned earlier in these reasons, it is clear that, contrary to the terms of paragraph 21 of the Claims Process Order, neither the Monitor nor E&Y, as Steels' financial advisors, have assisted Steels or Mr. Wood as CRO in reviewing these Proofs of Claim toward either accepting or revising or rejecting them. The Monitor acknowledges that it was never intended that a review by only Mr. Wood as CRO would be sufficient for a final determination in respect of the Proofs of Claim to be accepted for distribution.

[27] The only evidence from Mr. Wood filed on this application was a very general response on August 23, 2012:

I have also spent significant time managing the Petitioner's claims process, the details of which are set out [in] the Monitor's Fifth Report to Court filed in this proceeding. I understand that certain creditors have sought information related to those related parties claims, and I have spent time reviewing information related thereto and expect to spend more time on that issue going forward.

[28] Notwithstanding Mr. Wood's comment, he has not engaged in any meaningful dialogue with the Disputing Creditors toward providing clarification about these related party claims. I was advised by counsel there has been some exchange of correspondence between counsel for the Disputing Creditors and counsel acting for both Steels and the CRO (the same counsel acts for both Steels and the CRO). Despite being invited to provide further information concerning these claims, and despite what appears to have been his earlier intention, Mr. Wood has declined to provide further detail or documentation regarding these claims, save in response to a specific request which the Disputing Creditors did not provide.

[29] Counsel for Steels/the CRO and S.I.P. Holdings and Fama Holdings argue that any further review of the related party claims is not necessary. They say that the 2010 financial statements were audited and thus confirmed the amounts owing in that document. In addition, they say that Mr. Wood, as the CRO and the accountant of Steels, has "independently" reviewed these claims. It is apparent from Mr. Wood's prior involvement with Steels, as the Vice-President of Finance and Administration, that he would have some knowledge of these claims. They further argue that as the

CRO, he is an independent officer of the court and, in particular, independent of the related parties. The suggestion is made that his review of the claims is entitled to substantial deference and that funding for any further review should be refused. I would note again, however, that even as late as August 23, 2012, Mr. Wood indicated that he was still in the process of reviewing information regarding these claims.

[30] For all that Mr. Wood appears to have some knowledge of these claims, it is of some significance to me that he has provided no assistance, as an officer of this Court, to the Court in terms of the level of his knowledge with respect to all aspects of these claims. Nor has he disclosed any further work that he has done in reviewing these claims subsequent to receiving the Proofs of Claim and the objections of the Disputing Creditors.

[31] Furthermore, I consider that the Proofs of Claim, with the limited information disclosed and limited documentation attached, leave much to be desired in terms of fully understanding these claims.

[32] There is absolutely no backup with respect to the amounts claimed by S.I.P. Holdings as of July 1, 2005. There appear to be complex transactions after that date involving sales of real estate and tenancy arrangements. No doubt, there is a wealth of documentation which supports those transactions and presumably, the amounts or debts said to arise from those transactions and reductions or payments made.

[33] With respect to the Fama Holdings claim, I appreciate that this amount is referenced in the audited 2010 financial statements. But later reductions are said to arise from real estate sales by S.I.P. Holdings and no details relating to those transactions are provided.

[34] Support for both Proofs of Claim is sparse in terms of particulars provided; there appear to be only vague references to figures that are “reflected in the financial statements of Steels” or “known to Steels”. Such general statements do little to

provide the necessary backup so that other creditors may fully understand these claims and determine whether they are valid.

[35] To a large extent, the submissions made by Steels/the CRO, S.I.P. Holdings and Fama Holdings amount to them saying “trust the auditors” and “trust me”. Despite this, the Disputing Creditors continue to harbour concerns and I think justifiably so.

[36] We are therefore at the stage where, despite some efforts, the parties have failed to advance a better understanding of these related party claims through the provision of further information and documentation. The Disputing Creditors’ position is, in any event, that a forensic accountant, such as Mr. Cheevers, will be required to fully review the matter.

[37] Under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), the claims process is undertaken by a trustee in bankruptcy. Pursuant to s. 135, a trustee is required to examine every proof of claim and may require further evidence in support of a claim prior to determining, valuing or disallowing a claim. The cost of that review is borne by the estate as a whole since it is intended to benefit the body of creditors.

[38] Similar issues often arise in CCAA proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that “[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible”.

[39] Many CCAA proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356.

To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[40] Indeed, this was the underlying basis upon which the Claims Process Order was granted, particularly as it related to a review of the third party claims. That Order clearly contemplated that other creditors would have the ability to challenge these third party claims, even in the face of the claims process as originally crafted. Again, as stated above, the process set out in the Order was not followed in that there was no independent involvement or assistance by the Monitor or E&Y, as was initially intended. Nor did Steels provide any of the Disputing Creditors with “other material documents in its possession” as contemplated by paragraph 25 of that Order.

[41] In this case, no report from the Monitor has been prepared in any case. As for Mr. Wood in his capacity as CRO, I do not accede to the arguments that this Court should grant any particular deference to his review or conclusions, particularly in the face of the evidentiary deficiencies with respect to the Proof of Claims and his failure to further assist the Court in addressing such deficiencies. Fama Holdings and S.I.P. Holdings have the burden of proving their claims, and this requires more than providing general statements and unclear financial statements.

[42] In all of these circumstances, I have no hesitation in concluding that an independent review of these related parties claims is appropriate and should be undertaken. In addition to understanding how these particular transactions arose and the financial consequences arising from those transactions, an independent review would also focus on the proper characterization of the amounts said to be owed. It is possible, as suggested by counsel for the Disputing Creditors, that some or all of these amounts may have been equity investments in Steels, as opposed to debt. In that event, such equity claims would only be satisfied after all unsecured claims were paid. A similar issue was raised by the disputing creditors in *Pine Valley Mining*.

[43] Counsel for Steels/the CRO and also counsel for S.I.P. Holdings and Fama Holdings contend that the application is premature. Counsel for Steels/the CRO states that Mr. Wood will cooperate in speaking to counsel for the Disputing Creditors in providing documents as requested. No similar offer has been made by S.I.P. Holdings and Fama Holdings. Further, it is suggested that paragraph 27 of the Claims Process Order contemplates a preliminary hearing to discuss the claims and that the issues, including the provision of any further information and documentation, can be addressed at that time.

[44] I would not accede to these arguments that the application is premature. The related party claims have been presented and it does not appear that there is cooperation between the parties, at least to this point in time, with respect to providing the necessary information and backup documentation. In addition, even once such information and documentation is provided to counsel for the Disputing Creditors, it is evident to me that a forensic accounting of these claims will be required in the circumstances. I see no need to engage the court process in addressing these claims until that full review has taken place and positions are crystallized. It may be, for example, that upon that full review, the Disputing Creditors are satisfied that there are no issues to be addressed and that these are valid claims.

[45] I would also note that there is some urgency in dealing with these third party claims. I understand that matters relating to the assets sale are moving to a conclusion which will dictate the actual amount of funds to be distributed. It is intended that a plan will be submitted later this year which will provide for distributions to unsecured creditors. A failure to resolve issues relating to these claims, or resolve them in a timely manner, will result in delayed payment to all unsecured creditors. This is to be avoided if at all possible.

[46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims

would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

[47] The question then becomes who should complete this independent review and who should bear the costs of the review.

[48] The Monitor to this point in time has risen above the fray while these procedural matters are being sorted out. Nevertheless, the Monitor indicates that if directed by the Court, it will, of course, complete an independent review of the claims. In that event, as with any review of a claim that they would have undertaken from the outset, the cost will be borne by the estate. The Monitor, however, raises the issue that if it completes such a review and prepares a report, it would share that report with others who would be interested in the issue.

[49] Counsel for the Disputing Creditors submits that Wolrige Mahon Ltd. should be the party to complete this review. At this stage, it is, at least on the face of it, an adversarial process and the Monitor can remain as the neutral third party in respect of the matter. There would not appear to be any costs considerations in that respect; the Monitor has no vested knowledge of the related party claims that would reduce the cost of completing this review. It is also stated that Wolrige Mahon Ltd.'s expertise with respect to forensic accounting is of particular importance in this case, while the Monitor does not advocate any particular expertise in that regard.

[50] I noted that in *Pine Valley Mining*, the monitor had reviewed and accepted the claim that was the subject of the dispute in CCAA proceedings. Madam Justice Garson (as she then was), at para. 13, concluded that the role of the monitor was to determine the validity and amount of the claim, but that it did not do so in an adversarial process. As such, while the monitor's report was to be considered in the dispute, there was no deference to be accorded to that report "in the sense that would alter the burden of proof ordinarily imposed on the claimant".

[51] In my view, the appropriate disposition of this matter is to have the review completed by Wolrige Mahon Ltd. In that event, counsel for the Disputing Creditors can deal directly with Wolrige Mahon Ltd. in terms of the review, which may not necessarily result in a formal report being prepared. This may alleviate the higher costs normally associated with preparing a formal report.

[52] The next issue is whether the results of Wolrige Mahon Ltd.'s review should be shared. Under a *BIA* claims process, a trustee in bankruptcy would review claims. Normally, a trustee would seek the input of the inspectors appointed, however, it may not do so if, for example, there was some concern that an inspector had an interest relating to a potentially disputed claim. If the cost of the report is to be borne as an administrative cost, there is no reason why other interested parties should not have equal access to Wolrige Mahon Ltd.'s work product in respect of this independent review. Accordingly, I am ordering that Wolrige Mahon Ltd.'s work product be shared with the Monitor and any other unsecured creditor (other than the related parties) who wishes to join in a challenge of the related party claims, on terms as might be agreed between them.

[53] The Disputing Creditors seek a charge in favour of Wolrige Mahon Ltd. in an amount limited to \$50,000. The *CCAA* provides:

s. 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of:

...

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[54] I consider that it would be unfair to the Disputing Creditors for them to bear the costs of retaining Wolrige Mahon Ltd., which will not only provide the independent review that was contemplated by the Claims Process Order, but will also potentially benefit the unsecured creditors as a whole. In my view, this charge in favour of Wolrige Mahon Ltd. is necessary for the effective participation by the

Disputing Creditors in these proceedings (and perhaps others who might join in or benefit from such a review).

[55] The final issue is raised by S.I.P. Holdings and Fama Holdings. They take the position that while a charge may be granted at this time, there should be a provision in the order allowing them to seek recovery of some or all of the amounts paid to Wolrige Mahon Ltd. in the event that a review of the related party claims is not fruitful or alternatively, any challenge to those claims is not successful. Such a “comeback” provision is opposed by the Disputing Creditors.

[56] Usually, the cost of an independent review would be borne by the estate and would be indirectly borne by the creditors whose claims were potentially subject to challenge. In this case, I see no reason to depart from the usual manner in which this independent review is to be conducted, which would not include any ability to recoup these expenses. I would note, in any event, that if a challenge to these related party claims is brought against S.I.P. Holdings and Fama Holdings, and that challenge is ultimately unsuccessful, then the related parties will have the ability to seek costs against the unsuccessful applicant creditors at the end of the day.

[57] Accordingly, the order sought is granted. There will be a priority charge in favour of Wolrige Mahon Ltd. not to exceed \$50,000, for the purpose of Wolrige Mahon Ltd. assisting the Disputing Creditors to review and assess the claims of Fama Holdings and S.I.P. Holdings. This charge is to rank in priority to all other charges except for the existing Administrative Charge.

“Fitzpatrick J.”

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re)*,
2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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

And

**In the Matter of a Plan of Compromise or Arrangement of
0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.**

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Corrigendum to the Reasons for Judgment

Counsel for the Petitioner: D.E. Gruber

Counsel for the Monitor, McMillan LLP: P.J. Reardon

Counsel for S.I.P. Holdings Ltd. and Fama
Holdings Ltd.: D. Hyndman

Counsel for Henry Company Canada Inc.
and Stone Industries Inc.: J. McLean, Q.C.

Place and Date of Hearing: Vancouver, B.C.
September 19, 2012

Place and Date of Judgment: Vancouver, BC
October 11, 2012

Place and Date of Corrigendum: Vancouver, B.C.
December 3, 2012

[58] This is a corrigendum to my Reasons for Judgment issued October 11, 2012.

Paragraph 28 of those Reasons is amended to read as follows:

[28] Notwithstanding Mr. Wood's comment, he has not engaged in any meaningful dialogue with the Disputing Creditors toward providing clarification about these related party claims. I was advised by counsel there has been some exchange of correspondence between counsel for the Disputing Creditors and counsel acting for both Steels and the CRO (the same counsel acts for both Steels and the CRO). Despite being invited to provide further information concerning these claims, and despite what appears to have been his earlier intention, Mr. Wood has declined to provide further detail or documentation regarding these claims, save in response to a specific request which the Disputing Creditors did not provide.

"Fitzpatrick J."

TAB 22

CITATION: Timminco Limited (Re), 2014 ONSC 3393
COURT FILE NO.: CV-12-9539-00CL
DATE: 2014-07-07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TIMMINCO LIMITED AND BÉCANCOUR SILICON
INC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jane Dietrich* and *Kate Stigler*, for the Board of Directors, except John Walsh

Kenneth D. Kraft, for Chubb Insurance Company of Canada

James C. Orr, for St. Clair Pennyfeather, Plaintiff in the Class Action

Maria Konyukhova, for Timminco Entities

Robert Staley, for John Walsh

Linc Rogers, for the Monitor

HEARD: July 22, 2013

SUPPLEMENTARY WRITTEN SUBMISSIONS RECEIVED MARCH 2014

ENDORSEMENT

Introduction

[1] On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

[2] The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

[3] Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than \$18 per share by June 5,

2008. Subsequently, Mr. Pennyfeather alleges that as Timminco began to acknowledge problems with the alleged proprietary process, the share price fell to the point where the equity was described as “penny stock” prior to its delisting in January 2012.

[4] In the initial order, granted January 3, 2012 in the *Companies’ Creditors Arrangement Act.*, R.S.C. 1985, c. C-36, as amended (the “CCAA”) proceedings, Timminco sought and obtained stays of all proceedings including the Class Action as against Timminco and the Directors (the “Initial Order”).

[5] Timminco also obtained a Claims Procedure Order on June 15, 2012 (the “CPO”). Among other things, the CPO established a claims-bar date of July 23, 2012 for claims against the Directors. Mr. Pennyfeather did not file a proof of claim by this date.

[6] No CCAA plan has been put forward by Timminco and there is no intention to advance a CCAA plan.

[7] Mr. Pennyfeather moves to lift the stay to allow the Class Action to be dealt with on the merits against all named defendants and, if necessary, for an order amending the CPO to exclude the Class Action from the CPO or to allow the filing of a proof of claim relating to those claims.

[8] The Class Action seeks to access insurance moneys and potentially the assets of Directors.

[9] The respondents on this motion, (the Directors named in the Class Action), contend that the failure to file a claim under the CPO bars any claim against officers and directors or insurance proceeds.

[10] Neither Timminco nor the Monitor take any position on this motion.

[11] For the reasons that follow, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action.

The Stay and CPO

[12] The Initial Order contains the relevant stay provision (as extended in subsequent orders):

24. This Court Orders that during the Stay Period... no Proceeding may be commenced or continued against any former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacities as directors or officers for the payment or performance of such obligations, **until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this court or is refused by the creditors of the Timminco Entities or this Court.**

[emphasis added]

[13] In May and June 2012, The Court approved sales transactions comprising substantially all of the Timminco Entities' assets. In their June 7, 2012 Motion, the Timminco Entities sought an extension of the Stay Period to "give the Timminco Entities sufficient time to, among other things, close the transactions relating to the Successful Bid and carry out the Claims Procedure". The Timminco Entities sought court approval of a proposed claims procedure to "identify claims which may be entitled to distributions of potential proceeds of the ... transactions..." The Timminco entities took the position that the Claims Procedure was "a fair and reasonable method of determining the potential distribution rights of creditors of the Timminco Entities".

[14] The mechanics of the CPO are as follows. Paragraph 2(h) of the CPO defines the Claims Bar Date as 5:00 p.m. on July 23, 2012. "D&O Claims" are defined in para. 2(f)(iii):

Any existing or future right or claim of any person against one or more of the directors and/or officers of the Timminco Entity which arose or arises as a result of such directors or officers position, supervision, management or involvement as a director or officer of a Timminco Entity, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including this Claims Procedure whether enforceable in any civil, administrative, or criminal proceeding (each a "D&O Claim") (and collectively the "D&O Claims"), including any right:

- a. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a director or officer may be liable in his or her capacity as such;
- b. in respect of which a director or officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;
- c. in respect of which a director or officer may be liable in his or her capacity as such as a result of any act, omission or breach of duty; or
- d. that is or is related to a penalty, fine or claim for damages or costs.

Provided however that in any case "Claim" shall not include an Excluded Claim.

[15] The CPO appears to bar a person who fails to file a D&O Claim by the Claims Bar Date from asserting or enforcing the claim:

19. This Court orders that any Person who does not file a proof of a D&O Claim in accordance with this order by the claims-bar date **or such other later date as may be**

ordered by the Court, shall be forever barred from asserting or enforcing such D&O Claim against the directors and officers and the directors and officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification. [emphasis added]

Mr. Pennyfeather's Position

[16] Mr. Pennyfeather advances a number of arguments. Most significantly, he argues that it is not fair and reasonable to allow the defendants to bar and extinguish the Class Actions claims through the use of an interim and procedural court order. He submits that the respondents attempt to use the CCAA in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The operation of the fair and reasonable standard under the CCAA calls for the exercise of the Court's discretion to lift the stay and, if necessary, amend the CPO to either exclude the Class Action claims or permit submissions of a class proof of claim.

[17] In support of this argument, Mr. Pennyfeather adds that there is no evidence that any of the Directors who are defendants in the class action contributed anything to the CCAA process, and that the targeted insurance proceeds are not available to other creditors. Thus, he submits, a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

[18] Mr. Pennyfeather advances a number of additional arguments. Because I am persuaded by this first submission, it is not necessary to discuss the additional arguments in great detail. However, I will give a brief summary of these additional arguments below.

[19] First, Mr. Pennyfeather submits, since the stay was ordered, he has attempted to have the stay lifted as it relates to the Class Action.

[20] Second, Mr. Pennyfeather submits that the CPO did not permit the filing of representative claims, unlike, for example, claims processed in *Labourers' Pension Fund of Canada and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078, 100 C.B.R. (5th) 30. Representative claims are generally not permitted under the CCAA and the solicitors for the representative plaintiff do not act for class members prior to certification (see: *Muscletech Research and Development Inc. (Re)* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.)). Therefore, Mr. Pennyfeather submits that the omission in the order obtained by the Timminco entities, of the type of provision contained in the *Sino-Forest* Claims Order, precluded the action that they now assert should have been taken.

[21] Third, Mr. Pennyfeather responds to the significant argument made by the responding parties that the CPO bars the claim. He submits that the Class Action, which alleges, *inter alia*, misrepresentations and breaches of the *Securities Act*, R.S.O. 1990, c. S.5, is unaffected by the CPO. There are several reasons for this. First, the CPO excludes claims that cannot be compromised as a result of the provisions of s. 5.1(2) of the CCAA. Alternatively, even if Mr. Pennyfeather and other class members are not creditors pursuant to section 5.1(2), he submits that Parliament has clearly intended to exclude claims for misrepresentation by directors

regardless of who brought them. In addition, insofar as the Class Action seeks to recover insurance proceeds, the CPO did not, according to Mr. Pennyfeather, affect that claim.

[22] In summary, Mr. Pennyfeather's most significant argument is that the CCAA process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of putative class members should be determined on the merits of the Class Action, which are considerable given the evidence. Further, the lifting of the stay is fair and reasonable in all of the circumstances.

Directors' Position

[23] Counsel to directors and officers named in the proposed class action, other than Mr. Walsh (the "Defendant Directors") submit there are three issues to be considered on the motion: (a) should the CPO be amended to grant Mr. Pennyfeather the authority to file a claim on behalf of the class members in the D&O Claims Procedure? (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, should the claims-bar date be extended to allow him the opportunity to file a late claim against the Defendant Directors? and (c) if Mr. Pennyfeather is permitted to file a late claim against the Defendant Directors, should the D&O stay be lifted to allow the proposed class action to proceed against the Defendant Directors?

[24] The Defendant Directors take the position that: (a) Mr. Pennyfeather does not have the requisite authority and/or right to file a claim on behalf of the class action members and the CPO and should not be amended to permit such; (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, the claims-bar date should not be extended to allow Mr. Pennyfeather to file a late claim; and (c) if Mr. Pennyfeather is permitted to file a late claim, the D&O stay should not be lifted to allow the proposed class action to proceed against the Defendant Directors.

[25] The Defendant Directors counter Mr. Pennyfeather's arguments with a number of points. They take the position that while they were holding office, they assisted with every aspect of the CCAA process, including (i) the sales process through which the Timminco Entities sold substantially all of their assets and obtained recoveries for the benefit of their creditors; and (ii) the establishment of the claims procedure, resigning only after the claims-bar date passed.

[26] The Defendant Directors also submit that Mr. Pennyfeather has been aware of, and participated in, the CCAA proceedings since the weeks following the granting of the Initial Order. They submit that at no time prior to this motion did Mr. Pennyfeather take any position on the claims procedures established to seek the authority to file a claim on behalf of the class members. They submit that, at this point, Mr. Pennyfeather is asking the court to exercise its discretion to (i) amend the CPO to grant him the authority to file a claim on behalf of the class members; (ii) extend the claims-bar date to allow him to file such claim; and (iii) lift the stay of proceedings. They submit that Mr. Pennyfeather asks this discretion be exercised to allow him to pursue a claim against the Defendant Directors which remains uncertified, is in part statute barred, and lacks merit.

[27] Counsel to the Defendant Directors submits that the D&O Claims Procedure was initiated for the purpose of determining, with finality, the claims against the directors and officers. They submit that the D&O Claims Procedure has at no time been contingent on, tied to, or dependent on the filing of a Plan of Arrangement by the Timminco Entities.

[28] Simply put, the Defendant Directors submit that the CPO sets a claims-bar date of July 23, 2012 for claims against Directors and Mr. Pennyfeather did not file any Proof of Claim against the Defendant Directors by the claims-bar date. Accordingly, they submit that the claims against the Defendant Directors contemplated by the Class Action are currently barred and extinguished by the CPO.

[29] The arguments put forward by Mr. Walsh are similar.

[30] Counsel to Mr. Walsh attempts to draw similarities between this case and *Sino-Forest*. Counsel submits this is a case where Mr. Pennyfeather intentionally refused to file a Proof of Claim in support of a securities misrepresentation claim against Timminco and its directors and officers.

[31] They further submit that Mr. Pennyfeather is asking for the Court to exercise its discretion in his favour to lift the stay of proceedings, in order to allow him to pursue a proceeding which has been largely, if not entirely neutered by the Court of Appeal (leave to appeal to the Supreme Court of Canada dismissed). They point out that just like in *Sino-Forest*, to lift the stay would be an exercise in futility where the Court commented that “there is no right to opt out of any CCAA process...by virtue of deciding, on their own volition, not to participate in the CCAA process”, the objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[32] Counsel to Mr. Walsh also takes the position that Mr. Pennyfeather’s only argument is a strained effort to avoid the plain language of the CPO in an effort to say that his claim is an “excluded claim” and therefore a Proof of Claim was never required. Even if Mr. Pennyfeather was right, counsel to Mr. Walsh submits that Mr. Pennyfeather still would have been required to file a Proof of Claim, failing which his claim would have been barred. Under the CPO, proofs of such claims were still called for, even if they were not to be adjudicated.

[33] They note that Mr. Pennyfeather was aware of the CCAA proceeding and the Initial Order. As early as January 17, 2012, counsel to Mr. Pennyfeather contacted counsel for Timminco, asking for consent to lift the Stay.

[34] Counsel contends that the “excluded claim” language that Mr. Pennyfeather relies on is not found in the definition of D&O Claim. Under the terms of the CPO, the language is a carve-out from the larger definition of “claim”, not the subset definition of D&O Claim. As a result, counsel submits that proofs of claim are still required for D&O Claims, regardless of whether they are excluded claims. In that way, the universe of D&O Claims would be known, even if excluded claims would ultimately not be part of a plan.

[35] Mr. Walsh also takes the position that Mr. Pennyfeather made an intentional decision not to file a claim. Mr. Walsh emphasizes that Mr. Pennyfeather had full notice of the motion for the CPO and chose not to oppose or appear on the motion. Further, at no time did Mr. Pennyfeather request the Monitor apply to court for directions with respect to the terms of the CPO.

[36] Mr. Walsh submits he is prejudiced by the continuation of the Class Action and he wants to get on with his life but is unable to do so while the claim is extant.

Law and Analysis

[37] For the purposes of this motion, I must decide whether the CPO bars Mr. Pennyfeather from proceeding with the Class Action and whether I should lift the stay of proceedings as it applies to the Class Action. For the reasons that follow, I conclude that the CPO should not serve as a bar to proceeding with the Class Action and that the stay should be lifted.

[38] As I explain below, the application of the claims bar order and lifting the stay are discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the CCAA. A claim bar order and a stay under the CCAA are intended to assist the debtor in the restructuring process, which may encompass asset realizations. At this point, Timminco's assets have been sold, distributions made to secured creditors, no CCAA plan has been put forward by Timminco, and there is no intention to advance a CCAA plan. It seems to me that neither the stay, nor the claims bar order continue to serve their functional purposes in these CCAA proceedings by barring the Class Action. In these circumstances, I fail to see why the stay and the claim bar order should be utilized to obstruct the plaintiff from proceeding with its Class Action.

The Purpose of Stay Orders and Claims-Bar Orders

[39] For the purposes of this motion, it is necessary to consider the objective of the CCAA stay order. The stay of proceedings restrains judicial and extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. S.C.).

[40] Sections 2, 12 and 19 of the CCAA provide the definition of a "Claim" for the purposes of the CCAA and also provide guidance as to how claims are to be determined. Section 12 of the CCAA states

12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

The use of the word "may" in s. 12 indicates that fixing deadlines, which includes granting a claims bar order, is discretionary. Additionally, as noted above the CPO provided at para. 19 that a D&O Claim could be filed on "such other later date as may be ordered by the Court".

[41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

[43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[44] Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

[45] In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

[46] In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

[47] In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

[48] It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding,

where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

[49] Similar considerations apply to the Stay Order. With no prospect of a compromise or arrangement, and with the sales process completed, there is no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. In this regard, the fact that neither Timminco nor the Monitor take a position on this motion or argue prejudice is instructive.

Applicability of Established Tests

[50] The lifting of a stay is discretionary. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) where relevant, the merits of the proposed action: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156, at para. 27.

[51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[52] These are factors that have been considered by the courts on numerous occasions (see, for example, *Sino-Forest; Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), *Blue Range Resource Corp. (Re)*, 2000 ABCA 285, 193 D.L.R. (4th) 314, leave to appeal to S.C.C. refused, [2000] SCCA No. 648; *Canadian Red Cross Society (Re)* (2000), 48 C.B.R. (5th) 41 (Ont. S.C.); and *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (S.C.)).

[53] However, it should be noted that all of these cases involved a CCAA Plan that was considered by creditors.

[54] In the present circumstances, it seems to me there is an additional factor to take into account: there is no CCAA Plan.

[55] I have noted above that certain delay can be attributed to the CCAA proceedings and the impact of *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, at the Court of Appeal. That is not a full answer for the delay but a partial explanation.

[56] The prejudice experienced by a director not having a final resolution to the proposed Class Action has to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constitutes a degree of prejudice to the defendants, it can be alleviated by requiring the parties to agree upon a timetable to have this matter addressed on a timely basis with case management.

[57] I have not addressed in great detail whether the CPO requires excluded claims to be filed. In my view, it is not necessary to embark on an analysis of this issue, nor have I embarked on a review of the merits. Rather, the principles of equity and fairness dictate that the class action plaintiff can move forward with the claim. The claim may face many hurdles. Some of these have been outlined in the factum submitted by counsel to Mr. Walsh. However, that does not necessarily mean that the class action plaintiff should be disentitled from proceeding.

[58] In the result, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action. The CPO is modified so as to allow Mr. Pennyfeather to file his claim.

Morawetz, R.S.J.

Date: July 7, 2014

TAB 23

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *M. Barrack, J. Willis and M. Shapiro*, for United States Steel Corporation

R. Paul Steep and S. Kour, for the Applicant

A. Mark, R. Chadwick and T. Jackson, for the Province of Ontario

G. Capern, L. Harmer and D. Cooney, for the United Steel Workers Union and
USW Local 8782

S. White, for the United Steel Workers Union, Local 1005

C. Kopach, for Robert and Sharon Milbourne

A. Hatnay and B. Walancik, for the Non-unionized active employees and retirees

R. Staley and K. Zych for the Monitor

HEARD: May 5, 2015

ENDORSEMENT

[1] This was a motion to schedule the timing of the hearing of a motion brought by United States Steel Corporation ("USS") to determine the amount and status of its claims in these proceedings. In particular, the motion sought directions on the extent and nature of production and discovery in respect of certain objections brought by the Province of Ontario (the "Province"), the United Steel Workers, USW Local 8782 and USW Local 1005 (collectively, the "USW"), and Robert and Sharon Milbourne (collectively, the "Milbournes"). The objections raise fundamental issues regarding the determination of claims for which the objecting parties seek an order of "equitable subordination" in proceedings brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[2] The Province, the USW and the Milbournes seek a reduction or a subordination of the USS Claims (as defined below) to the claims of the other creditors of USSC for all purposes of the CCAA proceedings. In particular, they seek such subordination for purposes of determination of

the amount that USS may bid in any credit bid and for purposes of voting to approve any restructuring plan that may be proposed.

[3] At the conclusion of the hearing, the Court advised that, for written reasons to follow, the claims of the Province would be determined pursuant to the Claims Process Order within these CCAA proceedings and established a schedule for the next steps in that determination process. The Court also concluded that the claims of the USW, and of the Milbournes, other than their debt re-characterization claims, were not to be determined pursuant to the Claims Process Order and, after discussion with counsel, scheduled submissions by the parties regarding the appropriate forum for the determination of these claims. This Endorsement sets out the reasons for the Court's decision that the claims of the USW and the Milbournes, other than their debt re-characterization claims, are to be determined outside of the Claims Process Order, as well as the Court's decision regarding the forum for determination of such claims.

Background

[4] On September 16, 2014, U.S. Steel Canada Inc. ("USSC" or the "Applicant") was granted protection under the CCAA pursuant to an initial order of Morawetz R.S.J. (as amended and restated from time to time, the "Initial Order").

[5] USSC's objective in the CCAA process is to restructure its business by implementing either (i) a consensual CCAA restructuring plan, or (ii) one or more sales of its assets and business as a going concern pursuant to a sale and restructuring/recapitalization process that it has commenced and which was approved by the Court pursuant to an order dated April 2, 2015 (the "SARP").

[6] On November 13, 2014, the Court granted a claims process order (the "Claims Process Order") setting out, among other things, the procedure for the filing of proofs of claim, the Monitor's role in the review of claims, and the procedure for the resolution of claims.

[7] The Claims Process Order set out a specific procedure (the "USS Claims Determination Process") for the review and determination of the claims of USS, U.S. Steel Holdings, Inc., U.S. Steel Canada Limited Partnership, and any affiliates of USS, other than USSC or a subsidiary of USSC (the "USS Claims").

[8] The USS Claims Determination Process contemplated that the Monitor would prepare a report detailing its review of the USS Claims and then promptly seek a hearing to schedule a motion to determine such USS Claims. The Claims Process Order provided that the USS Claims would not be determined to be Proven Claims (as defined in the Claims Process Order) without Court approval.

[9] In accordance with the USS Claims Determination Process, USS and its subsidiaries filed 14 proofs of claim with the Monitor, some of which have since been amended. In aggregate, the proofs of claim set out a non-contingent secured claim in the amount of U.S. \$122,471,525, non-contingent unsecured claims in the aggregate amounts of U.S. \$127,855,104 and \$1,847,169,934, and a contingent secured claim in the amount of \$78,761,395.

[10] In connection with the USS Claims Determination Process, the Monitor filed a Seventh Report dated March 9, 2015 (the "Seventh Report") and a Supplemental Seventh Report dated April 29, 2015 (the "Supplementary Report"), describing its review of the USS Claims. The Monitor recommended that USS bring a motion for Court approval of its claims, and that, subject to the Court's determination of any objections to the USS Claims, USS be found to have Proven Claims in the full amounts claimed for the non-contingent claims. The Monitor also recommended leaving the contingent claims to be determined at a later date, as and when appropriate in the proceedings.

[11] On March 13, 2015, in accordance with the Monitor's recommendation, USS served a Notice of Motion for Court approval of the USS Claims.

[12] On March 18, 2015, a hearing to schedule the motion was held. The Court issued an endorsement setting a deadline of April 14, 2015 for the delivery of objections, and requiring the parties to return on April 24, 2015 to address a scheduling and litigation protocol.

[13] On April 14, 2015, four objections to the USS motion (the "Objections") were delivered by the following parties (collectively, the "Objecting Parties"): (i) the Province, (ii) the USW, (iii) representative counsel on behalf of the non-USW active salaried employees and retirees of USSC ("Representative Counsel"), and (iv) the Milbournes, each in their individual capacities as beneficiaries of a retirement benefits contract originally entered into by Stelco Inc. ("Stelco").

[14] On April 24, 2015, counsel to USSC, the Monitor, three of the Objecting Parties (the Province, the USW, and Representative Counsel), and USS appeared in chambers but were unable to settle a process and timetable for the determination of the USS Claims. A further case conference was held on April 30, 2014 to address the process and timetable, at which time it was agreed that the Objection of the Representative Counsel would be deferred and that a hearing would be scheduled for May 5, 2015 to address the process and timetable for the hearing of the Objections of the Province, the USW and the Milbournes.

[15] At the hearing on May 5, 2015, the parties addressed the substantive issue of whether the claims of the Province, the USW and the Milbournes were to be determined pursuant of the Claims Process Order, together with more procedural and timing issues that would follow after such a determination. This Endorsement does not address any of the latter issues for the reason that no material determinations were made other than to set a schedule for a subsequent case management conference to review the status of documentary production and the scheduling of discoveries, and any unresolved issues in respect thereof, regarding the process for determination of the Province's Objection and the similar claims of the USW and the Milbournes.

[16] This Endorsement is divided into three parts. In the first part, the Court summarizes the claims asserted in the Objections of each of the Province, the USW and the Milbournes. In the second part, the Court sets out its reasons for its previously announced decision that the claims of the Province set out in its Objection, and the similar claims of the USW and the Milbournes, would be determined pursuant to the Claims Process Order in the CCAA proceedings but that the remaining claims of the USW and of the Milbournes, set out in their respective Objections, would not. In the third part, the Court sets out its conclusions regarding the proper forum for the determination of these remaining claims of the USW and the Milbournes.

The Objections of the Province, the USW and the Milbournes

[17] The following summarizes briefly the claims set out in the Objections of the Province, the USW and the Milbournes, and adds certain observations concerning these claims that are relevant for the issues addressed in this Endorsement.

The Objection of the Province

[18] The Province says its Objection relates to financial issues, which it describes as relating to the proper characterization of the debt and the validity of the security. While it has provided the list of factual issues for which it seeks production and/or discovery, the Province has not provided any greater clarification regarding the specific legal issues that it intends to raise in respect of the USS Claim.

[19] It is my understanding, however, that, essentially, the Province intends to make two allegations: (1) that given the terms of the USS loans to USSC, and the circumstances in which the loans were made, such loans should substantively be characterized, in whole or in part, as equity; and (2) that given the circumstances in which the loans were made, the security for the loans should be invalidated pursuant to federal and/or provincial legislation pertaining to fraudulent preferences or fraudulent assignments.

[20] Although USS disputes the allegations of the Province in its Objection, USS is prepared to have these issues determined by the Court under the process contemplated by the Claims Process Order. The claim that the USS loans are, in substance, debt and should be so treated for the purposes of these CCAA proceedings is referred to herein as a "debt re-characterization claim".

The Objection of the USW

[21] The Union broadly categorizes its objections as follows:

- (a) an objection to the granting of security interests on the assets of USSC;
- (b) an objection to the characterization of much of the USS Claim as debt when it is properly characterized as equity; and
- (c) an objection grounded in USS's conduct in relation to its Canadian plants, unionized pensioners, pension plan members and beneficiaries, which gives rise to claims of oppression and breaches of fiduciary duty.

By way of overview, the USW submits that USS, as the shareholder of USSC, directed the operations of USSC in a manner that has caused it to significantly underperform, thereby incurring substantial losses rather than achieving profitability and requiring it to incur significant debt. In addition, the USW says that such actions undermined the ability of USSC to meet its on-going funding obligations to the USW pension plans of USSC. The USW argues that, as a result, USS has diluted the potential recoveries of the USW members and the USW pension plan beneficiaries in this CCAA proceeding. In Schedule "A" to this Endorsement, I have set out an

excerpt from the USW Objection which summarizes the claims asserted by the USW in somewhat greater detail.

[22] The USW acknowledges that the first two claims overlap significantly, if not completely, with the claims raised by the Province in its Objection. Accordingly, in this section, I will deal only with the claims of oppression and breaches of fiduciary duty. The following four aspects of these claims are relevant.

[23] First, the USW's claims for oppression and breach of fiduciary duty do not involve a determination that, in substance, the USS loans to USSC are properly characterized as equity, that is, they are not debt re-characterization claims. Instead, for the purposes of these claims, the USW implicitly accepts that such loans are valid debt claims but argues, instead, that, as a result of USS' actions, the USW should be entitled to equitable relief that would have the substantive result of treating some or all of the loans as if they were equity.

[24] Second, as a related matter, the USW claims are not related to the actions of USS in extending the challenged loans to USSC, and in particular do not involve claims based on the terms of the loans or the circumstances in which they were made. Instead, the oppression claim is based on actions of USS that occurred subsequent to the extension of most of the USS loans to USSC and that pertain principally to the effective integration of the manufacturing operations of USSC within the USS group of companies. Similarly, the breach of fiduciary duty claim pertains to the administration of the USW pension plans after USS acquired USSC. This claim has no connection whatsoever to the USS loans to USSC.

[25] The USW claims proceed on the basis that actions of USS resulted in a loss to the USW Beneficiaries (as defined in the USW Objection) that is represented by the diminished recoveries that they will realize in these CCAA proceedings. In essence, the USW argues that USSC would not have needed to commence these CCAA proceedings but for the decisions taken by USS regarding the operations of USSC. As such, the USW claims are fundamentally claims against USS in its capacity as a shareholder of USSC and as an alleged administrator of the USW pension plans, rather than in its capacity as a creditor of USSC.

[26] Third, while the actions upon which the USW bases its action are clear, the nature of the USW claim and the remedy which it seeks can be approached in two different ways.

[27] In its broadest form, the USW relies upon the actions as a basis for application of the doctrine of equitable subordination for which the relief sought would be a subordination of some or all of the USS Claims to the claims of all other creditors of USSC for all purposes of these CCAA proceedings. In this form, the USW claim asserts that the actions of USS caused loss to all of the other creditors of USSC or resulted in an unfair benefit to USS at the expense of all such other creditors. To anticipate a conclusion reached below, this claim cannot proceed within the process contemplated by the Claims Process Order for the reason that the Court lacks the authority under the CCAA to apply the doctrine of equitable subordination.

[28] In its alternative form, the USW Objection asserts claims on behalf of the USW members and its retirees against USS of oppressive behavior for the purposes of section 241 of the *Canada Business Corporations Act*, R.S.O. 1985, c. C-44 and of breach of trust. The USW asserts that

the actions of USS giving rise to such claims caused loss that is specific to such USW members and retirees. Two aspects of the USW claims, as expressed in this manner, are significant for present purposes.

[29] First, these claims are asserted against USS and are grounded in actions of USS, as the controlling stakeholder of USSC, pertaining to the manner in which USSC was operated as a subsidiary of USS from and after 2007. They are not asserted against USSC and, to the extent USSC were to be joined as a party to any proceeding in which the claims were determined, such joinder would be only for procedural purposes.

[30] Second if the USW is successful in its oppression claim or its breach of fiduciary duty claim, any remedy ordered subordinating some or all of the USS Claims would be specific to the USW members and retirees. Because the USW claim is based on an allegation of oppressive behaviour that is specific to the USW members, the relief granted by a court would be directed to, and limited to, rectification of the oppressive conduct suffered by such members. It would not extend to other stakeholders of USSC. Any other stakeholder who also considered that the actions of USS constituted oppressive conduct in respect of such stakeholder would have to institute a separate action based on its specific circumstances. In this regard, the Province, which is the other major stakeholder of USSC, while it supports the USW Objection, has not commenced a similar action and, does not suggest that it would be entitled to benefit from any equitable relief granted to the USW in respect of the USW's oppression claim.

[31] Similarly, the USW claim that is based on allegations that USS breached fiduciary duties owed to USW members and pensioners in respect of the USW pension plans is necessarily limited to claims in respect of alleged breaches of duties alleged to be owing to such individuals personally. Any remedy granted would therefore be specific to these individuals, and the loss that they suffered, rather than in favour of all stakeholders.

The Objection of the Milbournes

[32] The Milbournes also submit that the USS Claims should be dismissed in their entirety or subordinated to the claims of the other unsecured creditors of USSC.

[33] Their Objection is also based on the actions of USS as the controlling shareholder of USSC, which are summarized as follows:

All of the USS Claims arise either as a result of USS's accounting and legal treatment of its investment in the acquisition of Stelco or as a result of its accounting treatment of the normal costs of, and operating results from, USS' fully integrated operation and management of the acquired assets [being the assets of USSC] as part of its North American Flat Rolled Group and are either the result of transactions between itself and non-arm's length entities over which it had dominance and exercised total control at all material times, or are expenses incurred in the normal course of operating its flat rolled steel mills.

[34] Insofar as the Milbournes challenge the treatment of USS' investment in the acquisition of Stelco Inc., the Milbournes appear to raise claims similar to those asserted by the Province, that is a debt re-characterization claim. However, the principal assertion in the Milbournes'

Objection is that, in its management of the former assets of Stelco as part of its North American Flat Rolled Group of steel plants, USS took actions to idle the blast furnaces and steelmaking units of USSC which resulted in significant operating losses to USSC while USS continued to supply the former customer base of Stelco from its steel plants in the United States. This claim is based on factual assertions similar to, although not identical to, the facts asserted by the USW in respect of the oppression claim and claim for breach of trust asserted on behalf of its members. It is not related in any manner to the actions of USS in extending the challenged loans to USSC or the terms thereof. As with the USW oppression claim, the relief sought is an order for subordination of some or all of the USS Claims. Given the relationship of the Milbournes to the situation as pension recipients, the Milbournes' Objection is essentially a claim for breach of a fiduciary duty owed by USS to them personally, although in the discussion below I have also considered the possible expression of the Milbournes' Objection as a claim for application of the doctrine of equitable subordination.

Analysis and Conclusions Regarding the Process for Determination of the Claims of the USW and the Milbournes other than their Debt Re-Characterization Claims

[35] To address the issue in this section of the Endorsement, I will first set out the applicable statutory provisions and the authority of the Court to adjudicate claims in CCAA proceedings. I will then address the issue of whether the claims of the USW and the Milbournes, other than their debt re-characterization claims, are properly determined within the summary process provided for in the Claims Process Order.

The Applicable Statutory Provisions

[36] The following provisions of the CCAA are relevant for the issues on this motion:

2. In this Act,

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

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

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

“Equity Interest” means

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

(b) in the case of an income trust, a unit in the income trust -- or a warrant or option or another right to acquire a unit in the income trust -- other than one that is derived from a convertible debt;

6. (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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.

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, *the amount is to be determined by the court on summary application by the company or by the creditor*; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner

as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, *the amount is to be determined by the court on summary application by the company or the creditor.* [emphasis added]

22.1 Despite subsection 22(1) creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to “*date of the bankruptcy*” is to be read as a reference to “*day on which proceedings commence under this Act*”;

(b) to “*trustee*” is to be read as a reference to “*monitor*”; and

(c) to “*bankrupt*”, “*insolvent person*” or “*debtor*” is to be read as a reference to “*debtor company*”.

[37] Section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the “BIA”), which is referenced in section 2 of the CCAA, provides that a “claim provable in bankruptcy” includes any claim or liability provable in proceedings under the BIA by a creditor. “Creditor” is defined in s. 2 of the BIA as a person having a claim provable as a claim under the Act. Section 121(1) of the BIA describes claims provable as follows:

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.

The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination

[38] An important issue on this motion is the authority of the Court to order that part or all of the USS Claims be re-characterized as equity for purposes of these CCAA proceedings or subordinated to the claims of all other unsecured creditors. The two determinations are not synonymous.

[39] The re-characterization of a debt claim as equity proceeds on the basis that a creditor's claim is, in substance, an “Equity Claim” for purposes of the CCAA, based on the terms of the

debt claim and the circumstances in which the debt claim arose, notwithstanding the creditor's characterization of its claim as debt.

[40] Equitable subordination proceeds on the basis that it is equitable to subordinate in whole or in part an otherwise valid debt claim based on some form of inequitable conduct on the part of a creditor that has resulted in loss to the other creditors of a debtor corporation generally or that has conferred an unfair advantage on the creditor. In this regard, I note that, in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S. C. R. 558 at p. 609, Iacobucci J. referred to the following three-part test for the application of the principle of equitable subordination in the United States: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

[41] For the following reasons, I conclude that the Court has the authority to re-characterize a debt claim as equity in accordance with the test for equity implied by the definition of an "Equity Claim" or to invalidate security in favour of a creditor if the granting of such security constituted a fraudulent preference or a transaction at an undervalue. However, I am not persuaded that the Court has the authority under the CCAA to subordinate a valid debt claim to the claims of other creditors of the debtor corporation based on the actions of the creditor pursuant to the principle of equitable subordination.

[42] The CCAA establishes a structure for the adjudication of claims of creditors. It contemplates two categories of claims – "Claims" and "Equity Claims". Under the CCAA, a creditor's valid "Claim" is recognized for all purposes as such unless the Court determines that it shall be treated as an "Equity Claim" for purposes of proceedings under the statute. The definition of "Equity Claim" provides that an "Equity Claim" is "a claim that is in respect of an equity interest". "Equity Interest" is, in turn, defined in very specific terms to mean, in the case of a corporation, a share of the corporation.

[43] The CCAA also provides that, in certain circumstances, creditors can challenge prior transactions of the debtor corporation with a view to invalidating such transactions. Section 36.1 provides, among other things, that the provisions of the BIA pertaining to fraudulent preference transactions and transactions at an undervalue apply to proceedings under the CCAA on the basis provided for therein. Such provision has not been the subject of any litigation of which the Court is aware. However, on its face, such provision appears to be available to creditors to invalidate security granted by a debtor corporation in favour of a creditor if a fraudulent preference under section 95, as amended by section 36.1, can be demonstrated or possibly if a transfer at undervalue under section 96, as so amended, can be established.

[44] Given this framework, the Court has authority to determine whether a valid debt claim is, in substance, an equity claim, that is, to find that a debt claim should be re-characterized as equity. This is inherent in the definition of "Equity Claim" which, by the language of that definition, contains the test to be applied by a court - whether the claim represents, in substance, a share of the debtor corporation. As mentioned, the Court also has the authority to, in effect, subordinate a secured claim of a creditor if the Court determines that the security granted by the debtor constituted a fraudulent preference or a transaction at an undervalue pursuant to the

provisions of section 36.1 of the CCAA. Such a determination proceeds, however, on the basis of a determination that the actions and intentions of the debtor corporation constituted a fraudulent preference, or that the nature of the transaction itself together with the intentions of the debtor corporation, constituted a transaction at an undervalue. Neither a re-characterization of a debt claim nor an invalidation of security pursuant to section 36.1 of the CCAA would engage the principle of equitable subordination inasmuch as neither determination would address the question of whether the actions of the creditor call for a remedy in favour of the other creditors of the debtor corporation in the form of an equitable subordination of the creditor's claim.

[45] In this CCAA proceeding, however, the principal actions upon which the USW and the Milbournes base their claim of subordination do not fall within the circumstances that would trigger a remedy in the form of a re-characterization of debt as equity or in the form of an invalidation of security under section 36.1. The Court must therefore address the issue of whether a court also has the authority to determine that a valid "Claim" that is not an "Equity Claim", and that was not the subject of a transaction that falls within the circumstances addressed by section 36.1 of the CCAA, should be subordinated to the claims of the other unsecured creditors of a debtor corporation in reliance on equitable principles based on actions of the creditor.

[46] I am not aware of any Canadian case law in which the doctrine of equitable subordination has expressly applied. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, Iacobucci J., speaking for the Supreme Court, declined to express a view on whether the doctrine exists in Canada. In this proceeding, neither the USW nor the Milbournes submits that the doctrine exists in Canada. However, they argue that the Supreme Court has not excluded the possibility of application of the doctrine. They argue that, in addition to the authority to grant an order re-characterizing debt as equity, the Court also has the authority to grant an order of equitable subordination in the exercise of its statutory jurisdiction under section 11 of the CCAA.

[47] If it exists, the authority for the Court's jurisdiction to impose equitable subordination must be found in the authority granted to a court under section 11 of the CCAA. As set out above, section 11 provides that "the court ... 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" (*italics added*).

[48] Given the definition of "Equity Claim" and the scope of section 36.1 of the CCAA, I am not persuaded that a court has authority under section 11 of the CCAA to subordinate a valid debt claim to the claims of other creditors, based on the actions of the creditor pursuant to the principle of equitable subordination as that doctrine is understood in the United States.

[49] There is no case law supporting such an authority. Moreover, given the silence of the Supreme Court on this issue when presented with the opportunity to affirm its existence in Canadian law, one might infer that the Supreme Court has, in effect, rejected the principle of equitable subordination. As mentioned, the Supreme Court refused to endorse the principle outside of the CCAA in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*. More recently, the Supreme Court also refused to endorse the principle within the operation of the CCAA: see, in particular, Deschamps J. in *Sun Indalex Finance, LLC v. United Steel Workers*,

[2013] 1 S.C.R. 271 at para. 77. Insofar as the issue remains open, however, I am of the opinion that the CCAA indicates an intention on the part of Parliament to exclude equitable subordination claims based on the conduct of a creditor for the following reason.

[50] Parliament could have provided the authority to order that a “Claim” should be treated as a subordinated claim, or as an “Equity Claim”, based on conduct of the creditor. It chose not to do so. There is no language in the definition of “Equity Claim” that gives a court the authority to consider conduct of the creditor, including without limitation conduct in its capacity as a shareholder or as an alleged administrator of a pension plan, as a basis for subordinating a valid debt claim to the claims of other creditors, secured or otherwise. Similarly, Parliament could have drafted section 36.1 of the CCAA more broadly to extend beyond the specific circumstances in sections 95 and 96 of the BIA. It has chosen instead not to make any such provision in respect of the authority of a court under the CCAA.

[51] In these circumstances, the absence of any provision that would permit the application of the doctrine of equitable subordination must be taken as indicative of an intention to exclude the operation of the doctrine under the CCAA. As a matter of statutory interpretation, therefore, I consider that the language of the definition of an “Equity Claim” and of the provisions of section 36.1 operates as a “restriction set out in the Act” for the purposes of section 11 of the CCAA which has the effect of limiting the authority of the Court in any determination regarding an “Equity Claim” or in any proceeding brought under section 36.1.

[52] I note that the conclusion expressed herein is consistent with the views expressed by Pepall J. (as she then was) in *Nelson Financial Group Ltd., Re.*, 2010 ONSC 6229 (S. Ct.) at para. 34 in respect of actions of a debtor corporation in relation to the issuance of an equity interest:

In substance, the Styles’ claim is for an equity obligation. At a minimum, it is a claim in respect of an equity interest as described in section 2 of the CCAA. Parliament’s intention is clear and the types of claims advanced in this case by the preferred shareholders are captured by the language of the amended statute. While some, and most notably Professor Janis Sarra, advocated a statutory amendment that provided for some judicial flexibility in cases involving damages arising from egregious conduct on the part of a debtor corporation and its officers, Parliament opted not to include such a provision. Sections 6(8) and 22.1 allow for little if any flexibility. That said, they do provide for greater certainty in the appropriate treatment to be accorded equity claims.

I acknowledge that the issue raised in *Nelson* was whether the actions of the debtor corporation could create a debt obligation. However, I do not see any difference in principle, for present purposes, between the circumstances in *Nelson* and the circumstances of the present case, in which it is suggested that the actions of the creditor could give rise to an “Equity Claim”, that is, could support the conclusion that a broader test would apply beyond that contemplated by the definition of an “Equity Claim”.

[53] In addition, I note that the Court must also have regard to the caution articulated by Deschamps J. in *Sun Indalex* at para. 82 that “courts should not use equity to do what they wish

Parliament had done through legislation.” As addressed above, Parliament could have expressly introduced the law of equitable subordination into the CCAA at the time of the most recent amendments but chose not to do so. The Court must respect that policy decision.

Analysis and Conclusions Regarding the Process for Adjudication of the Equitable Subordination Claims of the USW and the Milbournes

[54] In furtherance of the determination of the secured and unsecured claims of USSC, including the USS Claims, the Court issued the Claims Process Order. It is agreed that the claims contemplated by the Objections of the Province and the USW, to the extent they constitute debt re-characterization claims and claims for the invalidation of security based on allegations of a fraudulent preference, a transaction at an undervalue, or similar concepts under provincial legislation, will be addressed pursuant to such process. The principal issue on this motion is whether the remaining claims described in the Objections of the USW and the Milbournes (herein, the “Subordination Claims”) are properly addressed pursuant to the process set out in the Claims Process Order.

[55] As mentioned, the Court advised the parties at the conclusion of the hearing on the motion that it had concluded that the Subordination Claims were not appropriately dealt with pursuant to the Claims Process Order. I reach this conclusion for the following reasons.

[56] For the reasons set out above, I have concluded that the CCAA grants a court the following authority regarding the determination of the Objections of the Province, the USW and the Milbournes in these CCAA proceedings. First, the Court has the authority to address the debt re-characterization claims of the Province, the USW and the Milbournes that some or all of the USS Claims are “Equity Claims” according to the test implied by the definition of an “Equity Claim”. Second, the Court has the authority to determine whether any security for the USS Claims should be invalidated pursuant to the provisions of section 36.1 of the CCAA. I would note that I am not addressing in this Endorsement whether such authority also extends to similar proceedings in respect of provincial insolvency legislation. Third, however, the Court does not otherwise have the authority to order that some or all of the USS Claims, if otherwise valid, shall be subordinated to the claims of the other creditors of USSC for the purposes of the CCAA proceedings based on application of the doctrine of equitable subordination to the actions of USS.

[57] As discussed above, the Subordination Claims of the USW and the Milbournes can be approached in two ways. Insofar as the Subordination Claims are based on application of the doctrine of equitable subordination, it necessarily follows from the conclusions set out above that the Court does not have the authority to determine the Subordination Claims pursuant to the Claims Process Order or otherwise.

[58] There remains a question, however, of the proper means of addressing the Subordination Claims of the USW and the Milbournes insofar as they are approached as claims of oppression and breach of fiduciary duty. Approached in this manner, the Subordination Claims are clearly third-party claims between USS and each of the USW and the Milbournes. The issue in the remainder of this section is therefore whether such third-party claims fall to be determined within the process contemplated by the Claims Process Order. I find that such claims

are not properly determined within such process by virtue of both the express language of the Claims Process Order as well as the provisions of the CCAA.

[59] The CCAA is a facilitative statute aimed at allowing financially distressed businesses to devise a plan of compromise or arrangement with their creditors with a view to becoming a viable business again. Section 19(1) of the CCAA provides, in effect, that a plan of compromise or arrangement may only deal with claims that relate to debts or liabilities to which a debtor company is subject at the time of commencement of proceedings under the CCAA or may become subject, prior to sanctioning of a plan of arrangement, by reason of an obligation incurred before the date of commencement of such proceedings.

[60] Section 20(1) provides the manner in which the amount of claims of secured and unsecured creditors are to be determined for the purposes of the CCAA. In particular, in the present circumstances, paragraphs 20(1)(a)(iii) and 20(1)(b) provide that “the amount is to be determined by the court on summary application by the company or the creditor”, in respect of unsecured and secured claims, respectively.

[61] Neither the Claims Process Order nor the CCAA contemplate that inter-creditor claims will be addressed, or will be relevant, to a plan of arrangement or compromise under the CCAA.

[62] The Claims Process Order addresses the determination of “Claims” as defined therein. The relevant provisions of the definition of a “Claim” are as follows:

- (i) *any right or claim of any Person that may be asserted or made in whole or in part against the Applicant, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts existing prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA*

had the Applicant become bankrupt on the Filing Date and includes an Equity Claim and a Secured Claim; ... [emphasis added]

[63] As indicated in the italicized language, the definition of a "Claim" is restricted to a claim that may be asserted against USSC. Accordingly, on the plain reading of the Claims Process Order, the claims asserted by the USW and the Milbournes do not give rise to a "Claim" for purposes of the Claims Process Order. This restriction of the Claims Process Order to determination of claims asserted against USSC is also consistent with the language, and the policy, of the CCAA.

[64] In this regard, the Claims Process Order is consistent with, and reflects, the approach contemplated by section 20(1) of the CCAA insofar as it provides for a summary application to resolve the determination of any "Claim" under the CCAA. As set out above, a "Claim" for such purposes under the CCAA is a claim against the debtor company, in this case USSC. It does not extend to inter-creditor claims of the nature asserted by the USW and the Milbournes.

[65] The CCAA is directed towards the creation, approval and implementation of a plan of arrangement or compromise proposed between a debtor company and its secured and unsecured creditors, or any claim thereof. Section 19 sets out the only claims that may be dealt with by a compromise or arrangement. Section 19 uses the defined term "claim" throughout, evidencing an intention that only claims against a debtor company are to be the subject of a plan of arrangement or compromise under the CCAA. Similarly, as mentioned, section 20 addresses the determination of claims for the purposes of the CCAA. Again, the operative concept is a "claim" as defined under the CCAA. In addition, pursuant to section 22, the debtor company may establish classes of creditors for purposes of voting upon a plan of arrangement. Pursuant to section 22(2), the factors that determine a commonality of interest for inclusion of creditors in the same class are related to the "claims" of such creditors, as defined in section 2 of the CCAA. In short, the CCAA does not contemplate incorporation of inter-creditor claims into any plan of arrangement or compromise or into the voting process in respect of any proposed plan.

[66] There is, in fact, a strict separation between claims between a creditor and a debtor corporation, on the one hand, and between or among creditors, on the other hand. The former are determined pursuant to the summary application procedure, or otherwise, pursuant to section 20 of the CCAA. The Court's determination of such claims governs for all purposes of the CCAA proceeding proper. The latter are determined outside the process contemplated by section 20 of the CCAA unless specifically incorporated into the restructuring plan as approved by the parties or otherwise ordered. The Court's determination of such claims would govern only the respective rights and obligations of the particular creditors with respect to actual distributions by the debtor corporation.

The Forum for the Remaining Objections

[67] Given the foregoing determination, the Court must also address the forum for determination of the Subordination Claims of the USW and the Milbournes. For clarity, for the reason set out above, in considering this issue, I approach the Subordination Claims of the USW and the Milbournes as claims of oppressive behavior and of breach of fiduciary duty asserted by these parties against USS for which the remedy sought is an order subordinating some or all of the USS Claims to the claims of these parties.

[68] USS makes a number of arguments against determination of the Subordination Claims against it within the CCAA process. First, it argues that use of the CCAA proceedings to adjudicate inter-creditor claims not involving the debtor company is an impermissible use of the CCAA proceedings with the result that a court would lack jurisdiction to determine such an action. Second, USS argues that the Subordination Claims can only justify a monetary award if successful, which can just as easily be paid by USS directly out of its own assets as it could be paid by USSC pursuant to a plan of arrangement, even if subordination of the position of USS were ordered. Third, USS argues that it would be prejudiced in four respects from a procedural and/or substantive perspective if the Subordination Claims were determined under the CCAA process. Lastly, USS argues that the adjudication of the Subordination Claims within the CCAA process would complicate the adjudication of those claims by, for example, potentially involving unnecessary parties such as USSC and the Monitor. Conversely, it says that any efficiencies associated with determination under the CCAA process could equally be achieved outside that process by having a judge familiar with the CCAA proceedings hear the actions.

[69] The USW and the Milbournes make a number of different arguments which will be addressed in the analysis below. The Province supports the USW, principally on the basis that, if the USW were successful in either of its Subordination Claims, it would be entitled to relief that would include relief in respect of distributions under any plan of arrangement. On this basis, the Province argues that the Subordination Claims are sufficiently related to the CCAA proceedings that a timely and orderly resolution of these claims is necessary for a successful plan of arrangement.

[70] I propose to address the USW claims and the Milbourne claims in turn. Before doing so, however, I will address the threshold issue of whether the Court has the authority to order that these claims be determined within this CCAA process. In addition, I will also set out certain observations that inform the conclusions below.

The Jurisdictional Issue

[71] As mentioned, USS argues that the Court lacks jurisdiction to hear the USW's oppression and breach of fiduciary duty claims under the CCAA proceedings. It says that the use of the CCAA proceedings to determine inter-creditor claims not involving the debtor company is not permissible under the CCAA as such use does not further the purpose of the CCAA. In support of its position, USS relies on dicta of Blair J.A. in *Stelco Inc., Re*, (2005), 78 O.R. (3d) 241 (C.A.) [*Stelco*] at para. 32, which also cited with approval the statement of Paperny J. in *Pacific Coastal Airlines Ltd. v. Air-Canada*, [2001] B.C.J. No. 2580 (B.C.S.C.) at para. 24.

[72] I acknowledge that the purpose of the CCAA is to facilitate a compromise or arrangement between an insolvent debtor corporation and its creditors to allow the business to continue as a going concern. Accordingly, in most situations, it would be expected that the resolution of inter-creditor disputes would not further such process and may, in fact, delay and possibly hinder such process. In such circumstances, there is no reasonable basis for a determination of such claims within the CCAA process.

[73] The issue for the Court, however, is whether the broad jurisdiction of a court granted under section 11 of the CCAA permits a court to exercise its discretion to determine inter-

creditor claims within a CCAA process if it determines that, in its judgment, such action would further the purposes of the CCAA. USS argues, in effect, for an inflexible rule that excludes such a possibility. I am not persuaded, however, that this is correct as a matter of the statutory interpretation of section 11 of the CCAA. I am also not persuaded that the case law relied upon by USS precludes such an approach.

[74] On its face, section 11 of the CCAA confers broad authority on a court. As mentioned above, it provides that, subject to the restrictions set out in the CCAA, a court may make “any order that it considers appropriate in the circumstances”. It is not suggested that there is any express restriction in the CCAA that prevents a court from ordering that inter-creditor claims, such as the Subordination Claims, shall be heard under the CCAA proceeding outside the process contemplated by the Claims Process Order.

[75] Case law establishes that the authority of a court under section 11 is to be interpreted broadly subject, in any particular case, to satisfaction of the baseline requirements of “appropriateness, good faith and due diligence”: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70. In the present case, USS raises the consideration of appropriateness.

[76] In *Century Services*, the Supreme Court defined the test for appropriateness as “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”. The application of this test argues against a hard and fast rule of the nature implied by USS and in favour of a more flexible rule that addresses, in any particular case, whether determination of inter-creditor issues will, in such case, further the remedial purpose of the CCAA.

[77] Two further observations in *Century Services* support this conclusion.

[78] First, at para. 60, the Supreme Court stressed that, in exercising a court’s authority under the CCAA, the broader public interest may support determination of particular actions in a CCAA proceeding that would not otherwise be addressed within the CCAA process:

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 ... 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 ... 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 ... [citations omitted]

[79] In addition, the Supreme Court noted with approval in para. 61 that, in exercising authority under the CCAA, and in particular under section 11 of the CCAA, courts must necessarily be flexible and innovative in order to further efforts to achieve the remedial purposes of the CCAA.

[80] All of these considerations argue in favour of a broad authority under section 11 that does not preclude the determination of inter-creditor claims within CCAA proceedings in appropriate circumstances. I do not suggest that such circumstances are presented in most circumstances before the courts. I do, however, think that the discretion or authority of a court under section 11 of the CCAA extends to the determination of inter-creditor matters within a CCAA proceeding if, on balance, such action would appear to further the remedial purpose of the CCAA.

[81] I turn then to the two authorities upon which USS relies. I do not read either of these cases as addressing the issue before the Court on this motion.

[82] In *Re Stelco Inc.*, the Court of Appeal addressed adjudication of an inter-creditor dispute in the context of the issue of classification of creditors for purposes of a vote on a plan of arrangement. At para. 30, Blair J.A. refers to the principle of that case in stating that “the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other.” This case therefore does not address whether the inter-creditor issue was appropriately dealt with inside or outside of the CCAA process. In fact, in the end, the plan of arrangement made provision for a determination of that issue within the CCAA proceedings after implementation of the plan.

[83] The circumstances in *Pacific Coastal Airlines* were also very different from the present circumstances. In that case, the tort claim against Air Canada was not connected in any way to the restructuring of Canadian Airlines. The issue was whether the plaintiff retained a claim after implementation of the plan of arrangement of Canadian Airlines. The plan of arrangement released the plaintiffs' claim against Canadian Airlines but not against its parent, Air Canada. Accordingly, the statement of Paperny J. at para. 24 of *Pacific Coastal Airlines* that “it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company” addresses a totally different situation from the present circumstances.

[84] Based on the foregoing, I conclude that the Court has authority under section 11 of the CCAA to order that the Subordination Claims be determined by a process within the CCAA proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely to further the remedial purpose of the CCAA.

Preliminary Observations

[85] The following four general observations establish the framework within which the Court has reached the conclusions in this section of this Endorsement.

[86] First, USS argues that it would be prejudiced in its ability to assert certain defences to the claims of the USW if the Subordination Claims were adjudicated under the CCAA proceedings. I do not believe this to be correct.

[87] To the extent that the determination of the Subordination Claims were to proceed under the CCAA, it would proceed outside of the procedure provided for under the Claims Process Order. Accordingly, the Subordination Claims would have to be asserted in a separate process determined by the Court. I see no reason why such a process could not substantially reflect the normal litigation process contemplated by the *Rules of Civil Procedure*, including an exchange of pleadings, the right to pre-trial motions under, among other provisions Rules 20 and 21 of the *Rules of Civil Procedure*, and appropriate documentary production and discovery.

[88] Second, in their submissions, each of USS and the USW mischaracterizes important aspects of the Subordination Claims that are significant for present purposes.

[89] USS argues that the USW would only be entitled to a monetary award if it were successful on either or both of its claims. However, as pleaded, the USW seeks an order of subordination if it were successful based on the broad remedial statutory authority of a court in respect of the oppression claim and the equitable authority of a court in respect of its breach of fiduciary claim. It is not appropriate for the Court to take a position on this motion on the relative likelihood of such relief in the event the USW were successful on either or both of these claims. The Court must instead proceed on the basis that there is a possibility that such relief might be ordered.

[90] In such event, however, as mentioned, given that such relief would be ordered in the context of an inter-creditor claim, the relief would be limited to an order affecting the priority entitlement to any proceeds of distribution pursuant to the plan of arrangement as between the USW and USS. To be clear, given that any such claim would not be a "Claim" to be determined pursuant to the Claims Process Order, there is no basis on which any relief could extend more generally for the benefit of creditors or other stakeholders who are not a proper party to the action between the USW and USS. Accordingly, the USW's claim for "equitable subordination" of some or all of the USS Claims in the context of its claims for oppression and breach of fiduciary duty is effectively limited to a claim for subordination of the proceeds receivable by USS from USSC pursuant to any plan of arrangement to the extent of any claim of the USW against USSC. The Milbournes' claim for "equitable subordination" in the context of their claims for breach of fiduciary duty is also effectively limited in the same manner.

[91] More generally, the USW suggests that, if successful, the equitable remedies in its favour could directly affect, among other things, the sale of the assets of USSC and any approval of a plan of arrangement in which USSC proposes to make any payment or give any credit to USS. As mentioned, it also suggests that the equitable remedies could disallow or subordinate some or all of the USS Claims, or set off some or all of the USS Claims against not only the USW claim but also the claims of the other creditors of USSC. I understand this submission to contemplate the operation of such remedies within the plan of arrangement rather than outside it.

[92] This concept of the remedies available to the USW is also inconsistent with the earlier determination in this Endorsement that the USW claims are not "Claims" against USSC to be dealt with in the Claims Process Order. Determination of the USW Claims under the CCAA process cannot obscure the difference in nature, and consequence, of inter-creditor claims and claims against USSC. In particular, determination of the inter-creditor claims under the CCAA proceedings does not have the result that any such claims, as so determined, will be applicable in

respect of any plan of arrangement and compromise in the proceedings without express inclusion of such claims in the plan of arrangement by the debtor company and approval of all the stakeholders. Nor would any such determination affect or alter the amount of a creditor's claim that the creditor could bid in any sales process conducted in the CCAA proceedings.

[93] Third, similarly, inclusion of the determination of the USW's claims within the CCAA process does not imply, as the USW appears to assume, that such determination must be completed before the SARP process is completed or any plan of reorganization is approved. Clearly, resolution of such claims as quickly as possible is highly desirable as addressed further below. However, as inter-creditor claims, the timing of the determination of such claims is not tied to the timing of the various actions of USSC in formulating and proposing a plan of arrangement.

[94] Fourth, given the inherent jurisdiction of a court to control its own processes and the fact that the inter-creditor issues raised by the USW and the Milbournes are not to be determined within the process contemplated by the Claims Process Order, the Court also retains the authority to require, at a later date, that the claims of either or both of the USW and the Milbournes be continued in proceedings outside of the CCAA. Such a determination would be appropriate if, at such time, the Court is of the opinion that continuation of a process for determination of such claims within the CCAA proceeding no longer furthers the remedial purpose of the CCAA.

The Forum for Determination of the USW Subordination Claims

[95] I turn then to the issue of whether the USW oppression and breach of fiduciary claims against USS, as set out in the USW Objection, should be determined within these CCAA proceedings or in a separate action in the Superior Court outside of these proceedings. The comparable question regarding the Milbournes' Subordination Claims will be addressed in the next section.

[96] As set out above, there is little case law on the considerations which should inform the Court's decision. As a practical matter, the easiest answer would be to exclude the USW claims from the CCAA proceedings on the basis proposed by USS – that is, as inter-creditor claims they are not contemplated by the provisions of section 20 of the CCAA. Moreover, there is always the concern that, for strategic purposes, either or both of the USW or USS will seek to tie resolution of these claims to the completion of the SARP or the approval and implementation of a plan of arrangement notwithstanding the Court's determination, for the reasons above, that these are separate and unconnected issues.

[97] Nevertheless, I think there are good reasons in the particular circumstances of this case to order that determination of the USW Subordination Claims should proceed within the CCAA process. In reaching this conclusion, the guiding principle is whether, on balance, such an approach to the determination of the USW Subordination Claims would render a successful plan of arrangement more or less likely. In this regard, the following considerations are relevant.

[98] First, the circumstances giving rise to the USW Subordination Claims are unique in the context of a CCAA restructuring. USS is the predominant creditor of USSC. It has also controlled USSC since 2007. It is important to recognize that the USW position that USS must

bear the financial consequences for the circumstances in which USSC finds itself is honestly and forcefully asserted. Whether there is any legal merit in the specific claims that the USW asserts is not being determined at this time. Under certain scenarios, however, as a practical matter, a resolution of the legal viability of these claims as soon as possible could be an important factor in realising a successful plan of arrangement, insofar as USW support for any such plan is necessary.

[99] Second, as a related matter, it is possible that inclusion of the process for determination of the USW claims within the CCAA process will allow for a more expeditious process based on the dynamic of the related CCAA process. In any event, without in any way intending to cast aspersions on the motives of any of the parties that would be involved in the determination of the USW Subordination Claims, I think it is probable that the process of determining such claims outside the CCAA process would, as the Province suggests, involve protracted and more expensive litigation if any connection to the dynamic of the CCAA process is removed.

[100] Third, as a related matter, inclusion of the determination of the USW Subordination Claims within the CCAA process will permit consideration by a court on an expeditious basis of a certain number of threshold issues pertaining to the USW claims that have been raised by USS and USSC. In addition, the USW says it continues to be prepared to work co-operatively with USS and USSC to ensure that the USW Objection is resolved quickly and efficiently. To the extent it is possible within the CCAA proceedings to significantly advance identification of the factual basis upon which the USW Subordination Claims are asserted, and consideration of the legal merit of such claims, it is possible that the prospects for a negotiated arrangement among the parties would be furthered.

[101] Lastly, as mentioned, I am not persuaded that USS would be prejudiced, or that the USW would gain a tactical advantage, by inclusion of the USW Subordination Claims within the CCAA process, given the procedural approach to determination of those claims described above. In particular, I do not consider that USS would be prejudiced in respect of any of the four specific matters raised by it for the following reasons.

[102] First, inclusion of the claims within the CCAA process does not remove the need for the USW to assert claims based on recognized principles of law – in this case, oppressive behaviour under the *Canada Business Corporations Act* and breach of fiduciary duty under traditional principles of the law of equity as supplemented by applicable statutory provisions. The CCAA does not create or establish any new rights, or remove or affect, any existing defences of either of the parties. Accordingly, determination of the USW claims within the CCAA proceedings would still require the USW to establish that it had standing as a “complainant” under section 238 of the CBCA. Second, there is nothing in the procedures governing the conduct of CCAA proceedings that precludes a costs award in respect of inter-creditor claims in appropriate circumstances in the discretion of the court. Third, I am not persuaded that appeal rights from a determination of inter-creditor claims in a proceeding conducted within the CCAA proceedings should be subject to any different standard from that which would apply in respect of an appeal from a determination in a separate action. In particular, there is nothing in the CCAA that otherwise alters or narrows rights of appeal in the circumstances contemplated in this Endorsement. It is also important to note that the factors referred to by Blair J.A. in *Stelco* at para. 15 that result in leave being granted only sparingly in CCAA matters – the “real-time” dynamic and the

discretionary character underlying many orders under the CCAA – would not be present in any meaningful way in respect of any determination under the CCAA proceedings of the USW Subordination Claims. Lastly, USS submits that the USW is positioning itself to seek a holdback or escrow arrangement within the CCAA proceedings without having to satisfy the requirements for pre-judgement relief. This concern is entirely speculative and premature. In any event, any such request would require an order of the Court in the exercise of its discretion. I do not think that the considerations that would govern the exercise of that discretion in CCAA proceedings would differ from the applicable considerations in respect of a request for such relief in a separate proceeding commenced in the Superior Court.

The Forum for Determination of the Milbournes' Subordination Claim

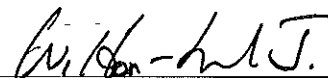
[103] The Milbournes also seek to have the Subordination Claim raised in the Milbourne Objection determined within the CCAA proceeding.

[104] The argument for doing so is not a strong one. It is far less clear that determination of the claim will further the remedial purpose of the CCAA proceeding of USSC. In particular, the Milbournes have no continuing relationship with USSC. Other things being equal, the Court would be inclined to require the Milbournes to commence a separate action in the Superior Court.

[105] However, the Subordination Claim of the Milbournes overlaps substantially with the Subordination Claims of the USW. In these circumstances, considerations of efficiency and the avoidance of a multiplicity of actions, with the possibility of conflicting judgments by different courts, argue for determination of all of these claims within the CCAA proceedings so long as the corresponding USW claim is also being determined within the CCAA proceeding. In my view, these latter considerations should be determinative in the present circumstances.

Conclusion

[106] The issues addressed in this Endorsement have been superseded by subsequent events. In particular, since the hearing of this motion, the parties have concentrated on the process for a determination of the debt re-characterization claims of the Province and the USW. Based on the foregoing, however, to the extent that at some stage in these CCAA proceedings, the USW and the Milbournes wish to have their Subordination Claims determined, I conclude that such claims can be determined within the CCAA proceedings pursuant to a process, other than the process contemplated by the Claims Process Order, to be established by the Court and reflecting the procedural considerations discussed herein.



Wilton-Siegel J.

Date: August 13, 2015

Schedule "A"

3. The Union's Objection is based on a number of grounds:

- (a) USS's secured claim is based on security interests effectively granted by USS to itself, at a time when there was no independent board of directors or advisors, for insufficient consideration, and in a manner which amounted to an improper preference and/or fraudulent conveyance;
- (b) a significant portion of USS's "debt" is really in the nature of equity and should be re-characterized as such. For instance:
 - (i) much of the debt was incurred to acquire Stelco Inc.;
 - (ii) USS completely controlled USSC;
 - (iii) USS was the sole source of USSC's financing;
 - (iv) USS provided commercially unreasonable interest and repayment terms;
 - (v) USS had no reasonable expectation of repayment on the purported loans; and
 - (vi) USSC was significantly undercapitalized throughout the years following its acquisition by USS;
- (c) USS has acted in a manner that is oppressive, unfairly prejudicial to, and unfairly disregards the interests of the Union's members in respect of all of USSC's obligations. USS has failed to:
 - (i) comply with its obligations to the federal and provincial government to maintain and/or increase production levels;
 - (ii) make good faith efforts to run USSC as a viable business, managed in Canada;
 - (iii) maintain the viability of the USW pension plans; and
 - (iv) avoid incurring debts which would give USS repayment priority over USSC's other creditors or which would seriously dilute any recovery by them on their claims;
- (d) USS has engaged in business practices which breached legally binding undertakings it provided to the Canadian government, and which undermined USSC's ability to meet its obligations to the employees, retirees and beneficiaries of the USW pension plans (collectively, the "Beneficiaries"). USS's conduct in this regard is in breach of fiduciary

duties that it owed to the Beneficiaries by virtue of its role as administrator of the Pension Plans, including:

- (i) failing to meet its undertakings to the Canadian government with respect to production and employment levels;
 - (ii) directing USSC's operations in a way which caused it to incur significant debts;
 - (iii) diverting production from Canadian facilities to its American facilities; and
 - (iv) locking out the Union's members in order to slow down Canadian production rather than for genuine labour relations purposes.
4. USS controlled USSC to further its own interests, to the detriment of USSC's business, its employees, pensioners, and other stakeholders. This conduct directly affects the validity of many or all of USS's claims. It would be inequitable to allow USS's claims in these circumstances, at the expense of USSC's other creditors, and in particular the Union and Beneficiaries. Its claims should be disallowed in their entirety, reduced, or subordinated to the claims of the Union and the Beneficiaries.

TAB 24

COURT OF APPEAL FOR ONTARIO

CITATION: U.S. Steel Canada Inc. (Re), 2016 ONCA 662
DATE: 20160909
DOCKET: C61331

Strathy C.J.O., Lauwers and Benotto JJA.

In the Matter of the *Companies' Creditors
Arrangement Act*, R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Proposed Plan of Compromise or
Arrangement with Respect to U.S. Steel Canada Inc.

Gordon Capern, Kristian Borg-Olivier and Denise Cooney, for the appellant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Union"), Appellant

Andrew Hatnay and Barbara Walancik, for SSPO and non-union retirees and active employees of U.S. Steel Canada Inc.

Tamryn Jacobson, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

Michael E. Barrack, Jeff Galway and John Mather, for United States Steel Corporation, Respondent

Sharon Kour, for U.S. Steel Canada Inc.

Heard: March 17, 2016

On appeal from the order of Justice H. Wilton-Siegel of the Superior Court of Justice, dated August 13, 2015.

Strathy C.J.O.:

[1] U.S. Steel Canada Inc. (“USSC”) is in CCAA¹ protection. Its former employees claim that its American parent, United States Steel Corporation (“USS”), ran the company into insolvency to further its own interests. An issue arose in the court below as to whether the CCAA judge could apply an American legal doctrine called “equitable subordination” to subordinate USS’s claims to the appellant’s claims.

[2] The CCAA judge held he had no jurisdiction to do so. For reasons different than the ones he gave, I agree, and would dismiss the appeal.

FACTUAL BACKGROUND

[3] USS is one of the largest steel producers in North America. In 2007, it acquired Stelco, which was in CCAA protection at the time, and changed its name to USSC.

[4] Seven years later, on September 16, 2014, USSC was again granted CCAA protection by order of the Superior Court of Justice (Commercial List).

[5] The CCAA judge made a Claims Process Order on November 13, 2014, establishing a procedure for filing, reviewing and resolving creditors’ claims against USSC.

¹ *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[6] The order set out a separate procedure for resolving claims of approximately \$2.2 billion by USS against USSC. Most of the claims arose from USS's acquisition and reorganization of Stelco and from advances of working capital. Those claims were to be determined by the court, rather than by the Monitor.

[7] USS filed its proofs of claims. The Monitor recommended they be approved and USS moved for court approval of the claims.

[8] Notices of Objection were filed by four parties: (a) the Province of Ontario and the Superintendent of Financial Services in his capacity as administrator of the Pension Benefits Guarantee Fund; (b) the United Steelworkers, Locals 8782 and 1005; (c) Representative Counsel to the Non-USW Active Salaried Employees and Non-USW Salaried Retirees; and (d) Robert Milbourne, a former president of Stelco, and his wife, Sharon Milbourne, both of whom are beneficiaries of a pension agreement with USSC.

[9] These objections overlapped to some extent. The CCAA judge had to develop a procedure to address the objections. He had to decide whether they should be dealt with within the CCAA process, outside it, or not at all.

[10] The Province made two allegations. The first was that loans by USS to USSC should be characterized as shareholders' equity, because of the circumstances in which they were made. They should therefore be subordinated to all other claims

pursuant to s. 6(8) of the CCAA² (the “Debt/Equity Objection”). Second, the Province argued that the security for the loans should be invalidated pursuant to provincial and federal fraudulent assignment and fraudulent preference legislation (the “Security Objection”). USS disputed both allegations, but was content to have the issues determined under the Claims Process Order.

[11] The Union made objections similar to the Province’s, but it added a third based on oppression and breach of fiduciary duty arising out of USS’s conduct in relation to the Canadian plants, pensioners, pension plan members and beneficiaries (the “Conduct Objections”).

[12] The CCAA judge described the Conduct Objections as allegations that USS caused USSC to underperform, thereby requiring it to incur significant debt and to be unable to meet its pension obligations. The Union sought, among other things, an order subordinating the USS claims in whole or in part to its claims.

[13] The Milbournes’ objections were based on USS’s alleged conduct and relied primarily on the doctrine of equitable subordination. They asked that the USS claims be dismissed entirely or subordinated to the claims of the other unsecured creditors.

[14] The CCAA judge scheduled a motion to establish a litigation plan for USS’s motion for approval of its claims against USSC. The parties agreed that the Security

² 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Objection and the Debt/Equity Objection could be determined pursuant to the Claims Process Order and within the CCAA proceedings.³

[15] The primary disagreement concerned the procedure and timing for the determination of the other objections. The Union argued that the Conduct Objections should be resolved as part of the Claims Process Order and that an evidentiary record was required to do so. USS and USSC took the position that the Conduct Objections should be litigated outside the CCAA claims process.

[16] The CCAA judge found that some of the claims of the Union and the Milbournes could be approached as third party claims against USS for oppression for the purpose of s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and for breach of fiduciary duty. He found that neither the Claims Process Order nor the CCAA contemplated that such claims would be addressed by or would be relevant to a plan of arrangement or compromise under the CCAA. The third party claims fell outside the claims process unless specifically incorporated into the restructuring plan as approved by the parties or otherwise ordered.

[17] The CCAA, he said at para. 65, “is directed towards the creation, approval and implementation of a plan of arrangement or compromise proposed between a debtor company and its secured and unsecured creditors”. It did not contemplate

³ In a subsequent ruling, *U.S. Steel Canada Inc., (Re)*, 2016 ONSC 569, the CCAA judge dismissed the Debt/Equity objection, finding that approximately \$2 billion of USSC’s unsecured claims and \$73 million in secured claims were properly characterized as debt rather than equity. He also dismissed the objection that approximately \$118 million in secured claims should be invalidated due to lack of consideration or as a fraudulent preference.

incorporation of inter-creditor claims into any plan of arrangement or compromise or into the voting process in respect of any proposed plan.

[18] He concluded, at para. 84, that under s. 11 the court had authority to order the remaining claims of the Union and the Milbournes, except the claim for equitable subordination, to be “determined by a process within the CCAA proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely to further the remedial purpose of the CCAA.” He held that those claims could be determined within the CCAA proceedings, rather than in a separate action in the Superior Court, but not under the Claims Process Order. He noted that the court retained jurisdiction to order that the claims be continued outside the CCAA if it was determined that pursuing them within the process would no longer further the remedial process of the CCAA.

[19] He held, however, that he had no jurisdiction under the CCAA to apply the doctrine of equitable subordination. Before turning to his reasons, I will explain the doctrine of equitable subordination.

EQUITABLE SUBORDINATION

[20] Equitable subordination was developed as an equitable remedy in American insolvency law to subordinate a creditor’s claim based on its inequitable conduct. The principles were articulated in *Re Mobile Steel* (1977) 563 F. (2d) 692 (5th Cir.), which set out a three-part test:

- a. the claimant must have engaged in some type of inequitable conduct;
- b. the misconduct must have resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant; and
- c. equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

[21] Paragraph 105(a) of the U.S. *Bankruptcy Code* authorizes bankruptcy courts to use equitable principles to alter the provisions of Title 11 or to prevent an abuse of process. One year after *Mobile Steel*, the *Code* was amended to give legislative effect to equitable subordination: *Bankruptcy Reform Act*, 11 U.S.C. §510(c)(1).

[22] The Supreme Court of Canada considered the doctrine on two occasions. In both, the court found it unnecessary to determine whether equitable subordination should be applied, because the underlying facts did not meet the test: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, at p. 609; and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 77. This court also found it unnecessary to decide the issue in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (C.A.).

[23] The availability of the doctrine has been considered in various Canadian superior courts at the trial level, in various contexts and with inconclusive results: see e.g. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, [2006] O.J. No. 3087 (S.C. [Commercial List]), (in the context of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3); *Christian Brothers of Ireland*

in Canada (Re) (2004), 69 O.R. (3d) 507, (in the context of the *Winding-up and Restructuring Act*, R.S.C. 1985, C. W-11, as amended).

[24] In *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Gen. Div.), Chadwick J. rejected the application of equitable subordination in Canadian law, observing, at p. 372, that to introduce the doctrine would create chaos and would lead to challenges to security agreements based on the conduct of the secured creditor. In *I. Waxman & Sons Ltd. (Re)* (2008), 89 O.R. (3d) 427 (S.C.), Pepall J. queried, at para. 33, whether statutory priorities should be upset by a doctrine “divorced from its legal home”. This observation was followed, however, with the comment that “a vibrant legal system must be responsive to new developments in the law and the need for reform. Jurisprudence from other jurisdictions often provides the impetus or basis for much needed legal developments.”

[25] On the other hand, the Newfoundland and Labrador Supreme Court (Trial Division) applied the doctrine in a bankruptcy case in *Oppenheim v. J.J. Lacey Insurance Limited*, 2009 NLTD 148, 291 Nfld. & P.E.I.R. 149.

[26] The Supreme Court of Canada’s silence on the issue of equitable subordination in *CDIC* and *Indalex* cannot be taken, as the CCAA judge appears to have thought, as an outright rejection of the doctrine. In my view, the Supreme Court simply left the issue for another day.

[27] It is unnecessary to decide that issue in order to resolve this appeal. The only issue is whether the CCAA judge was right in deciding that he had no jurisdiction to

grant equitable subordination under the CCAA, assuming the remedy is available in Canadian law.

SUBMISSIONS AND ANALYSIS

A. PROCEDURAL OBJECTION

[28] The appellant's first submission is procedural. It claims that it was unnecessary for the CCAA judge to determine whether he had jurisdiction to grant equitable subordination. The Union essentially says it was blindsided. It says it made no submissions on the doctrine of equitable subordination and the CCAA judge did not indicate that he was going to address the issue in the context of the scheduling motion. It was inappropriate and unnecessary for the court to shut the door on a novel and controversial remedy without a full factual record.

[29] The respondent acknowledges that equitable subordination was not a central issue in the oral submissions before the CCAA judge, but points out that it was raised in some of the factums and memoranda filed before and after the hearing. The CCAA judge was required to determine what conduct-based inter-creditor claims would be litigated, either under the Claims Process Order or under the CCAA. He was entitled to determine whether he had jurisdiction to grant equitable subordination within the CCAA.

[30] I do not accept the appellant's submission. The issue of equitable subordination was plainly before the CCAA judge in submissions made before and after the hearing. The Milbournes' factum made extensive submissions on equitable

subordination and argued that it, along with fiduciary duty and oppression, were “live issues which should be the subject matter of a robust evidentiary record and subject to a fair and thorough due process in this court”. The Union’s factum suggested that some of USS’s unsecured claim could be subordinated to the claims of other creditors “on account of a breach of fiduciary duty, a finding of oppression, or otherwise.” USSC’s factum argued that the Union’s claim for equitable subordination should be rejected and that suitable remedies were available outside the Claims Process. In supplementary written submissions, the Union argued, in response to USSC’s submissions, that the determination of the issue of equitable subordination should await an evidentiary record.

[31] Moreover, the issue before the CCAA judge was not simply scheduling. The motion sought directions on the extent and nature of production and discovery with respect to the various objections. The Union argued that the objections had to be resolved before there could be approval of a plan of restructuring, a sale process or a distribution to creditors. The allegations that USS’s claims should be re-characterized, invalidated, disallowed or subordinated had to be resolved and the CCAA judge had to determine a process for their resolution. Some might be dealt with under the Claims Process Order and some might be dealt with outside that Order but nevertheless in the CCAA proceedings. Some might not be dealt with under the CCAA at all.

[32] The CCAA judge was plainly aware that a determination of the inter-creditor claims could have implications for the approval of any subsequent reorganization, sale of the business or credit bid. It was appropriate for him to consider whether the court had jurisdiction to address those claims and, if so, how and when.

[33] An evidentiary record was unnecessary. The CCAA judge was not deciding whether equitable subordination applied on the facts of this case. The issue was whether he had jurisdiction to grant equitable subordination under the CCAA.

[34] I turn now to the question whether the CCAA judge correctly held that he had no jurisdiction under the CCAA to order equitable subordination of USS's claims.

B. JURISDICTION TO ORDER EQUITABLE SUBORDINATION

[35] I will begin by summarizing the CCAA judge's reasons on this issue. I will then set out the submissions of the parties, identify the standard of review, describe the methodology I will use and apply that methodology to the legislation.

(1) The CCAA judge's reasons

[36] The CCAA judge noted that although the CCAA gives authority to re-characterize debt as equity and to invalidate a preference or assignment, there is no express provision conferring jurisdiction to grant equitable subordination. He was of the view that any jurisdiction to do so would have to be found in s. 11, which provides that "the court ... may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances."

[37] He observed that there is no Canadian case law supporting that authority and, when given the occasion to confirm the existence of equitable subordination on two occasions, the Supreme Court of Canada had declined to do so: *Canada Deposit Insurance Corp.*; and *Indalex*. He suggested that one might infer from this that the Supreme Court had rejected the principle of equitable subordination.

[38] He found, however, that to the extent the issue remained open, the CCAA evidenced an intention to exclude equitable subordination. When Parliament amended the legislation in 2009, it gave authority under s. 6(8) to subordinate debt as being in substance equity, but it did not enact any provision to subordinate a claim based on the conduct of the creditor. Nor had it drafted s. 36.1, which permitted the court to invalidate preferences and assignments, broadly enough to permit the court to make an order for equitable subordination. These provisions, he said, were “restrictions set out in this Act”, limiting the court’s broad discretion under s. 11. Parliament’s failure to include equitable subordination in the remedies introduced in 2009 must be taken as indicative of an intention to exclude the operation of the doctrine under the CCAA. This, he said, was a policy decision the court must respect.

(2) The submissions of the parties

[39] The appellant submits the CCAA judge had jurisdiction to grant equitable subordination pursuant to s. 11 of the CCAA in the absence of express “restrictions”

on that jurisdiction. He erred in implying restrictions based on Parliament's failure to amend the legislation.

[40] The respondent submits that Canadian courts have all the tools they need to assess, review and, where necessary, subordinate or invalidate creditors' claims in a manner consistent with the underlying legislation, without the need for equitable subordination. Some of these tools are the result of the 2009 amendments to the *BIA* and the *CCAA*. Parliament might have expanded those amendments to incorporate equitable subordination or some other conduct-based remedy, but declined to do so. The court should not invoke a controversial doctrine that Parliament declined to adopt when it had the opportunity to do so.

(3) The standard of review

[41] The parties agree that the applicable standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, at para. 8; and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 40.

(4) Framework for analysis

[42] In *Century Services v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 65ff., the Supreme Court of Canada gave guidance on the approach to the scope of statutory remedies under the *CCAA*, and, if need be, under related sources of judicial authority. The court adopted the analysis proposed by Justice Georgina R. Jackson of the Court of Appeal for Saskatchewan and

Professor Janis Sarra in an article entitled, “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters” in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Toronto: Thomson Carswell, 2007), at p. 41. Blair J.A. also approved of this approach in *Metcalf & Mansfield*, at paras. 48-49.

[43] Jackson and Sarra note that the CCAA is skeletal legislation and advocate a transparent and consistent methodology as judges define the scope of their jurisdiction under the statute. They propose that the courts should take a hierarchical view of the powers at their disposal, adopting a broad, liberal and purposive interpretation of the statute and applying the principles of statutory interpretation before turning to other tools such as the common law or the exercise of inherent jurisdiction.

[44] At para. 66 of *Century Services*, the Supreme Court held that in most cases, the search for jurisdiction under the CCAA should be an exercise in statutory interpretation. The starting point is the “big picture” principles of statutory interpretation.

[45] Driedger’s modern principle is the crucial tool for construing skeletal legislation such as the CCAA. A court must go beyond an examination of the wording of the statute and consider the scheme of the Act, its object or the intention of the legislature and the context of the words in issue:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: Jackson and Sarra, at p. 47; Elmer A. Driedger, *The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at p. 87, cited in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. See also: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 23, 40.

[46] With this in mind, I will apply the framework in *Century Services* to the search for jurisdiction. I turn first to a consideration of the purpose and scheme of the CCAA, before considering the language of the statute.

(5) Application of the framework

(i) The purpose of the CCAA

[47] There is no dispute about the purpose of the CCAA. It describes itself as “An Act to facilitate compromises and arrangements between companies and their creditors”. Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows the court to preserve the status quo while “attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all”: *Century Services*, at para. 77.

[48] The CCAA has proven to be a flexible and successful tool to enable businesses to avoid bankruptcy. As Professor Sarra notes, “[i]t has been the statute

of choice for debtor corporations in every major Canadian restructuring in the past quarter century, including national airlines, major steel and forestry companies, telecommunications companies, major retail chains, real estate and development groups, and the national blood delivery system”: Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, 2d ed. (Toronto: Carswell, 2013), at p. 1.

[49] The CCAA achieves its goals through a summary procedure for the compromise or arrangement of creditors’ claims against the company. It was described in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36, as:

a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company’s creditors, shareholders, employees and other stakeholders.

[50] The process has been effective because it is summary, it is practical, it is supervised by an independent expert monitor and it is managed in real time by an experienced commercial judge.

[51] *Century Services* is a good example of how the purpose of the CCAA informs the exercise of the court’s authority. At issue in that case were the reconciliation of another federal statute with the CCAA and the scope of a CCAA judge’s discretion. At para. 70, the orders of the CCAA judge were considered squarely within the context of the purpose of the Act:

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. [emphasis added]

[52] The Supreme Court concluded, at para. 75, that the order advanced the underlying purpose of the CCAA.

(ii) The scheme of the CCAA

[53] The CCAA has been described as “skeletal” or “under-inclusive” legislation, (Jackson and Sarra at p. 48) which grants broad powers to the courts in general terms.

[54] The Act has five parts. Part I, entitled “Compromises and Arrangements” permits the court to sanction a compromise or arrangement between a company and its secured or unsecured creditors, or both.

[55] The powers of the court are found in Part II, entitled “Jurisdiction of Courts”. The statute gives the court jurisdiction to receive applications, order stays, approve debtor-in-possession financing and appoint a monitor, among other things.

Proceedings are commenced by an application to the Superior Court. The court generally grants an initial stay, appoints a monitor with authority to repudiate leases and other agreements and authorizes debtor in possession financing. A process is established for the identification and review of creditors' claims by the monitor and to deal with disputed claims, with the ultimate purpose of establishing classes of creditors who will vote, by class, on the compromise or arrangement.

[56] One possible outcome is the preparation of a plan of arrangement. Creditors vote by class on the plan at a meeting called for that purpose. A majority by number of creditors in each class, together with two-thirds of the creditors in that class by dollar value, must approve the plan. If a class of creditors approves the plan, it is binding on all creditors within the class, subject to the court's approval of the plan. If all classes of creditors approve the plan, the court must then approve the plan as a final step.

[57] Part III, entitled "General", deals with such issues as the determination of the amount of creditors' claims, classes of creditors, the duties of monitors, the disclaimer of agreements between the company and third parties and preferences and transfers at undervalue.

[58] Section 19 identifies "claims" that may be dealt with in a compromise or arrangement. Those are claims provable in bankruptcy that relate to debts or

liabilities, present or future, to which the debtor company is subject or may become subject before the compromise or arrangement is sanctioned.⁴

[59] The significance of this definition is that the focus of the plan of arrangement is claims against the debtor company that are provable in bankruptcy. The CCAA judge identified this significance at para. 59 of his reasons, where he noted that s. 19(1) of the CCAA provides, effectively, “that a plan of compromise or arrangement may only deal with claims that relate to debts or liabilities to which a debtor company is subject at the time of commencement of proceedings under the CCAA”. At para. 61, he noted that neither the Claims Process Order nor the CCAA contemplated that inter-creditor claims would be addressed by or be relevant to a plan of arrangement.

[60] Section 20 sets out the method for determining the amount of the claim of any secured or unsecured creditors. In most cases, it will be the amount “determined by the court on summary application by the company or by the creditor”.

⁴ CCAA, s. 2(1): “*claim* means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.” Section 121 of the *BIA* states that claims provable in bankruptcy are those to which the bankrupt is subject: “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.”

[61] Section 22 provides for the establishment of classes of creditors for the purpose of voting on a compromise or arrangement, based on, among other things, the nature of their claims, the nature of the security in respect of their claims and the remedies available to them in relation to their claims. Creditors may be included in the same class “if their interests or rights are sufficiently similar to give them a commonality of interest”.

[62] Part IV deals with Cross-Border Insolvencies. Its stated purposes are to give mechanisms to provide for the fair and efficient administration of such insolvencies, to promote cooperation with courts of other jurisdictions, to promote “the rescue of financially troubled businesses to protect investment and preserve employment” and to protect the interests of creditors, of other interested persons and of the debtor company. Part V deals with Administration.

[63] The CCAA was amended in 2009. The amendments were the product of extensive discussion of the BIA and the CCAA in the Standing Senate Committee on Banking, Trade and Commerce. The Committee recommended amendments to the legislation, including an expanded power to review, invalidate or subordinate creditors’ claims under the CCAA.

[64] These recommendations were reflected in the 2009 amendments in two respects. First, s. 6(8) provides that a compromise or arrangement will not be approved unless it provides that all other claims are to be paid in full before an equity claim is paid.

[65] This provision, coupled with the definition of “equity interest”⁵ and “equity claim”⁶ in s. 2(1), permits the court to determine whether a creditor’s claim is in substance a share, warrant or option. This is the underpinning of the Debt/Equity Objection, an objection based on a disagreement as to the proper characterization of the disputed claims.

[66] Section 22.1, also added in 2009, provides that all creditors with equity claims are to be in the same class unless the court otherwise orders, and may not, as members of that class, vote at any meeting unless the court otherwise orders.

[67] Second, the 2009 amendments harmonized the rules of reviewable transactions under the *BIA* and the *CCAA*. Creditors in a *CCAA* proceeding are now entitled to invoke the provisions of the *BIA* to invalidate security granted by a debtor corporation to a creditor where a fraudulent preference or transfer at undervalue is established. Section 36.1 of the *CCAA* provides that ss. 38 and 95 to 101 of the *BIA* apply, with any required modifications, in respect of a compromise or arrangement, unless the compromise or arrangement provides otherwise.

⁵ “*Equity interest* means (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt.”

⁶ “*Equity claim* means a claim that is in respect of an equity interest, including a claim for, among others, (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d).”

[68] USS says that the 2009 amendments reflected Parliament's decision concerning the extent of the court's jurisdiction over "reviewable transactions" in CCAA proceedings and the extent to which a creditor's claim can be subordinated to other claims as a result of its conduct. It says Parliament might have included jurisdiction to rearrange priorities between creditors, for example through equitable subordination, but it declined to do so.

[69] The scheme of the CCAA focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a compromise or arrangement. Except as contemplated by ss. 2(1), 6(8), 22.1 and 36.1, the statute does not address either conflicts between creditors or the order of priorities of creditors. Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated.

[70] There is nothing in the record before us to indicate that the issue of equitable subordination was given serious consideration at the time of the 2009 amendments or that those amendments were intended to import other remedies.

(iii) Interpreting the particular provisions before the court

[71] I now turn to the words of the statute itself, considered in context and having regard to the scheme of the CCAA, the object of the act and the intentions of Parliament.

[72] As Blair J.A. put it when deciding whether the CCAA granted the court the power to sanction the disputed order in *Metcalfe & Mansfield*, at para. 58, “[w]here in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases?” The question before us is “where (if at all) in the words of the statute is the court (implicitly or explicitly) clothed with authority to make an order for equitable subordination of the USS claims?”

(a) Section 11: “The engine that drives the statutory scheme”

[73] The parties focussed their arguments on whether the powers granted by s. 11 include the power to grant the remedy of equitable subordination. In order to inform the scope of s. 11, they urge us to consider the treatment of “equity” claims in s. 6(8) of the CCAA and the remedies available under s. 36.1.

[74] In *Stelco*, at para. 36, Blair J.A. described s. 11 as “the engine that drives this broad and flexible statutory scheme”. Section 11 states, in full:

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. [Emphasis added.]

[75] Prior to amendment in 2005 (S.C. 2005, c. 47, s. 128), the underlined portion above had read “subject to this Act”. In *Century Services*, the Supreme Court, at

paras. 67-68, interpreted this amendment as being an endorsement of the broad reading of CCAA jurisdiction that had been developed in the jurisprudence.

[76] The jurisdiction under s. 11 has two express limitations. First, the court must find that the order is “appropriate in the circumstances”. Second, even if the court considers the order appropriate in the circumstances, it must consider whether there are “restrictions set out in” the CCAA that preclude it.

[77] As I have noted, the CCAA judge held that s. 11 did not confer jurisdiction to apply the doctrine of equitable subordination. The statute could have provided the authority to subordinate claims on this basis, as it did with equity claims, but it did not. He also held that the definition of “equity claim” and the option to bring proceedings under s. 36.1 were “restrictions” within the meaning of s. 11.

[78] In my view, the interpretative process should start with the scope of s. 11 before the restrictions are considered in the analysis. The broad powers exercised by CCAA judges evolved in the jurisprudence before the concept of “restrictions” was legislated.

[79] Moreover, it is inconsistent with the anatomy and history of the CCAA to maintain that if Parliament had intended that a CCAA judge would have the authority to make a certain type of order, it would have said so. The Supreme Court has made it clear that “[t]he general language of the CCAA should not be read as being restricted by the availability of more specific orders”: *Century Services*, at para. 70.

[80] What is apparent from the many creative orders that have been made, before and since the 2009 amendments, is that such orders are made squarely in furtherance of the legislature's objectives. In *Century Services*, at para. 59, the Supreme Court observed that "[j]udicial discretion must of course be exercised in furtherance of the CCAA's purposes", to avoid the devastating social and economic effects of bankruptcy while an attempt is made to organize the affairs of the debtor under court supervision.

[81] The words "may ... make any order it considers appropriate in the circumstances" in s. 11 must, in my view, be read as "may ... in furtherance of the purposes of this act, make any order it considers appropriate in the circumstances."

[82] There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

[83] I turn to the second limit on the court's jurisdiction under s. 11, the "restrictions set out in this Act". The first question is whether such restrictions must be express or can be implied.

[84] It bears noting that there are numerous express restrictions on the court's jurisdiction contained within the CCAA itself. Some are contained in Part II (Jurisdiction of Courts) and some are actually preceded by the heading "Restriction". In *North American Tungsten Corp. v. Global Tungsten and Powders*

Corp., 2015 BCCA 426, 81 B.C.L.R. (5th) 102, at para. 34, the British Columbia Court of Appeal observed that “where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms.”

[85] The CCAA judge found that there were “restrictions set out” in the CCAA that prevented the court from applying equitable subordination, namely the definition of “equity claim” in s. 2(1) and the provisions of s. 36.1. Essentially, he found that Parliament could have introduced equitable subordination into the CCAA when it amended the legislation in 2009, but declined to do so. “The court must respect that policy decision”, he said at para. 53. The respondent supports this interpretation.

[86] I agree with the appellant that “equity claim” is not a restriction at all, but a definition. Together with s. 6(8), it codifies what was essentially the law before the 2009 amendments. The purpose of this involvement in the priority of claims is to remove shareholders from the process of arriving at a compromise or arrangement, absent permission of the court. It has nothing to do with any wrongdoing by the person with the equity interest. The only “restriction”, if any, would be the lack of flexibility to reverse this statutory subordination, as Pepall J. pointed out in *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229, 75 B.L.R. (4th) 302, at para. 34. However, this has to do only with subordination flowing from the characterization of a claim and not equitable subordination.

[87] I also agree that the plain meaning of the words “subject to the restrictions set out in this Act” refers to express restrictions, of which there are a number.

(b) Subsection 6(8): Subordination of “equity claims”

[88] In the court below, and in the appellant’s submissions in this court, there was a blurring of the distinction between the separate concepts of “equity claim” and the doctrine of “equitable subordination”. The CCAA judge’s reasons referred at times to the “subordination claims” of the Union and the Milbournes as including the equitable subordination claims and the claims for oppression and breach of fiduciary duty.

[89] As explained earlier, s. 6(8) of the CCAA effectively subordinates “equity claims”, as defined, to the claims of all other creditors. No compromise or arrangement can be approved unless it provides for other claims to be paid, in full, before equity claims are paid.

[90] With the exception of environmental claims, ss. 6(8) and 22.1 are the only provisions of the CCAA to deal expressly with priorities between creditors.⁷ There is a clear rationale for these provisions. In E. Patrick Shea, *BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime* (Markham: LexisNexis Group, 2009), at p. 89, the author explains that “[t]he intention of these amendments is to

⁷ Subsection 11.8(8) gives the federal and provincial Crowns priorities for environmental claims against the debtor.

remove the shareholder/creditor from the reorganization process, unless the court orders that they have a seat at the table.”

[91] “Equitable subordination”, on the other hand, refers to the doctrine at issue here: a form of equitable relief to subordinate the claim of a creditor who has engaged in inequitable conduct. Such a claim is not an “equity claim”, as defined. If it were, it would be subordinated without the need for intervention by the court.

[92] *Pepall J.* dealt with these different principles and distinguished them clearly in *I. Waxman & Sons Ltd.*, a Commercial List decision that predated the 2009 amendments. There, a trustee in bankruptcy brought a motion for advice and directions as to whether a judgment creditor’s claim should be allowed. Other creditors argued that his claim was rooted in equity and was not a debt claim. In the alternative, they argued that even if it was a debt claim, it should be subordinated to their claims pursuant to the doctrine of equitable subordination.

[93] *Pepall J.* addressed the argument that the judgment creditor’s claim was an equity claim under the heading “Characterization” (paras. 18-26), because the issue was whether his claim was properly characterized as one of equity or debt, with the attendant priority consequences. Next she considered whether, even though she had found that the claim was a debt claim, it should be subordinated pursuant to the doctrine of equitable subordination (paras. 27-35). She noted, at para. 27, that “[a]s its name suggests, the basis for development of the doctrine is the equitable

jurisdiction of the court”. She held that even if it applied in Canada, which was not established, there was no evidence on which to apply it in that case.

[94] By contrast, the CCAA judge in this case disposed of these issues under one heading, “The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination”, at paras. 38-53. He found, at para. 51, that the absence of any provision in the CCAA that would permit the application of equitable subordination was indicative of an intention to exclude the operation of the doctrine.

[95] The CCAA judge appears to have treated equitable subordination as akin to equity claims as defined in s. 2(1), the subordination of equity claims in s. 6(8) and the remedies under s. 36.1. He found that because equitable subordination is not mentioned in the context of these remedies, Parliament must have intended to exclude it.

[96] The distinction between these terms undermines the argument that equitable subordination does not exist because it was not included as part of the definition of (or together with the subordination of) equity claims. Equity claims are subordinated in order to keep shareholders away from the table while the claims of other creditors are being sorted out. Even prior to being explicitly subordinated by statute in 2009, they generally ranked lower than general creditors: *Sino-Forest Corp. (Re)*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 30. The purpose of the 2009 amendments appears to have been to confirm and clarify the law: see The Report

of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa, November 2003), at p. 158-59.

(c) Section 36.1: Preferences and Assignments

[97] Section 36.1, which was part of the 2009 amendments, incorporates by reference provisions of the *BIA* permitting the court to invalidate prior fraudulent preferences or fraudulent assignments.

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

[98] The respondent argues that the inclusion of these express provisions implies that no other form of equitable remedy was contemplated. Its argument is that, had Parliament wished to invalidate or subordinate claims of creditors who had engaged in inequitable conduct in relation to other creditors, it could have expressly included that remedy.

[99] I would not read anything into s. 36.1, one way or the other. Nor would I regard it as a “restriction” set out in the Act within the meaning of s. 11.

(6) Summary

[100] The appellant requested “a declaration that the CCAA contains no restrictions within the meaning of s. 11 on the court’s ability to apply the doctrine of equitable

subordination.” In my view, this is the wrong inquiry and this is why I reach the same result as the CCAA judge, but for different reasons.

[101] I would not grant the relief sought because, applying the principles of statutory interpretation, nowhere in the words of the CCAA is there authority, express or implied, to apply the doctrine of equitable subordination. Nor does it fall within the scheme of the statute, which focuses on the implementation of a plan of arrangement or compromise. The CCAA does not legislate a scheme of priorities or distribution, because these are to be worked out in each plan of compromise or arrangement. The subordination of “equity claims” is directed towards a specific group, shareholders, or those with similar claims. It also has a specific function, consistent with the purpose of the CCAA: to facilitate the arrangement or compromise without shareholders’ involvement.

[102] The success of the CCAA in fulfilling its statutory purpose has been in large measure due to the ability of judges to fashion creative solutions, for which there is no express authority, through the exercise of their jurisdiction under s. 11. As Blair J.A. noted in *Metcalfe and Mansfield*, however, the court’s powers are not limitless. They are shaped by the purpose and scheme of the CCAA. The appellant has not identified how equitable subordination would further the remedial purpose of the CCAA.

[103] At this stage of the analysis, I am mindful of the Supreme Court’s observation in *Century Services* that in most cases the court’s jurisdiction in CCAA matters will

be found through statutory interpretation. I am also mindful of its observation in *Indalex*, at para. 82, that courts should not use an equitable remedy to do what they wish Parliament had done through legislation. In my view, there is no “gap” in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court’s inherent jurisdiction or by equitable principles.

[104] There is no provision in the CCAA equivalent to s. 183 of the *BIA* or §105(a) of the U.S. *Bankruptcy Code*. Section 183 invests the bankruptcy court with “such jurisdiction at law and in equity” as will enable it to exercise its bankruptcy jurisdiction. This is significant, because if equitable subordination is to become a part of Canadian law, it would appear that the *BIA* gives the bankruptcy court explicit jurisdiction as a court of equity to ground such a remedy and a legislative purpose that is more relevant to the potential reordering of priorities.

CONCLUSION

[105] For these reasons, I would dismiss the appeal. I would order that counsel may make written submissions as to costs, not to exceed five pages in length, excluding costs outlines. I would assume counsel can agree on a timetable for delivery of all costs submissions within 30 days of the release of these reasons.

“George R. Strathy C.J.O.”
“I agree P. Lauwers J.A.”
“I agree M.L. Benotto J.A.”

Released: “GRS” September 09, 2016

TAB 25

CITATION: U.S. Steel Canada Inc. (Re), 2017 ONSC 1967
COURT FILE NO.: CV-14-10695-00CL
DATE: 20170419

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Heather Meredith and Sharon Kour*, for the Applicant, U.S. Steel Canada Inc.

Robert Staley and Kevin J. Zych, for the Monitor, Ernst & Young Inc.

Gale Rubenstein and Melaney Wagner, for the Superintendent of Financial Institutions and the Province of Ontario

Lily Harmer, for the United Steelworkers International Union and the United Steelworkers International Union, Local 8782

Sharon L.C. White, for the United Steelworkers International Union, Local 1005

James Harnum, Representative Counsel for the non-unionized active employees and retirees

Michael Barrack, Mitch Grossell and Leanne Williams, for United States Steel Corporation

Michael Kovacevic, for the City of Hamilton

Lou Brzezinski, for Robert and Sharon Milbourne

Patrick Riesterer, for Brookfield Capital Partners Ltd.

Mario Forte, for Bedrock Industries Canada LLC and Bedrock Industries L.P.

Vlad Calina, for USSCF, the Plan Advisor

HEARD: March 15, 2017

ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. (“USSC”), sought a number of orders in respect of a proposed plan of arrangement and compromise (the “Plan”) under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”). The Plan contemplates the acquisition of substantially all of USSC’s operating business and assets on a going-concern basis by Bedrock Industries Canada LLC (“Bedrock”) through the acquisition of all of USSC’s outstanding shares. At the conclusion of the hearing of the motions, I advised the parties that the motions were granted for written reasons to follow. This Endorsement sets out the reasons for such relief.

[2] As a preliminary matter, it should be noted that the motions were supported by Her Majesty the Queen in Right of the Province of Ontario (“Ontario”) and the United States Steel Corporation (“USS”) and were not opposed by Representative Counsel for the current and former non-unionized employees of USSC or by the United Steelworkers International Union (the “USW”), USW Local 8782 or USW Local 1005. In addition, in its thirty-seventh report, dated March 13, 2017 (the “Monitor’s Report”), the Monitor recommended approval of each of the motions for the reasons set out therein. Such level of support constituted an important consideration in the Court’s approval of each of the motions, in addition to the specific considerations set out below.

The Supplementary Claims Process Order

[3] USSC seeks approval of an order providing for a process to identify and determine claims not previously determined pursuant to the order dated November 13, 2014 (the “General Claims Process Order”). The General Claims Process Order excluded claims of current and former employees respecting outstanding wages, salaries and benefits, claims relating to USSC’s retirement plans, claims relating to non-pension post-employment benefits (“OPEB”s), and claims against the directors and officers of USSC.

[4] The purpose of the order sought is to crystallize the pool of claims that will be affected under the Plan. The proposed supplementary claims process would pertain to a subset of the creditors whose claims were excluded from the General Claims Process Order, being: (1) current and former non-unionized employees with pension claims, OPEB claims and supplemental pension claims; (2) former non-unionized employees with claims pertaining to the termination of their employment; (3) persons with claims against the directors and officers of USSC; and (4) persons who filed a claim after December 22, 2014 but before March 1, 2017.

[5] The Court has the authority under s. 11 of the CCAA to make orders it considers appropriate in the circumstances, subject to restrictions set out in the CCAA. It is not disputed that such authority includes the authority to approve a process to solicit and determine claims against a debtor company and its directors and officers.

[6] In this case, the claims process sought is necessary for the approval and implementation of the Plan, both for voting purposes and in order to determine the universe of claims subject to the releases contemplated by the Plan. There is no suggestion from the stakeholders appearing on this motion that the proposed claims process is not fair to the potential claimants in terms of notice or process. The timeline provided for the determination of the relevant claims is also expedient in as much as it is consistent with the timing of the proposed meetings of creditors dealt with below. In this regard, the Monitor has advised in the Monitor’s Report that it believes

the proposed claims process provides sufficient and timely notification to allow creditors to submit proofs of claim or dispute notices, as applicable, prior to the claims bar date under the proposed order, being April 20, 2017, particularly in view of the fact that non-unionized employees and retirees will not need to file individual proofs of claim in most circumstances. Further, the Monitor will have a supervisory role to ensure that claimants are dealt with reasonably and fairly. In respect of the late-filed claims in item (4) above, the Monitor does not believe their inclusion in the claims process will materially prejudice the other creditors in view of the *de minimus* amount of these claims and the current status of the Plan.

[7] Based on the foregoing, including the support for the motion and the absence of any objections thereto as set out above, I am satisfied that the proposed supplementary claims process order should be approved.

The Meetings Order

[8] USSC seeks an order accepting the filing of the Plan; authorizing USSC to convene creditors meetings to vote on the Plan; approving the classification of creditors as set out in the Plan for the purposes of the meetings and voting on the Plan; approving the distribution of the notice of meeting and materials pertaining to the Plan; approving the procedures to be followed at the meetings; and setting May 9, 2017 as the date for the hearing of USSC's motion for an order of the Court sanctioning the Plan.

[9] The Plan is the outcome of an initial sales and restructuring/recapitalization process and a subsequent sale and investment solicitation process. These activities have been addressed fully in other endorsements of the Court, and are summarized in the affidavit of the chief restructuring officer of USSC, William Aziz, sworn March 10, 2017, and therefore need not be repeated here.

[10] There are two classes of "affected creditors" pursuant to the Plan:

- (1) General unsecured creditors, which for this purpose do not include Ontario and USS, who would receive a cash distribution in respect of their claims which would be released, discharged and barred; and
- (2) Creditors having claims for non-unionized pension benefits and OPEBs, which would be replaced by new non-unionized pension benefits and OPEBs, with these creditors' existing claims to be released, discharged and barred.

[11] USSC proposes that the meetings of these two classes of creditors be held on April 27, 2017.

[12] In determining whether the Court should approve the filing of the Plan under paragraph 3 of the initial order in these proceedings under the CCAA (the "Initial Order") and order the convening of a meeting of creditors to vote upon the Plan, the Court must be satisfied that the Plan is not doomed to failure. This standard is amply satisfied in the present circumstances, given the level of support for the motion and the absence of any objections as described above. The Court is not to determine the fairness and reasonableness of the Plan at this stage, such issues being reserved for the sanction hearing after the creditors meetings.

[13] Section 22 of the CCAA requires approval by the Court of the division of creditors into the classes contemplated by the Plan. The two classes of creditors contemplated by the Plan have been described above. For clarity, the Plan leaves the treatment of the claims of other creditors to be addressed pursuant to contractual arrangements to be negotiated between those creditors and USSC.

[14] I am satisfied that the creditors in each of the classes contemplated have the necessary commonality of interest required by s. 22(2) of the CCAA. The creditors in class (1) will receive a cash distribution in respect of their claims. The creditors in class (2) will not receive a cash distribution but will instead receive replacement benefits. Accordingly, the two classes of creditors receive different treatment under the Plan while each of the creditors within each class is an unsecured creditor who receives similar treatment under the Plan and would have similar remedies if the Plan is not accepted. I note as well that the Monitor supports the proposed classification of creditors as being appropriate based on the fact that the two classes have different interests and are treated differently under the Plan.

[15] Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.

[16] The other terms of the proposed meetings order regarding the notice of the meetings, the conduct of the meetings, and voting at the meetings do not otherwise raise any substantive issues of fairness and reasonableness.

[17] Based on the foregoing, the proposed meetings order is approved.

Amendment of the Plan Support Agreement

[18] USSC also seeks an order authorizing USSC to enter into:

- (1) An agreement (the “PSA Amending Agreement”) amending the “CCAA Acquisition and Plan Sponsor Agreement” dated December 9, 2016 between USSC, Bedrock and Bedrock Industries L.P. (the “PSA”); and
- (2) An agreement (the “Support Amending Agreement”) amending the “Support Agreement” made December 9, 2016 between USSC and Ontario.

[19] The Court has the authority under ss. 11 and 11.02(2) to approve a debtor company entering into an agreement to facilitate a restructuring. The Court has previously authorized the PSA and the Support Agreement pursuant to such powers.

[20] The PSA Amending Agreement and the Support Amending Agreement, among other things, amend the timetable for various milestones to reflect the timetable contemplated by the meetings order. They also amend the existing agreements to reflect the term sheets as finalized to date respecting various aspects of the Plan arrangements.

[21] I am satisfied that the PSA Amending Agreement and the Support Amending Agreement should be approved as necessary for, and as furthering the purposes of, the proposed restructuring of USSC pursuant to the Plan.

Extension of the Stay Period

[22] Lastly, USSC seeks an order extending the stay of proceedings under the Initial Order in these proceedings to May 31, 2017.

[23] Section 11.02(2) of the CCAA gives the Court the discretion to extend the stay of proceedings if the requirements of s. 11.02(3) are satisfied.

[24] In this case, USSC has established that it has acted, and is acting, in good faith and with due diligence to implement a plan of restructuring and compromise. The proposed stay extension provides USSC with the time required to allow the creditors to vote on the Plan at the creditors meetings and, if approved, to seek the Court's approval at the sanction hearing. It also grants USSC sufficient time to negotiate the necessary agreements and to finalize the necessary arrangements that are conditions to implementation of the Plan. The Monitor advises in the Monitor's Report that the revised cash flow forecast of USSC contemplates that USSC will have sufficient liquidity to continue to operate throughout the proposed stay extension period.

[25] Accordingly, I am satisfied that it is appropriate to approve the extension of the stay of proceedings under the Initial Order to May 31, 2017.

Wilton-Siegel, J.

Date: April 19, 2017

TAB 26

FORM 10
[RULE 3.25]

CLERK'S STAMP

COURT FILE NUMBER

COURT

COURT OF KING'S
ALBERTA

JUDICIAL CENTRE

EDMONTON

PLAINTIFF

COMPEER FINANCIAL, PCA

DEFENDANT

**SUNTERRA FARMS LTD., SUNWOLD
FARMS LIMITED, SUNTERRA
ENTERPRISES INC., RAY PRICE and
DEBBIE UFFELMAN**

DOCUMENT

STATEMENT OF CLAIM

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

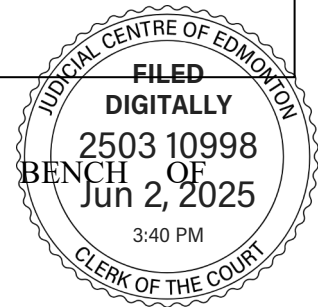
BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7
Attention:
Lincoln Caylor,
Nathan J. Shaheen,
Keely Cameron and
Mathieu J. LaFleche
Telephone No.: 403-298-3100
Fax No.: 403-265-7219

NOTICE TO DEFENDANTS

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Statement of facts relied on:



Overview of Claim

1. This Action arises from the perpetration of a sophisticated international fraudulent Cheque Kiting Scheme (as detailed and defined herein) perpetrated against the plaintiff, Compeer Financial, PCA (“**Compeer**”), the result of which is that Compeer is currently facing losses of more than USD \$36,500,000.
2. The perpetrators of the Cheque Kiting Scheme include Sunterra Farms Ltd. (“**Sunterra Canada**”) and Sunwold Farms Limited (“**Sunwold Canada**” and, together, the “**Canadian Sunterra Entities**”), which are members of the Alberta-based “**Sunterra Group**” that is ultimately owned by the Price family.
3. The fraudulent and oppressive conduct of the Canadian Sunterra Entities, and the United States-based members of the Sunterra Group that were Compeer’s customers, was undertaken by Ray Price (“**Price**”) and Debbie Uffelman (“**Uffelman**”), who were directors and/or officers of corporations in the Sunterra Group, including the Canadian Sunterra Entities. Price and Uffelman were directly and personally involved with the signing and delivery of cheques, and lending and financing documents, to Compeer.
4. Through their direct and personal involvement, Price and Uffelman not only caused the Canadian Sunterra Entities to perpetrate the Cheque Kiting Scheme, but sought to conceal the Cheque Kiting Scheme from Compeer. Their fraudulent conduct gives rise to the liability of the Canadian Sunterra Entities, as well as their personal liability.
5. In addition, Sunterra Enterprises Inc. (“**Sunterra Enterprises**”), which is another member of the Sunterra Group and the holding company of Compeer’s customers, provided contractual guarantees for amounts owing to Compeer. It has failed to satisfy those guarantees despite Compeer’s demands made in April 2025. Sunterra Enterprises is therefore also liable for Compeer’s losses.
6. By way of this Action, Compeer seeks a declaration that the Cheque Kiting Scheme constitutes fraud and judgment in the amount of its losses and related expenses, plus related relief, including an award of punitive damages reflecting its status as the victim of the fraudulent Cheque Kiting Scheme and the egregiously wrongful conduct of the defendants.

The Parties

7. Compeer is an instrumentality under the laws of the United States, with its headquarters in Sun Prairie, Wisconsin. It is a member-owned, Farm Credit cooperative serving and supporting agriculture and rural communities. Compeer provides loans, leases, risk management, and other financial services throughout 144 counties in Illinois, Minnesota and Wisconsin.
8. The Canadian Sunterra Entities are incorporated under the laws of the Province of Alberta. They carry on the business of owning and operating Alberta livestock facilities at which sows give birth to piglets, which are then sold to the U.S. Sunterra Entities (defined below).
9. Sunterra Enterprises is incorporated under the laws of the Province of Alberta. It is a holding company that holds the shares of, among other entities:
 - (a) Sunterra Farms Iowa, Inc. ("**Sunterra U.S.**"), a corporation incorporated under the laws of the State of Iowa; and
 - (b) Sunwold Farms, Inc. ("**Sunwold U.S.**"), a corporation incorporated under the laws of the State of South Dakota(together, the "**U.S. Sunterra Entities**").
10. The U.S. Sunterra Entities, along with another member of the Sunterra Group, Lariagra Farms South, Inc. ("**Lariagra U.S.**"), a corporation incorporated pursuant to the State of South Dakota, were at relevant times customers of Compeer. The U.S. Sunterra Entities and Lariagra U.S. are now in receivership in the jurisdiction of the U.S. Federal Court located in the State of South Dakota, as described herein.
11. The Canadian Sunterra Entities, Sunterra Enterprises, the U.S. Sunterra Entities, and Lariagra U.S. are various of the members of the Sunterra Group, a group of related entities ultimately owned and controlled by the Price family. The business of the Sunterra Group includes a multifaceted, and fully integrated, farm to market enterprise across multiple sectors of the agricultural and food distribution industries.

12. Price is a member of the Price family who resides primarily in the Province of Alberta. At relevant times, he was the President of the Sunterra Group. Price was among the officers and/or directors, and the ultimate beneficial owners, of each of the Canadian Sunterra Entities and Sunterra Enterprises. He was also an officer and/or director, and an ultimate beneficial owner, of each of the U.S. Sunterra Entities and Lariagra U.S.
13. Uffelman is an individual who resides primarily in the Province of Alberta. At relevant times, she was the Vice President, Corporate Finance and/or Chief Financial Officer of the Sunterra Group, with knowledge and oversight of, and responsibility for, the finances of the Sunterra Group at large, including each of the Canadian Sunterra Entities, Sunterra Enterprises, the U.S. Sunterra Entities and Lariagra U.S.

Compeer's Provision of Products and Services to the Sunterra Group

14. Since in or around 2005, Compeer provided revolving lines of credit ("RLOCs") to the U.S. Sunterra Entities and Lariagra U.S. At relevant times, Compeer extended the RLOCs pursuant to a "Promissory Note/Loan Agreement" that was respectively entered into from time-to-time by each of the U.S. Sunterra Entities.
15. The purpose of the RLOCs was to fund the operations of the U.S. Sunterra Entities and Lariagra U.S. At relevant times, those operations consisted of:
 - (a) Sunterra U.S. is a pig management company. It managed approximately 500,000 pig spaces, of which approximately 110,000 were in South Dakota and housed pigs owned by Sunwold U.S. or Lariagra U.S. Sunterra U.S.'s revenues were generated by management fees it charged for managing pigs; and
 - (b) Sunwold U.S. and Lariagra U.S. are "wean-to-finish" operations. They purchased weaned pigs (from Canadian members of the Sunterra Group), and then raised those pigs to market weight in contract nursery and finishing barns in South Dakota.
16. Consistent with their prior arrangements, on October 7, 2024, Compeer entered into Promissory Note/Loan Agreements with the U.S. Sunterra Entities and Lariagra U.S. for the purpose of establishing RLOCs with each of those entities.

17. The three RLOCs established by Compeer on October 7, 2024 allowed for borrowing up to a combined USD \$11,500,000, as follows:
 - (a) Sunterra U.S. established a USD \$500,000 RLOC:
 - (b) Sunwold U.S. established a USD \$7,000,000 RLOC; and
 - (c) Lariagra U.S. established a USD \$4,000,000 RLOC.
18. Each Promissory Note/Loan Agreement provided a Maturity Date of May 1, 2025, and was executed by Price in his capacity as President/Secretary, and by Uffelman in her capacity as Chief Financial Officer.
19. Each of the foregoing RLOCs was secured by a “Security Agreement” under which the U.S. Sunterra Entities and Lariagra U.S. granted Compeer a senior, perfected security interest in various items of personal property, including the 110,000 pigs in South Dakota.
20. The Security Agreement of Sunterra U.S. was executed by Price in his capacity as President, and by Uffelman in her capacity as Chief Financial Officer, on September 26, 2023. The combined Security Agreement of Sunwold U.S. and Lariagra U.S. was executed by Price in his capacity as President/Secretary, and by Uffelman in her capacity as Chief Financial Officer, on October 7, 2024.
21. The RLOCs were also coupled with financial products called “Farm Cash Management” accounts (“**FCM Accounts**” and, together with the RLOCs, the “**Compeer Accounts**”). The FCM Accounts allowed the U.S. Sunterra Entities and Lariagra U.S. to deposit excess funds and earn interest on those funds, similar to a money market account.
22. When the Compeer Accounts were in a net borrowing or “draw” position, Compeer was owed funds under the Promissory Note/Loan Agreements, as secured by the collateral under the Security Agreements. When the Compeer Accounts were in a net positive or “balance” position, interest would be earned and paid to the U.S. Sunterra Entities and Lariagra U.S. on the positive balance.

23. Importantly, the Compeer Accounts included cheque writing privileges. More specifically, the RLOCs and FCM Accounts worked together, allowing the U.S. Sunterra Entities and Lariagra U.S. to write cheques in amounts equal to the combined total of their credit limit (USD \$11,500,000) and any positive balance in their FCM Accounts.
24. In this way, for example, if Sunwold U.S. was in a net “draw” position of USD \$5,000,000 (on a RLOC of USD \$7,000,000), it could write cheques up to USD \$2,000,000 against its Compeer Accounts. By contrast, if Sunwold U.S. had a net “balance” of USD \$5,000,000, they could write cheques up to USD \$12,000,000 against their Compeer Accounts.
25. Each of the foregoing lending arrangements were the subject of a “Continuing Guaranty Agreement” between Compeer and Sunterra Enterprises, as follows:
 - (a) On September 26, 2023, Sunterra Enterprises guaranteed the indebtedness of Sunterra U.S. owing to Compeer in an unlimited amount;
 - (b) On August 28, 2023, Sunterra Enterprises guaranteed the indebtedness of Sunwold U.S. owing to Compeer in the amount of USD \$3,000,000; and
 - (c) On August 28, 2023, Sunterra Enterprises guaranteed the indebtedness of Lariagra U.S. owing to Compeer in the amount of USD \$3,000,000(together, the “**Guarantees**”).
26. Compeer relied on the Guarantees, which expressly acknowledged that they were being provided to induce Compeer to extend or continue the provision of credit through “future loans and advances” to the U.S. Sunterra Entities and Lariagra U.S. Each Continuing Guaranty Agreement that gave rise to the Guarantees was executed by Price in his capacity as “President” of Sunterra Enterprises.

The Canadian Sunterra Group Members’ Arrangements with National Bank of Canada

27. During the period that Compeer provided the Compeer Accounts, Canadian Western Bank (which has since amalgamated and continued under the name “National Bank of Canada” (“**National Bank**”)) extended secured credit and provided commercial banking services,

including the operation of bank accounts (the “**National Bank Accounts**”), to Canadian members of the Sunterra Group, including the Canadian Sunterra Entities.

28. Like how the Compeer Accounts provided the U.S. Sunterra Entities (and Lariagra U.S.) with cheque writing privileges, the National Bank Accounts also provided the Canadian Sunterra Entities with cheque writing privileges.

The Historical Operation of the Compeer Accounts

29. Over the years, Compeer’s relationship with the U.S. Sunterra Entities and Lariagra U.S. became longstanding and one that Compeer reasonably afforded considerable respect and trust. The reasons included what Compeer understood to be its regular, open and transparent engagement with Price and Uffelman, in their roles as officers and/or directors of the U.S. Sunterra Entities, Lariagra U.S., and other Sunterra Group members.
30. In engaging with Compeer, Price and Uffelman had – and made clear to Compeer that they had – deep, firsthand knowledge of the Sunterra Group’s affairs, including the integrated financial affairs of the Sunterra Group’s members. At the same time, Compeer understood Price to be well-known and reputable in the industries in which the Sunterra Group operated, and understood Uffelman to have long been Price’s trusted second-in-command.
31. Price and Uffelman consistently signed and/or delivered to Compeer the financial records required by the Promissory Note/Loan Agreements. Such financial records related to, among other things, the creditworthiness of the U.S. Sunterra Entities and Lariagra U.S., and compliance of Sunwold U.S. and Lariagra U.S. with their covenants under the Promissory Note/Loan Agreements (the “**Covenants**”).¹
32. Having received such financial information and records, Compeer applied its usual processes and, by doing so, consistently understood that Sunwold U.S. and Lariagra U.S. were generally in compliance with the Covenants, as required by the Promissory Note/Loan

¹ The Covenants did not apply to Sunterra U.S. because it primarily operated a swine management company with limited assets that consisted almost entirely of the accounts receivable for the management fees it received.

Agreements. When there was non-compliance with the Covenants, such non-compliance was addressed to Compeer's satisfaction.

The Sunterra Group's Use of Cheques for Intercompany Transactions

33. Over the years, and increasingly so in recent years, Compeer raised with Price and Uffelman the manner in which the U.S. Sunterra Entities' Compeer Accounts were used in connection with the Sunterra Group's approach to intercompany transactions between its U.S. and Canadian operations.
34. In particular, the U.S. Sunterra Entities regularly used cheques drawn on the National Bank Accounts of the Canadian Sunterra Entities to make deposits into their Compeer Accounts. Similarly, the Canadian Sunterra Entities regularly used cheques drawn on the U.S. Sunterra Entities' Compeer Accounts to make deposits into their National Bank Accounts. Most or all such cheques flowing in both directions were signed by Uffelman, with the knowledge of and at the direction of Price, who oversaw the Sunterra Group's affairs.
35. Compeer was required to undertake a time-consuming, manual, and broadly inefficient process to verify, clear, and settle cheques presented by the U.S. Sunterra Entities and drawn on the National Bank Accounts. This was particularly the case compared to alternative methods of cross-border intercompany transactions such as wire transfers.
36. In addition, the underlying funds from a cheque drawn on the National Bank Accounts were not available to Compeer until the cheque was verified, cleared, and settled by Compeer in the Compeer Accounts. Such a delay from when a cheque was deposited until the funds were made available is referred to as the "float" and could take up to a few days.
37. Like many commercial banking customers at Compeer and elsewhere, the U.S. Sunterra Entities were not subject to holds on funds deposited via cheque during the float. Accordingly, the cheques deposited by the U.S. Sunterra Entities and drawn on the Canadian Sunterra Entities' National Bank Accounts resulted in funds being immediately available for use, in the amount of the face value of the cheques, by way of conditional credit, before the underlying funds were cleared and settled by Compeer.

38. Similarly, Canadian Sunterra Entities were not subject to holds on funds deposited into their National Bank Accounts during the float, including on any cheques drawn on the U.S. Sunterra Entities' Compeer Accounts.
39. Prior to 2025, Compeer understood that the float and corresponding conditional credit resulting from the use of cheques drawn on the Canadian Sunterra Entities' National Bank Accounts, as well as the inefficiencies that resulted from relying on cross-border cheques, was the cause of overdraft positions that at times occurred on the RLOCs, particularly as the Sunterra Group's business appeared to grow over time.
40. Compeer retained discretion regarding how to respond to any such overdraft. Prior to February 2025, overdrafts on the RLOCs were promptly remedied through the deposit of further amounts via cheque by the U.S. Sunterra Entities. With that being the case – and given Compeer's longstanding relationship with the Sunterra Group, and its understanding that the overdraft resulted from the Sunterra Group's typical use of cheques being sent from Canada to the United States – Compeer exercised its discretion to take no further action in response to the overdrafts at that time.
41. Compeer nonetheless raised with Price and Uffelman the manner in which the U.S. Sunterra Entities' Compeer Accounts were used in connection with the Sunterra Group's approach to cross-border intercompany transactions, including potential alternatives that would see the U.S. Sunterra Entities move away from reliance on cheques for such transactions, to achieve a more efficient process that was less likely to result in overdrafts.
42. Although Price and Uffelman advised in response that there were legitimate business reasons for the Sunterra Group's approach and use of cheques, and that they were pursuing alternatives to using cheques, at all relevant times the U.S. Sunterra Entities continued to rely on cheques drawn on, and deposited to, their Compeer Accounts.
43. Ultimately, at Compeer's insistence, Price and Uffelman committed that the Sunterra Group would implement an alternative to undertaking intercompany transactions by cheques by the end of 2024. By that agreed-upon deadline, however, the Sunterra Group remained reliant on cheques for such transactions, and Price and Uffelman requested a brief

extension to implement an alternative to the use of cheques for cross-border intercompany transactions. Given the history of the relationship, Compeer permitted that brief extension.

The Events of Early 2025

44. In the early weeks of 2025, despite Price and Uffelman having committed that the Sunterra Group would imminently implement an alternative to undertaking cross-border intercompany transactions by cheques, the Sunterra Group's use of cheques drawn on and deposited to the U.S. Sunterra Entities' Compeer Accounts accelerated. In this regard:
 - (a) Between January 1, 2025 and February 10, 2025, 474 cheques were drawn on the U.S. Sunterra Entities' Compeer Accounts, in the total amount of USD \$431,301,200, all for deposit into the Canada Sunterra Entities' National Bank Accounts; and
 - (b) During the same period, the U.S. Sunterra Entities deposited 472 cheques in the total amount of USD \$432,359,712.35 into their Compeer Accounts, all drawn on the Canadian Sunterra Entities' National Bank Accounts.
45. These simultaneous transfers occurred nearly daily throughout this period, and averaged approximately 18 cheques for a total amount of USD \$16,588,508 out of the U.S. Sunterra Entities' Compeer Accounts *each day*. In total, in just over the first month of 2025, USD \$863,660,912 was deposited into the Compeer Accounts and the National Bank Accounts, which greatly exceeded the total revenue of the entire Sunterra Group for the fiscal year ending December 31, 2024, which was CAD \$143,968,018.
46. As a result, by February 10, 2025, Compeer was aware that, contrary to the commitments of Price and Uffelman to implement an alternative approach, the U.S. Sunterra Entities:
 - (a) Used the cheque-writing features on their Compeer Accounts to write even more cheques each day, which were being deposited the same day (apparently reflecting that the cheques were being signed in Alberta, primarily by Uffelman) into the Canadian Sunterra Entities' National Bank Accounts;

- (b) Simultaneously sent Compeer even more cheques each day drawn against those same National Bank Accounts to pay down its RLOCS and/or increase the balance in their FCM Accounts with Compeer;
 - (c) Transacted funds through the Compeer Accounts in the January 1, 2025 to February 10, 2025 period in a volume that outpaced the annual reported and projected revenues and other financial metrics of the Sunterra Group; and
 - (d) Issued cheques in denominations generally ranging between USD \$800,000 and USD \$990,000, and no single cheque exceeded USD \$1,000,000.
47. The denominations of the cheques was significant because a cheque deposited across international lines for USD \$1,000,000 or more would have triggered additional scrutiny by the United States Bulk Exchange, which Price and Uffelman sought to avoid.
48. As a result, on February 11, 2025, Compeer personnel spoke with Price by videoconference in an effort to better understand the Sunterra Group's cheque-writing activity.
49. During that conversation, despite his direct, personal involvement with the Sunterra Group and the U.S. Sunterra Entities' Compeer Accounts (and his active coordination with Uffelman), Price stated that he was unsure of the reason for the activity other than to say that it was a "timing" issue. He further advised that he would have to consult with other Sunterra Group personnel to further advise Compeer about the reason for the activity.
50. Compeer was not satisfied with, and was concerned by, Price's statements made during the February 11, 2025 videoconference. As a result, later that day, Compeer notified Price in writing that it was exercising its right to terminate cheque-writing privileges for the Compeer Accounts, while also stating that it would consider permitting cheques to be written for necessary operational expenses, such as to feed animals.
51. In accordance with its written notice, on February 11, 2025, Compeer took action to ensure that cheques written on the Compeer Accounts would need to be manually approved by Compeer, so that Compeer could actively monitor all cheque-writing activity.

52. Despite its written notice, later on February 11, 2025, Compeer learned that 18 cheques had been drawn on the U.S. Sunterra Entities' Compeer Accounts for intercompany transfers to the Canadian Sunterra Entities' National Bank Accounts totaling USD \$16,302,000. Compeer relied on its written notice to dishonour those 18 cheques.
53. On the morning of February 12, 2025, Compeer received another batch of cheques totaling approximately USD \$9,000,000 drawn on the Canadian Sunterra Entities' National Bank Accounts to pay down the U.S. Sunterra Entities' RLOCS and/or increase the balance in their FCM Accounts with Compeer.
54. Later on February 12, 2025, having received that batch of cheques, Compeer personnel had another videoconference with Price. During that call, Price admitted:
 - (a) The U.S. Sunterra Entities were moving funds back and forth between Compeer and National Bank to ensure that the U.S. Sunterra Entities had sufficient funds to avoid causing their RLOCs at Compeer to go into an overdraft position;
 - (b) The U.S. Sunterra Entities should not have done what they did;
 - (c) The practice of sending cheques back and forth between the same accounts was "wrong";
 - (d) If Compeer deposited the USD \$9,000,000 in cheques received earlier that day but did not permit new cheques to be drawn on the Compeer Accounts to be immediately deposited in the Canadian Sunterra Entities' National Bank Accounts, those National Bank Accounts would go into overdraft;
 - (e) If Compeer did not allow the U.S. Sunterra Entities to move money from Compeer to National Bank, then they would not have enough money to cover their operational expenses;
 - (f) That he felt "badly" that Compeer had been paying interest to the U.S. Sunterra Entities for the positive FCM Account balances; and

- (g) That he believed that Compeer was holding more than USD \$20 million in positive FCM Account balances that he wanted sent back to the National Bank Accounts, at least in part, to cover the overdraft position of the Canadian Sunterra Entities at National Bank.
55. Price's request amounted to seeking to have Compeer to continue the conduct that he knew, and had admitted to Compeer, constituted a fraudulent cheque kiting scheme, the particulars of which are pleaded further below.
56. After the February 12, 2025 videoconference, Compeer confirmed to Price that it would not deposit the USD \$9,000,000 in cheques that had been presented to Compeer for deposit drawn on the Canadian Sunterra Entities' National Bank Accounts.
57. On February 13, 2025, Compeer personnel spoke again with Price. At that time, Price advised that the Canadian Sunterra Entities' National Bank Accounts were overdrawn by approximately USD \$21 million, and those entities needed money sent back from Compeer to cover those overdraft positions.
58. In response, Compeer advised Price that it could not release any funds unless it could verify that there were good and valid funds in the National Bank Accounts from which the cheques delivered to Compeer would be drawn. Compeer requested that Price consent to Compeer communicating directly with National Bank to verify the existence of such funds, but Price would not provide that consent.
59. Similarly, since Compeer was restricted from sharing information about the U.S. Sunterra Entities with National Bank, Compeer repeatedly requested consent from Price and from other principals of the Sunterra Group, namely Price's brothers Arthur Price and Glen Price, to communicate directly with National Bank, but those requests were refused.
60. On February 10, 2025, the Compeer Accounts of the U.S. Sunterra Entities and Lariagra U.S. had a combined positive balance of approximately USD \$21,000,000 in funds payable to the U.S. Sunterra Entities and Lariagra U.S., comprised of:

- (a) A positive FMC Account balance of approximately USD \$14 million in favour Sunterra U.S.;
 - (b) A positive FMC Account balance of approximately USD \$10 million in favour of Sunwold U.S.; and
 - (c) A draw of approximately USD \$3 million on the RLOC of Lariagra U.S.
61. However, during the week of February 24, 2025, Compeer determined that National Bank had dishonoured 65 cheques totaling USD \$59,900,000 that had been previously credited by Compeer to the U.S. Sunterra Entities' Compeer Accounts.
62. As a result, the approximately USD \$21,000,000 positive cash balance that was showing as owed to the U.S. Sunterra Entities and Lariagra U.S. was immediately wiped out and, instead, there was more than USD \$30,000,000 of debt owing from the U.S. Sunterra Entities and Lariagra U.S. This was the case despite their combined credit limit of only USD \$11,500,000 with Compeer.
63. After accounting for additional deposits and withdrawals from the U.S. Sunterra Entities' Compeer Accounts, the total indebtedness of the U.S. Sunterra Entities and Lariagra U.S. to Compeer at the time of this statement of claim is over USD \$36,500,000.
64. Compeer repeatedly requested additional information from Price and Arthur Price about the Sunterra Group's finances in Canada and its financial position with National Bank, but Price and Arthur Price continued to refuse to permit Compeer to communicate substantively with National Bank and refused to provide transparency about the Sunterra Group's financial condition or Compeer's exposure to additional losses. Such refusals impeded Compeer's ability to understand the true use of the Compeer Accounts.

The Fraudulent Cheque Kiting Scheme

65. The foregoing circumstances resulted in disclosure of the fact that at least Price and Uffelman caused at least the U.S. Sunterra Entities and the Canadian Sunterra Entities to perpetrate a highly-sophisticated and fraudulent cheque kiting scheme against Compeer (the "**Cheque Kiting Scheme**"). The same conclusion has been reached by National Bank,

which was the other victim of the Cheque Kiting Scheme. The time at which the Cheque Kiting Scheme commenced is not currently known to Compeer, but with the information now known to Compeer, it appears likely to have been going on for years.

66. In summary, the Cheque Kiting Scheme consisted of fraudulent conduct that took advantage of the float and the corresponding conditional credit that was provided by Compeer and National Bank in connection with the deposit of cheques by the U.S. Sunterra Entities (in the case of Compeer) and the Canadian Sunterra Entities (in the case of National Bank). It required the continuous issuance of additional cheques, as between the U.S. Sunterra Entities on one hand, and the Canadian Sunterra Entities on the other hand, to satisfy amounts drawn by existing cheques with new conditional credit accrued with the issuance and deposit of new cheques.
67. The Cheque Kiting Scheme was undertaken, and could only have been undertaken, deliberately and with sufficient knowledge of the manner in which Compeer and National Bank respectively verified, cleared, and settled cheques, including regarding the extension of conditional credit and the lack of holds on cheques during the float. Only Price and Uffelman (and potentially others from the Sunterra Group) had such knowledge, which resulted from the manner in which they caused cross-border intercompany transactions to be conducted by cheque using the Compeer Accounts and the National Bank Accounts.
68. More specifically, the Cheque Kiting Scheme was undertaken as follows:
 - (a) The Canadian Sunterra Entities would issue a first set of cheques payable to the U.S. Sunterra Entities from their National Bank Accounts knowing that those cheques could not be satisfied by the balances in their accounts;
 - (b) For the reasons described above, the denominations of those cheques ultimately would be in amounts close to – but not exceeding – USD \$1,000,0000, which was a deliberate tactic to transact significant funds while evading detection of the fraud;
 - (c) Once the first set of cheques was deposited to the U.S. Sunterra Entities' Compeer Accounts, those entities would immediately issue a second set of cheques payable to the Canadian Sunterra Entities knowing that the funds were only available in

their Compeer Accounts to clear the cheques by virtue of the conditional credit from depositing the first set of cheques from the Canadian Sunterra Entities;

- (d) The second set of cheques from the U.S. Sunterra Entities would then be immediately deposited into the Canadian Sunterra Entities' National Bank Accounts so that the funds available by virtue of the conditional credit from that second set of cheques would be available to backstop the amounts required to satisfy the first set of cheques payable from the National Bank Accounts; and
 - (e) In this way, the fact that the Canadian Sunterra Entities' National Bank Accounts did not have sufficient funds to satisfy the first set of cheques payable to the U.S. Sunterra Entities was concealed from both Compeer and from National Bank.
69. Unbeknownst to Compeer until February 2025, the foregoing fraudulent process appears to have been undertaken at least hundreds of times, resulting in thousands of cheques amounting to billions of dollars being issued over the course of the Cheque Kiting Scheme.
70. Consistent with the foregoing, intercompany transactions described above had no legitimate commercial purpose. Rather, the purpose of those transactions was fraudulent and undertaken to illegitimately access credit and misappropriate funds from Compeer (and National Bank), and to fraudulently conceal that the Cheque Kiting Scheme was ongoing.
71. Accordingly, at least each of the U.S. Sunterra Entities and the Canadian Sunterra Entities knowingly and deliberately participated in the Cheque Kiting Scheme. They did so with the knowledge and at the direction of at least Price and Uffelman.
72. Given the nature of the Cheque Kiting Scheme, each and every time the Canadian Sunterra Entities issued a cheque to the U.S. Sunterra Entities, the issuing entity made a representation that it had the capacity to honour the cheque that was being issued.
73. Such representations were false and were known to be false at all relevant times by Price, who exercised control over the affairs and finances of the U.S. Sunterra Entities and the Canadian Sunterra Entities. Price also repeatedly engaged with Compeer regarding the Sunterra Group's use of cheques to undertake intercompany transactions, knowing (but

omitting to advise Compeer) that such transactions had no legitimate purpose but were instead being undertaken in furtherance of the Cheque Kiting Scheme.

74. Such representations were also known to be false at all relevant times by Uffelman, who also exercised control over the affairs and finances of the U.S. Sunterra Entities and the Canadian Sunterra Entities, and who personally signed the cheques used to perpetrate the Cheque Kiting Scheme. Uffelman also repeatedly engaged with Compeer regarding the Sunterra Group's use of cheques to undertake intercompany transactions, knowing (but omitting to advise Compeer) that such transactions had no legitimate purpose but were instead being undertaken in furtherance of the Cheque Kiting Scheme.
75. In addition, given the nature of the Cheque Kiting Scheme, each and every time Price and Uffelman knowingly caused or permitted the Canadian Sunterra Entities to deposit a cheque drawn on the U.S. Sunterra Entities' Compeer Accounts, they did so knowing that there were inadequate funds in those accounts and that they were defrauding Compeer.
76. The knowledge and direct personal involvement of Price and Uffelman, all of which is binding on the Canadian Sunterra Entities, also includes:
 - (a) The Sunterra Group utilized a unified accounting system that integrated all financial activities, including the activities of the U.S. Sunterra Entities and the Canadian Sunterra Entities. As a result, those with access to, knowledge of and responsibility for the financial activities of the Sunterra Group – including Price and Uffelman – knew that there were insufficient funds at Compeer and National Bank to cover the cheques used to perpetrate the Cheque Kiting Scheme, consistent with all such cheques being fraudulent misrepresentations;
 - (b) Price and Uffelman executed the Promissory Note/Loan Agreements with Compeer on behalf of the U.S. Sunterra Entities and Lariagra U.S. on October 7, 2024 (and previously). They did so knowing they were perpetrating the Cheque Kiting Scheme and intending to use the RLOCs provided pursuant to those Promissory Note/Loan Agreements to continue to perpetrate and conceal the Cheque Kiting Scheme;

- (c) Price and Uffelman executed the Security Agreements on behalf of Sunterra U.S. on September 26, 2023, and Sunwold U.S. and Lariagra U.S. on October 7, 2024 (and previously). They did so knowing they were perpetrating the Cheque Kiting Scheme and intending to use the Security Agreements to purport to provide security in connection with the RLOCs, and thereby continue to perpetrate and conceal the Cheque Kiting Scheme;
 - (d) Price executed the Continuing Guaranty Agreements on behalf of Sunwold U.S. and Lariagra U.S. on August 28, 2023, and Sunterra U.S. on September 26, 2023 (and previously). He did so knowing that he and Uffelman were perpetrating the Cheque Kiting Scheme and intending to use the Guarantees to purport to provide further security or financial backing in connection with the RLOCs to thereby continue to perpetrate and conceal the Cheque Kiting Scheme;
 - (e) Price and Uffelman repeatedly provided (or caused to be provided) financial information and records to Compeer. They did so knowing that they were actively perpetrating the Cheque Kiting Scheme, doing so was a means of maintaining and concealing their perpetration of the Cheque Kiting Scheme using the Compeer Accounts, and at least certain such financial information and records were false due to the Cheque Kiting Scheme; and
 - (f) Misrepresentations and omissions by Price and Uffelman to actively conceal the approach to cross-border intercompany transactions and the role of cheques in undertaking those transactions.
77. The funds misappropriated from Compeer by way of the Cheque Kiting Scheme were received or applied for the ultimate benefit of at least the U.S. Sunterra Entities and the Canadian Sunterra Entities. In addition, prior to discovery of the Cheque Kiting Scheme, the U.S. Sunterra Entities generated profits derived from the misappropriated funds, including interest payments on the fraudulent positive balances in the FCM Accounts, all of which was known by Price and Uffelman as it occurred.

78. Further particulars of the manner in which the Cheque Kiting Scheme was undertaken is within the knowledge of those individuals who undertook such fraudulent conduct, including Price and Uffelman, including others who participated with them.

Compeer's Response to the Cheque Kiting Scheme To Date

79. On March 10, 2025, Compeer issued notices of default and demands for accelerated payment to the U.S. Sunterra Entities and Lariagra U.S. However, the U.S. Sunterra Entities and Lariagra U.S have failed to respond to or satisfy those demands, in whole or in part.
80. On March 18, 2025, Compeer filed a complaint in South Dakota State Court against the U.S. Sunterra Entities and Lariagra U.S. It did so out of concern about the well-being of the pigs under those entities' control, which formed Compeer's collateral. Compeer understood that the pigs lacked feed and veterinary care, and were potentially not being kept warm. Compeer alleged that its claims against the U.S. Sunterra Entities and Lariagra U.S. arose from "a check kiting scheme involving billions of dollars fraudulently transferred by the Defendants and their principals between Canada and the United States." The case was later removed to the U.S. District Court, District of South Dakota.
81. On March 28, 2025, the U.S. District Court granted Compeer's motion and appointed Pipestone Management II, LLC as the receiver of the U.S. Sunterra Entities and Lariagra U.S. (the "**U.S. Receiver**") with duties that include investigating the Cheque Kiting Scheme. In its Opinion and Order appointing the U.S. Receiver, the U.S. District Court recited the facts put forward by Compeer in respect of the Cheque Kiting Scheme and concluded: "The evidence at the hearing supports the facts from the pleadings [of cheque kiting] cited above and is hereby incorporated by reference into this Opinion and Order."
82. Compeer has continued to advance funds to the U.S. Sunterra Entities and Lariagra U.S. necessary to advance the mandate of the U.S. Receiver, including caring for the pigs. Although the U.S. Receiver is also mandated to investigate the Cheque Kiting Scheme and help maintain the value of the relevant personal property that is to secure any indebtedness

to Compeer, the realizable value of that property is significantly less than the USD \$36,500,000 currently owing to Compeer.

83. In addition, on April 11, 2025, Compeer made a demand of Sunterra Enterprises on the Guarantees in the amount of USD \$25,729,079.66, which was the amount for which Sunterra Enterprises was liable at that time (accounting for the limits on the Guarantees and accumulated interest, which is now greater). In breach of the Guarantees, Sunterra Enterprises has neglected or refused to pay any amounts under the Guarantees.
84. Separately, National Bank brought an application in Alberta for the appointment of a receiver over all members of the Sunterra Group. In that application, National Bank's position, and its evidence, was that the "members of the Sunterra Group appear to have conducted a highly sophisticated cheque kiting scheme...involving bank accounts in Canada and the United States", and described Compeer as a victim of that scheme.
85. National Bank's application was initially dismissed and its appeal of that dismissal was adjourned after the Canadian members of the Sunterra Group – including the Canadian Sunterra Entities and Sunterra Enterprises – successfully applied for protections under the *Companies' Creditors Arrangement Act*. The initial order rendered in that proceeding permits the issuance of this statement of claim without leave of the Alberta court.
86. The affidavit filed by National Bank in support of its application includes as an exhibit an email dated February 14, 2025 from Price to National Bank personnel with the subject line "Sunterra Overdraft Situation". In that email, Price again admits to the Cheque Kiting Scheme: "We then would pay from the U.S. to Canada, but in order to keep the U.S. entities with appropriate cash, we would move money back down on an 'advance' basis. It obviously grew beyond what it was meant to be as we continued to make sure that both entities had the money they needed. I apologize for what ended up happening."

Fraud, Deceit, and Fraudulent Misrepresentation

87. As a result of their perpetration of the Cheque Kiting Scheme, the currently-known particulars of which are pleaded herein, the Canadian Sunterra Entities, Price, and Uffelman are liable to Compeer in fraud, deceit, and fraudulent misrepresentation.

88. The conduct of the Canadian Sunterra Entities, Price, and Uffelman pleaded herein amount to representations and omissions made to Compeer that constitute fraud, dishonest dealings, knowingly false representations, including by the non-disclosure of facts, and deprivation by deceit. All such conduct was undertaken with knowledge of its falsehood, or recklessly, without belief in its truth, with intention that it should be acted on by Compeer, which is what occurred.
89. Compeer relied on the false representations to its detriment by permitting the U.S. Sunterra Entities and Lariagra U.S. to access their respective RLOCs and the conditional credit that resulted from the Sunterra Group's use of cheques to further the Cheque Kiting Scheme.
90. The result of Compeer's detrimental reliance on such fraudulent and deceitful conduct is that Compeer suffered losses for which the Canadian Sunterra Entities, Price, and Uffelman are jointly and severally liable.

Civil Conspiracy

91. As a result of their perpetration of the Cheque Kiting Scheme, the currently-known particulars of which are pleaded herein, the Canadian Sunterra Entities, Price, and Uffelman are liable to Compeer for unlawful conduct conspiracy.
92. The Canadian Sunterra Entities, Price, and Uffelman agreed to engage in unlawful conduct that they knew (and in fact intended) or should have known would likely cause injury to Compeer. Their unlawful conduct, namely the Cheque Kiting Scheme, is actionable. It amounts to fraud, deceit, and fraudulent misrepresentation, and all such conduct was directed towards Compeer.
93. The Canadian Sunterra Entities, Price, and Uffelman acted in concert with a common design in pursuing the Cheque Kiting Scheme with the intention of inducing Compeer to advance funds based on false and misleading representations, knowing that there were insufficient funds in the accounts from which the cheques were to be drawn. In doing so, they engaged in unlawful conduct, specifically the Cheque Kiting Scheme.

94. By engaging in their conspiracy, the Canadian Sunterra Entities, Price, and Uffelman caused Compeer to suffer losses for which they are jointly and severally liable.

Oppression

95. As a result of their perpetration of the Cheque Kiting Scheme, the currently-known particulars of which are pleaded herein, the Canadian Sunterra Entities, Price, and Uffelman engaged in oppressive conduct that entitles Compeer as a creditor of the Canadian Sunterra Entities, and their affiliates, including Sunterra Enterprises, the U.S. Sunterra Entities, and Lariagra U.S., to compensation as an aggrieved person pursuant to section 242 of Alberta's *Business Corporations Act*.

Damages

96. Due to the Cheque Kiting Scheme, Compeer has uniquely suffered losses of at least USD \$36,500,103.19. The other victim, National Bank, has no losses arising from the Cheque Kiting Scheme. This amount is the total indebtedness to Compeer of the U.S. Sunterra Entities and Lariagra U.S., the latter of which would not have been extended credit if not for the conduct of undertaking and concealing the Cheque Kiting Scheme. The Canadian Sunterra Entities, Price, and Uffelman are jointly and severally liable for such losses.
97. Compeer has also incurred compensable and ever-increasing expenses arising out of its investigation of the Cheque Kiting Scheme, and its funding of the appointment and activities of the U.S. Receiver. The Canadian Sunterra Entities, Price, and Uffelman are jointly and severally liable for such losses.
98. As a result of the fraudulent and high-handed conduct of the Canadian Sunterra Entities, Price, and Uffelman, Compeer is entitled to recover punitive and/or exemplary damages.

Breach of the Guarantees

99. Sunterra Enterprises provided the Guarantees to induce Compeer to extend or continue to extend credit to the U.S. Sunterra Entities and Lariagra U.S. Pursuant to the Guarantees, Sunterra Enterprises unconditionally, absolutely, and irrevocably covenanted and agreed

to, among other things, pay and punctually perform the obligations of the U.S. Sunterra Entities and Lariagra U.S. subject to certain caps in liability contained therein.

100. Despite Compeer having demanded payment under the Guarantees on April 11, 2025, Sunterra Enterprises has neglected or refused to pay any amounts to Compeer. Sunterra Enterprises is therefore liable to Compeer under the Guarantees in the amount of at least USD \$25,729,079.66, plus additional accumulated interest. Compeer is therefore entitled to judgment against Sunterra Enterprises.

Remedy sought:

101. Compeer seeks the following relief:

- (a) A declaration that at least Sunterra Canada, Sunwold Canada, Price, and Uffelman have committed fraud;
- (b) Damages in the amount of at least USD \$36,500,103.19 and such further or other amount as may be determined (plus contractual interest of 9% under the Promissory Note/Loan Agreements) from the Canadian Sunterra Entities, Price, and Uffelman arising from their fraudulent and oppressive conduct, namely their perpetration of the Cheque Kiting Scheme, and in respect of Compeer's resulting expenses;
- (c) Damages in the amount of at least USD \$25,729,079.67 and such further or other amounts as may yet determined (plus additional contractual interest of 9% under the Promissory Note/Loan Agreements) from Sunterra Enterprises for its breach of the Guarantees or, alternatively, amounts owing under the Guarantees;
- (d) Punitive damages in the amount of at least CAD \$1,000,000;
- (e) A declaration that Compeer is entitled to trace the funds advanced as a result of the Cheque Kiting Scheme and a declaration that those funds are held in trust as a constructive trustee for Compeer;

- (f) An order for an accounting of any profits or benefits realized by the Canadian Sunterra Entities, Price, or Uffelman from the funds obtained as a result of the Cheque Kiting Scheme and the disgorgement of same;
- (g) An order, to the extent necessary, declaring that Compeer is entitled to pierce the corporate veil of the Canadian Sunterra Entities to enforce their claims and seek damages against Price and/or Uffelman;
- (h) In the alternative to the contractual interest stated above, interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1;
- (i) Costs on a solicitor-client basis; and
- (j) Such further and other relief as counsel may advise and this Honourable Court shall permit.

NOTICE TO THE DEFENDANTS

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a Statement of Defence or a Demand for Notice in the office of the clerk of the Court of King's Bench at Edmonton, Alberta, and serving your Statement of Defence or a Demand for Notice on the Plaintiff's address for service.

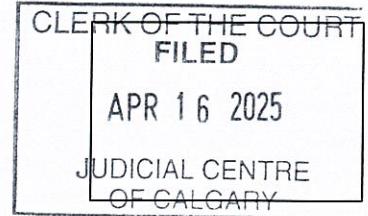
WARNING

If you do not file and serve a Statement of Defence or a Demand for Notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the Plaintiff against you.

TAB 27

Clerk's Stamp:

2501 06120



COURT FILE NUMBER

COURT

JUDICIAL CENTRE OF

COURT OF KING'S BENCH OF ALBERTA

CALGARY

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 SUNTERRA FOOD
CORPORATION, TROCHU MEAT PROCESSORS
LTD., SUNTERRA QUALITY FOOD MARKETS INC.,
SUNTERRA FARMS LTD., SUNWOLD FARMS
LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS
LTD., SUNTERRA FARM ENTERPRISES LTD.,
SUNTERRA ENTERPRISES INC.

APPLICANT(S):

SUNTERRA FOOD CORPORATION, TROCHU MEAT
PROCESSORS LTD., SUNTERRA QUALITY FOOD
MARKETS INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD.,
LARIAGRA FARMS LTD., SUNTERRA FARM
ENTERPRISES LTD., SUNTERRA ENTERPRISES
INC.

DOCUMENT

AFFIDAVIT

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING DOCUMENT

Blue Rock Law LLP
700-215 9 Avenue SW
Calgary AB T2P 1K3
Attention: David W. Mann KC/Scott Chimuk
Phone: (587) 317-0643/(587) 390-7041
Fax: (825) 414-0831
Email Address: david.mann@bluerocklaw.com
scott.chimuk@bluerocklaw.com
File No. 1375-00001

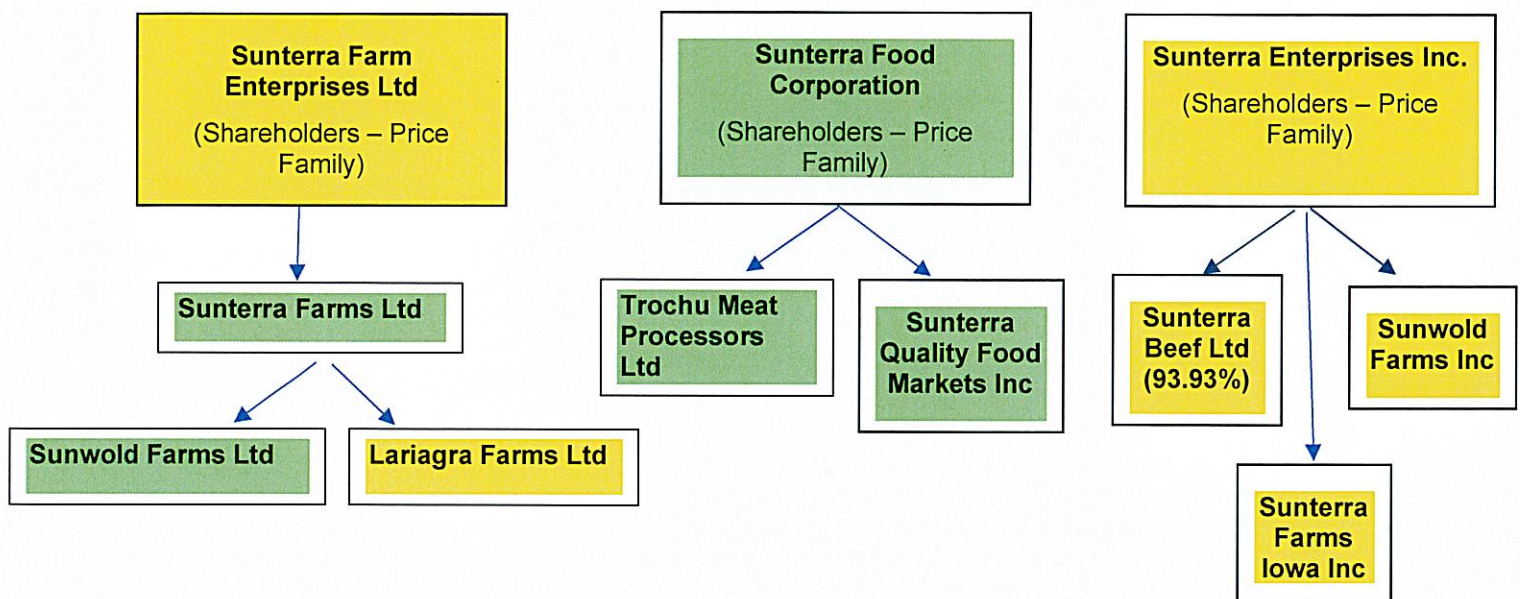
Group's operations extend across multiple sectors of the agricultural and food distribution industries, and its businesses benefit from longstanding relationships with third-party vendors, service providers, and a dedicated workforce.

8. The Group's business model allows production and processing operations to provide specialty meat and produce to international markets and also directly to its retail outlets. Such integration affords stringent quality control, enhanced operational efficiencies, and the consistent maintenance of premium product standards. In addition, Sunterra Markets benefits from its longstanding relationships with a network of third-party vendors who supply supplementary food products, beverages, and ancillary services, and the farming businesses benefit from long term supplier relationships such as for livestock feed. This strategic integration together with valuable supplier relationships, reinforces the Group's prominent market position within the high-end retail food sector and hog breeding businesses.
9. The Group's sustained operations for over 50 years exemplifies its resilience and robust market presence. Over time, the Price family has built and maintained significant goodwill with suppliers, employees, and customers alike, cultivating a brand that is synonymous with high quality and reliability. This reputable standing has enabled the Group to negotiate favourable credit terms and secure significant equity across its operations, contributing to its ability to weather challenging economic periods.
10. Since 2010, the Group has banked with Canadian Western Bank (recently acquired by National Bank of Canada and referred to in this my affidavit as "**NBC**" or the "**Bank**"), where the Bank as provided bank account services, credit facilities (as described in more detail below), and related cash management services.
11. On March 14, 2025, following a period of dispute with NBC regarding the freezing of accounts held by the Applicants with the Bank, NBC issued a Demand for Repayment within 15 business days and Notices of Intention to enforce and to realize security pursuant to section 244 of the *BIA* and section 21 of the *Farm Debt Mediation Act* S.C. 1997, c. 21 respectively ("**Demand and Notice of Intention to Enforce Security**"), against the NBC Borrowers (as defined below) and also against Sunterra Beef Ltd., Lariagra Farms Ltd. ("**Lariagra**"), Sunterra Farm Enterprises Ltd., Sunterra Enterprises Inc, Sunterra Farms Iowa Inc ("**Sunterra Farms Iowa**") and Sunwold Farms Inc ("**Sunwold Farms US**") as alleged guarantors (the "**Alleged Guarantors**"). Sunterra Farms Iowa and Sunwold Farms US (together, the "**US Hog Farm Entities**") are members of the Sunterra Group and are registered corporate entities in the U.S.. They are not parties to these proceedings. Their relationship to the Canadian operations of the Sunterra Group and issues with their lender are dealt with at paragraphs 17, 44 and 51 below. The Demand and Notice of Intention to Enforce Security is attached hereto as **Exhibit "A"**.
12. After careful consideration of the Applicants' current financial circumstances, their diversified and integrated operations, and the longstanding, trusted relationships established with key stakeholders, it is my view and the view of the Board of each of the Applicants, that the commencement of these CCAA proceedings is in the best interests of the Applicants, their lenders, and the broader community of stakeholders. Those stakeholders include creditors, employees, related companies, the ultimate shareholders of the Group (including the Applicants), and the broader communities served or sustained by the Sunterra Group and its activities. The protection and relief provided by the Stay of Proceedings will offer the necessary support and time for the Applicants to work with their professional advisors and the Monitor in directing cash flows for prompt repayment of the NBC debt while implementing a re-financing, orderly sale and/or restructuring strategy. This strategy is designed to best ensure lender repayment, orderly

asset management and restructuring, continuation of the businesses of the Applicants and thereby the continuing provision of employment and quality products and services to the communities they serve, and maximization of value for the balance of interested stakeholders.

IV. CORPORATE STRUCTURE AND DIRECTORS

13. The Applicants fall within three shareholding structures, all of which are owned and controlled by members of the Price family.
14. The following diagrams show the corporate structure in which the Applicants sit, plus the US Hog Farm Entities. The NBC Borrowers are highlighted in green and the Alleged Guarantors in yellow. Corporate profile reports for each of the Applicants are collectively attached hereto as **Exhibit "B"**.



15. The directors of each of the Applicant companies are as follows:
 - (a) for Sunterra Food Corporation, Sunterra Farm Enterprises Ltd ("**Sunterra Farm Enterprises**"), Sunterra Enterprises Inc ("**Sunterra Enterprises**"): Arthur Price, Glen Price, Ray Price, David Price and Allan Price;
 - (b) for Sunterra Farms, Sunwold Farms and Lariagra Farms: Arthur Price and Ray Price;
 - (c) for Trochu and Sunterra Beef: Glen Price and Ray Price; and
 - (d) for Sunterra Markets: Ray Price, Glen Price and Art Price.

V. THE BUSINESS OF THE APPLICANTS

16. The Applicants and their businesses are as described in summary below:
 - (a) Sunterra Quality Food Markets Inc owns and operates the high-end, European style retail food markets for the Group, that combine proprietary and third-party supplied premium food and beverage products.

TAB 28

Clerk's Stamp:



COURT FILE NUMBER
COURT
JUDICIAL CENTRE OF

2501-06120
COURT OF KING'S BENCH OF ALBERTA
CALGARY
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
SUNTERRA FOOD CORPORATION, TROCHU
MEAT PROCESSORS LTD., SUNTERRA QUALITY
FOOD MARKETS INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED, SUNTERRA BEEF
LTD., LARIAGRA FARMS LTD., SUNTERRA FARM
ENTERPRISES LTD., SUNTERRA ENTERPRISES
INC.

APPLICANT(S):

SUNTERRA FOOD CORPORATION, TROCHU
MEAT PROCESSORS LTD., SUNTERRA QUALITY
FOOD MARKETS INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED, SUNTERRA BEEF
LTD., LARIAGRA FARMS LTD., SUNTERRA FARM
ENTERPRISES LTD., SUNTERRA ENTERPRISES
INC.

DOCUMENT

CLAIMS PROCEDURE ORDER

CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT:

Blue Rock Law LLP
700-215 9 Avenue SW
Calgary AB T2P 1K3
Attention: David W. Mann KC/Scott Chimuk
Phone: (587) 317-0643/(587) 390-7041
Fax: (825) 414-0831
Email Address: david.mann@bluerocklaw.com
scott.chimuk@bluerocklaw.com
File No. 1375-00001

**DATE ON WHICH ORDER WAS
PRONOUNCED:**

July 24, 2025

**NAME OF JUDGE WHO MADE THIS
ORDER:**

The Honourable Justice M.J. Lema

LOCATION OF HEARING:

Edmonton, Alberta

UPON the application of Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd. ("**Sunterra Canada**"), Sunwold Farms Limited ("**Sunwold Canada**"), Sunterra Beef Ltd., Lariagra

Farms Ltd., Sunterra Farm Enterprises Ltd., Sunterra Enterprises Inc. (collectively, the “**Applicants**” or “**Sunterra Group**”); **AND UPON** having read the Application, the Affidavit of Arthur Price dated July 15, 2025; **AND UPON** reading the Second Report of the Monitor, FTI Consulting Canada Inc. (the “**Monitor**”); **AND UPON** hearing counsel for the Applicants and any other counsel who may be present; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order (the “**Order**”) is hereby abridged and deemed good and sufficient and this application is properly returnable today.

DEFINITIONS AND INTERPRETATION

2. Any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Initial Order.
3. For the purposes of this Order, the following terms shall have the meanings set forth below:
 - a. “Assessments” means current or future claims of His Majesty the King in Right of Canada or of any province, territory, municipality, or other taxation authority in any Canadian or non-Canadian jurisdiction, including, without limitation, amounts that may arise or have arisen under any current or future notice of assessment, notice of objection, notice of reassessment, notice of appeal, audit, investigation, demand, or similar request from any taxation authority;
 - b. “Bar Date” means the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable pursuant to the terms of this Order;
 - c. “Business Day” means, except as otherwise specified herein, a day other than a Saturday, Sunday, or statutory holiday on which banks are generally open for business in Calgary, Alberta;
 - d. “CCAA Proceedings” means the CCAA proceedings commenced by the Applicants in the Court under Court File No. 2501-06120;
 - e. “Characterization” means, for the purposes of this Order, the determination solely of whether a Claim is a secured or unsecured Claim, a priority, property or trust Claim, a Pre-Filing Claim, Restructuring Period Claim, or D&O Claim;
 - f. “Claim” means:
 - i) any right or claim of any Person, wherever situated, including in Canada and the United States

of America, against any of the Sunterra Group entities, whether or not asserted, in connection with any indebtedness, liability, or obligation of any kind whatsoever of any such Sunterra Group entity to such Person, in existence on the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed or undisputed, legal, equitable, secured, unsecured, perfected or unperfected, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature—including any right or claim with respect to any Assessment, contract, or by reason of any equity interest, ownership, title to property or assets, or right to a trust or deemed trust (whether statutory, express, implied, resulting, or constructive)—including any right or ability of any Person to seek contribution or indemnity or otherwise assert a Claim against any of the Sunterra Group entities with respect to any matter, action, cause, or chose in action, whether those facts arose wholly or in part prior to the Filing Date (each such claim being a **“Pre-Filing Claim”**, and collectively, the **“Pre-Filing Claims”**);

- ii) any right or claim of any Person, wherever situated, including in Canada and the United States of America, against any of the Sunterra Group entities in connection with any indebtedness, liability or obligation of any kind whatsoever of any such Sunterra Group entity to such Person arising out of the restructuring, disclaimer, termination, or breach by such Sunterra Group entity on or after the Filing Date of any contract, lease, or other agreement, including any right or claim with respect to any Assessment (each such claim being a **“Restructuring Period Claim”**, and collectively, the **“Restructuring Period Claims”**);
- iii) any right or claim of any Person, wherever situated, including in Canada and the United States of America, against one or more of the Directors and/or Officers arising, in whole or in part, on facts that existed prior to the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to seek contribution, indemnity, or otherwise assert a claim against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action for which any Director or Officer is alleged to be liable in his or her capacity as a Director or Officer (each such claim being a **“Pre-Filing D&O Claim”**, and collectively, the **“Pre-Filing D&O Claims”**); and
- iv) any right or claim of any Person, wherever situated, including in Canada and the United

States of America, against one or more of the Directors and/or Officers arising on or after the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to seek contribution, indemnity or otherwise assert a claim against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action for which any Director or Officer is alleged to be liable in his or her capacity as a Director or Officer (each such claim being a “**Restructuring Period D&O Claim**”, and collectively, the “**Restructuring Period D&O Claims**”); provided, however, that in any case “Claim” shall not include an Excluded Claim or any right or claim of any Person that was previously released, barred, estopped, and/or permanently stayed, but shall include any Claim arising through subrogation against any Sunterra Group entity or any Director or Officer;

g. “Claimant” means:

- i) a Person, wherever situated, including in Canada and the United States of America, asserting a Pre-Filing Claim or a Restructuring Period Claim against any Sunterra Group entity; or
- ii) a Person, wherever situated, including in Canada and the United States of America, asserting a D&O Claim against any of the Directors or Officers;

h. “Claims Bar Date” means, with respect to a Pre-Filing Claim or Pre-Filing D&O Claim, 5:00 p.m. on September 4, 2025;

i. “Claims Process” means the procedures outlined in this Order in connection with the assertion of Claims against the Sunterra Group entities and/or the Directors and Officers;

j. “Court” means the Court of King’s Bench of Alberta;

k. “D&O Claim” means any Pre-Filing D&O Claim or Restructuring Period D&O Claim, and “D&O Claims” means collectively the Pre-Filing D&O Claims and the Restructuring Period D&O Claims;

l. “D&O Claim Instruction Letter” means the letter containing instructions for completing the D&O Proof of Claim form, substantially in the form attached as Schedule “F” hereto;

m. “D&O Proof of Claim” means the proof of claim to be filed by Claimants in connection with any D&O Claim, substantially in the form attached as Schedule “G” hereto;

- n. "Director" means anyone who is or was, or may be deemed to be or have been, whether by statute, operation of law, or otherwise, a director or de facto director of any of the Sunterra Group entities, in such capacity;
- o. "Excluded Claim" means any:
 - i) Claim that may be asserted by any beneficiary of the Administration Charge, the Directors' Charge, or any other charge granted by the Court in the CCAA Proceedings;
 - ii) Claim that may be asserted by any of the Sunterra Group entities against any Directors and/or Officers; and
 - iii) any Excluded Claim arising through subrogation;
- p. "Filing Date" means April 22, 2025;
- q. "General Claims Package" means the document package to be disseminated by the Monitor in accordance with the terms of this Order, which shall consist of a Proof of Claim form, a Proof of Claim Instruction Letter, a D&O Proof of Claim form, a D&O Claim Instruction Letter, and such other materials as the Sunterra Group, in consultation with the Monitor, may consider appropriate;
- r. "Meeting" means any meeting of the creditors of the Sunterra Group called for the purpose of considering and voting in respect of a Plan;
- s. "Intercompany Claim" means any Claim that may be asserted against any Sunterra Group entity by or on behalf of any other Sunterra Group entity;
- t. "Monitor's Website" means <https://cfcanada.fticonsulting.com/Sunterra/>;
- u. "Notice of Dispute of Revision or Disallowance" means the notice, substantially in the form attached as Schedule "E" hereto, which may be delivered to the Monitor by a Claimant disputing a Notice of Revision or Disallowance received by such Claimant;
- v. "Notice of Revision or Disallowance" means the notice, substantially in the form attached as Schedule "D" hereto, which may be prepared by the Sunterra Group entities, in consultation with the Monitor, and delivered by the Monitor to a Claimant revising or disallowing, in part or in whole, a Claim submitted by such Claimant in a Proof of Claim or D&O Proof of Claim for purposes of voting and/or distribution;
- w. "Notice to Claimants" means the notice for publication by the Monitor as described in paragraph

11 herein, substantially in the form attached as Schedule “A” hereto;

- x. “Officer” means anyone who is or was, or may be deemed to be or have been, whether by statute, operation of law, or otherwise, an officer or de facto officer of any of the Sunterra Group entities, in such capacity;
 - y. “Order” means this Claims Procedure Order;
 - z. “Person” means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof, or any other entity, wherever situated, including in Canada and the United States of America;
 - aa. “Plan” means any proposed plan of compromise or arrangement that may be filed in respect of any or all of the Sunterra Group entities pursuant to the CCAA as amended, supplemented, or restated from time to time in accordance with its terms;
 - bb. “Proof of Claim” means the proof of claim to be submitted or delivered by a Claimant to the Monitor in respect of any Pre-Filing Claim and/or Restructuring Period Claim, substantially in the form attached as Schedule “C” hereto, including all available supporting documentation in respect thereof;
 - cc. “Proof of Claim Instruction Letter” means the letter containing instructions for completing the Proof of Claim form, substantially in the form attached as Schedule “B” hereto;
 - dd. “Restructuring Period Claims Bar Date” means, with respect to a Restructuring Period Claim or Restructuring Period D&O Claim, the later of:
 - i) thirty (30) days after the date on which the Monitor sends a General Claims Package (as appropriate) with respect to such Claim; and
 - ii) the Claims Bar Date.
4. Except where otherwise specified herein, all references as to time shall mean local time in Calgary, Alberta, Canada, and any reference to an event occurring on a Business Day shall mean occurring prior to 5:00 p.m. on such Business Day unless otherwise indicated herein. Any reference to an event occurring on a day that is not a Business Day shall mean the next following day that is a Business Day.
5. All references to the word “including” shall be read as “including without limitation.” All references in the singular shall include the plural, the plural shall include the singular, and any reference to gender shall include all genders.

GENERAL PROVISIONS

6. Notwithstanding any other provisions of this Order, the solicitation by the Sunterra Group and the Monitor of Proofs of Claim and D&O Proofs of Claim, the filing by any Claimant of any Proof of Claim, D&O Proof of Claim, or Notice of Dispute of Revision or Disallowance shall not, by that fact alone, confer any rights on any Person— including without limitation any rights regarding the amount or Characterization of its Claims or its standing in the CCAA Proceedings—except as specifically provided in this Order.
7. The Monitor, in consultation with the Sunterra Group and, if applicable, the relevant Directors and Officers or their counsel, is hereby authorized to use reasonable discretion regarding the adequacy of compliance with respect to the manner, content, and timing of any forms submitted or delivered hereunder. Where, in consultation with the Sunterra Group and, if applicable, the relevant Directors and Officers or their counsel, the Monitor is satisfied that a Claim has been adequately established, the Monitor may waive strict compliance with the requirements of this Order—including those relating to the completion, execution, and timing of such forms—recognizing that certain Claims may be contingent in nature and may therefore not contain all details that are not yet known at the time they are filed.
8. Amounts claimed in Assessments shall be subject to this Order, and there shall be no presumption of validity, or automatic acceptance, of the amounts due in respect of any Claim set out in any Assessment.

MONITOR'S ROLE

9. In addition to its prescribed rights, duties, responsibilities, and obligations under the CCAA, the Initial Order, and any other orders of the Court in the CCAA Proceedings, the Monitor shall assist the Sunterra Group in connection with the administration of the Claims Process set out herein, including the determination and resolution of Claims, if applicable, and is hereby authorized, directed, and empowered to take such further actions and fulfill such additional roles as are authorized by this Order or incidental thereto.
10. In carrying out the terms of this Order, the Monitor:
 - a. shall have all the protections granted by the CCAA, the Initial Order, any other orders of the Court in the CCAA Proceedings, and this Order, or as an officer of the Court, including a stay of proceedings in its favour;
 - b. shall incur no liability or obligation as a result of carrying out the provisions of this Order, except in

respect of its gross negligence or wilful misconduct;

- c. shall be entitled to rely upon the books and records of the Sunterra Group and any information provided by or on behalf of any of the Sunterra Group without independent investigation, provided that Intercompany Claims are subject to independent review by the Monitor as provided in paragraph 34;
- d. shall not be liable for any claims or damages resulting from any errors or omissions in such books, records, or information; and
- e. may seek such assistance as may be reasonably required to carry out its duties and obligations under this Order from the Sunterra Group or any of their affiliated companies, partnerships, or other corporate entities, including by making inquiries and obtaining the relevant records and information in connection with the Claims Process.

NOTICE TO CLAIMANTS

- 11. As soon as practicable—but no later than 5:00 p.m. on the tenth (10th) Business Day following the date of this Order—the Monitor shall cause a General Claims Package to be sent to:
 - a. each Person that appears on the Service List (except those Persons likely to assert only Excluded Claims, in the reasonable opinion of the Sunterra Group entities and the Monitor);
 - b. any Person who has requested a Proof of Claim regarding any potential Claim; and
 - c. any Person known to the Sunterra Group entities or the Monitor as having a potential Claim based on the books and records of the Sunterra Group entities.
- 12. The Monitor shall cause the Notice to Claimants (or a condensed version thereof, as the Monitor, in consultation with the Sunterra Group, may deem appropriate) to be published once in the *National Post* and *Wall Street Journal* soon as practicable after the date of this Order.
- 13. As soon as practicable—but no later than 5:00 p.m. on the tenth (10th) Business Day following the date of this Order—the Monitor shall cause the Notice to Claimants and the General Claims Package, to be posted on the Monitor's Website.
- 14. To the extent any Claimant requests documents or information relating to the Claims Process prior to the Claims Bar Date or the applicable Restructuring Period Claims Bar Date, or if the Sunterra Group or the Monitor become aware of any further Claims after the mailings contemplated in paragraphs 11 and 20, the Monitor shall forthwith (i) send such Claimant a General Claims Package, (ii) direct such

Claimant to the documents posted on the Monitor's Website, or (iii) otherwise respond to the request for documents or information in a manner that the Sunterra Group, in consultation with the Monitor, consider appropriate in the circumstances.

15. Any notices of disclaimer delivered after the date of this Order to potential Claimants in connection with any action taken by the Sunterra Group to restructure, disclaim, terminate, or breach any contract, lease, or other agreement—whether written or oral—pursuant to the terms of the Initial Order shall be accompanied by a General Claims Package.
16. The Claims Process and the forms of Notice to Claimants, Proof of Claim Instruction Letter, D&O Claim Instruction Letter, Proof of Claim, D&O Proof of Claim, Notice of Revision or Disallowance, and Notice of Dispute of Revision or Disallowance, are hereby approved. Notwithstanding the foregoing, the Sunterra Group, in consultation with the Monitor, may from time to time make minor non-substantive changes to the forms as they deem necessary or desirable.
17. The dispatch of the General Claims Packages, as described above, the publication of the Notice to Claimants in accordance with this Order, and the completion of all other requirements herein, shall constitute good and sufficient service and delivery of notice of (a) this Order, (b) the Claims Bar Date, and (c) the Restructuring Period Claims Bar Date on all Persons who may be entitled to receive such notice and who may wish to assert a Claim. No further notice or service need be given, nor any additional document or material sent or served upon any Person in respect of this Order.

CLAIMS PROCEDURE

Pre-Filing Claims and Pre-Filing D&O Claims

18. Any Claimant intending to assert a Pre-Filing Claim or a Pre-Filing D&O Claim shall file a Proof of Claim or D&O Proof of Claim, as applicable, with the Monitor on or before the Claims Bar Date. Every Claimant must file a Proof of Claim or D&O Proof of Claim in respect of every Pre-Filing Claim and every Pre-Filing D&O Claim, regardless of whether a legal proceeding in respect of such Claim has been previously commenced.
19. Any Claimant that does not file a Proof of Claim or D&O Proof of Claim, as applicable, in accordance with paragraph 18 so that the Proof of Claim or D&O Proof of Claim is actually received by the Monitor on or before the Claims Bar Date (or such later date as the Monitor, in consultation with the Sunterra Group or the Directors and Officers or their counsel, as applicable, may agree in writing or as the Court otherwise directs) shall be deemed to:
 - a. be forever barred, estopped, and enjoined from asserting or enforcing any such Pre-Filing

Claim(s) or Pre-Filing D&O Claim(s) against the Sunterra Group and the Directors and Officers, as applicable, and all such Claims shall be permanently extinguished;

- b. not be permitted to vote at any Meeting on account of such Pre-Filing Claim(s) or Pre-Filing D&O Claim(s);
- c. not be entitled to receive further notice with respect to the Claims Process or these proceedings regarding such Pre-Filing Claim(s) or Pre-Filing D&O Claim(s); and
- d. not be permitted to participate in any distribution under any Plan or otherwise on account of such Pre-Filing Claim(s) or Pre-Filing D&O Claim(s).

Restructuring Period Claims

- 20. Upon becoming aware of a circumstance giving rise to a potential Restructuring Period Claim or Restructuring Period D&O Claim after the mailings contemplated in paragraph 11 are completed, the Monitor, in consultation with the Sunterra Group, shall send the General Claims Package to the Claimant in respect of such Restructuring Period Claim or Restructuring Period D&O Claim in the manner provided herein.
- 21. Any Claimant intending to assert a Restructuring Period Claim or a Restructuring Period D&O Claim shall file a Proof of Claim or D&O Proof of Claim, as applicable, with the Monitor on or before the Restructuring Period Claims Bar Date. For the avoidance of doubt, every Claimant must file a Proof of Claim or D&O Proof of Claim in respect of every Restructuring Period Claim and every Restructuring Period D&O Claim, regardless of whether any legal proceeding in respect of such Claim has been previously commenced.
- 22. Any Claimant who intends to assert a Restructuring Period Claim or Restructuring Period D&O Claim but does not file a Proof of Claim or D&O Proof of Claim, as applicable, in accordance with paragraph 21 so that such Proof of Claim or D&O Proof of Claim is actually received by the Monitor on or before the Restructuring Period Claims Bar Date—or such later date as the Monitor, in consultation with the Sunterra Group or the Directors and Officers (or their counsel) may agree in writing or as directed by the Court—shall:
 - a. be and remain forever barred, estopped, and enjoined from asserting or enforcing any such Restructuring Period Claim(s) or Restructuring Period D&O Claim(s) against the Sunterra Group or the Directors and Officers, as applicable, with all such Claims being permanently extinguished;
 - b. not be permitted to vote at any Meeting on account of such Restructuring Period Claim(s) or Restructuring Period D&O Claim(s);

- c. not be entitled to receive further notice regarding the Claims Process or these proceedings with respect to such Restructuring Period Claim(s) or Restructuring Period D&O Claim(s); and
- d. not be permitted to participate in any distribution under any Plan or otherwise on account of such Restructuring Period Claim(s) or Restructuring Period D&O Claim(s).

23. The provisions of paragraphs 18 to 22 of this Order shall not apply to Intercompany Claims.

Adjudication and Resolution of Claims Other than Intercompany Claims

24. Paragraphs 25 to 33 herein shall not apply to the adjudication of Intercompany Claims.

25. The Monitor shall make reasonable efforts to promptly deliver a copy of any D&O Proofs of Claim, Notices of Revision or Disallowance with respect to any D&O Claim, and Notices of Dispute of Revision or Disallowance with respect to any D&O Claim, to the applicable Directors and Officers named in such documents and/or their counsel.

26. The Sunterra Group, in consultation with the Monitor, shall accept, revise, or reject each Claim set out in every Proof of Claim for voting and/or distribution purposes; and with respect to any D&O Claim set forth in a D&O Proof of Claim, the Sunterra Group, in consultation with the Monitor, the applicable Directors and Officers named therein and/or their counsel, shall accept, revise, or reject such D&O Claim—provided that the Sunterra Group shall not accept or revise any portion of a D&O Claim without the consent of the applicable Directors and Officers (which may be communicated through their counsel) or a further Order of the Court.

27. If the Sunterra Group, in consultation with the Monitor, agree with the amount and Characterization of the Claim as set out in any Proof of Claim or D&O Proof of Claim and intend to accept the, then the Monitor shall notify the respective Claimant of the acceptance of its Claim by the Sunterra Group.

28. If the Sunterra Group, in consultation with the Monitor, disagree with the amount or Characterization of the Claim as set out in any Proof of Claim or D&O Proof of Claim, then the Sunterra Group shall, in consultation with the Monitor and any applicable Directors or Officers (and/or their counsel), attempt to resolve such dispute and settle the purported Claim with the Claimant for voting and/or distribution purposes.

29. If the Sunterra Group, in consultation with the Monitor, intend to revise or reject a Claim for voting and/or distribution purposes, the Monitor shall notify the applicable Claimant—in writing via a Notice of Revision or Disallowance—that its Claim has been revised or rejected for voting and/or distribution purposes, and shall state the reasons for such revision or rejection.

30. Any Claimant who intends to dispute a Notice of Revision or Disallowance sent pursuant to paragraph

31 regarding a Claim for voting and/or distribution purposes shall deliver a completed Notice of Dispute of Revision or Disallowance, along with its reasons for dispute, to the Monitor in accordance with paragraph 42 on or before thirty (30) days after the date on which the Claimant is deemed to have received the Notice of Revision or Disallowance, or on another date as may be agreed by the Monitor, in consultation with the Sunterra Group, in writing.

31. If a Claimant who receives a Notice of Revision or Disallowance fails to file a completed Notice of Dispute of Revision or Disallowance by the deadline set in paragraph 30, then such Claimant's Claim for voting and distribution purposes shall be deemed to be as determined in the Notice of Revision or Disallowance—and any further rights to dispute, assert, or pursue such Claim (except as determined therein for voting and/or distribution purposes) shall be permanently extinguished and barred without further act or notification.
32. Upon receipt of a Notice of Dispute of Revision or Disallowance regarding a Claim, the Sunterra Group, in consultation with the Monitor and any applicable Directors or Officers (and/or their counsel), shall attempt to resolve the dispute and settle the purported Claim with the Claimant. In the event that the dispute is not resolved within a satisfactory time period or in a manner acceptable to the Sunterra Group or the applicable Directors or Officers, then, at their election and in consultation with the Monitor, the Sunterra Group shall refer the dispute to the Court for adjudication, and the Monitor shall send written notice of such referral to the Claimant.
33. Notwithstanding any other provisions of this Order, the Sunterra Group, in consultation with the Monitor and any applicable Directors or Officers (and/or their counsel), may refer any Claim to the Court for adjudication at any time, and the Monitor shall send written notice of such referral to the applicable parties.

INTERCOMPANY CLAIMS

34. Upon the request of the Monitor, or as may otherwise be ordered by the Court, the Sunterra Group shall prepare a report detailing its review of all Intercompany Claims. The report shall include a detailed assessment—with reasonably sufficient particulars and analysis—of the amount and characterization of the Intercompany Claims. The Monitor shall review the report and provide such commentary as it deems appropriate on the particulars, analysis, and characterization of the Intercompany Claims (the **"Intercompany Claims Report"**). The Intercompany Claims Report shall be filed with the Court and served on Service List. Nothing in this Report shall bind the Court in its ultimate determination of the Intercompany Claims, including without limitation the validity, priority, or quantum of such Claims.
35. Each Intercompany Claim identified in the Intercompany Claims Report shall be deemed to have been properly submitted through a Proof of Claim with respect to such Intercompany Claim, as if it were a

Pre-Filing Claim or Restructuring Period Claim, as applicable, in accordance with the requirements of this Order. Notwithstanding anything to the contrary, no Claims Bar Date shall operate to bar or otherwise impair, an Intercompany Claim.

CLAIMS PROCESS – COMPEER AND NBC

36. Notwithstanding anything to the contrary herein:

- a. Compeer Financial, PCA (“**Compeer**”) is not required to provide a Proof of Claim, Compeer’s claims will be assessed and adjudicated for the purpose of this claims process as set out in Schedule “A” of the Consent Order dated July 24, 2025 in Court File Number 2501-06120 (the “**Compeer Consent Order**”). A copy of the Compeer Consent Order is attached hereto as Schedule “H”.
- b. National Bank of Canada is not required to provide a Proof of Claim, National Bank of Canada’s claims will be admitted in the amount as set out or assessed and adjudicated for the purpose of this claims process as set out in Schedule “A” of the Consent Order dated July 24, 2025 in Court File Number 2501-06120 (the “**NBC Consent Order**”). A copy of the NBC Consent Order is attached hereto as Schedule “I”;
- c. Any of Sunterra, Compeer, or National Bank of Canada may apply to the Court, *de novo*, for advice and direction with respect to the utilization of transcripts from the examinations contemplated by the Compeer Consent Order and the NBC Consent Order.

NOTICE TO TRANSFEREES

37. From the date of this Order until seven (7) days prior to the first distribution in the CCAA Proceedings or any other proceeding (including a bankruptcy, to the extent required), leave is hereby granted to permit any Claimant to provide the Monitor with notice of the assignment or transfer of a Claim to any third party.
38. Subject to the terms of any subsequent Order of the Court, if the holder of a Claim transfers or assigns its Claim to another Person in accordance with paragraph 37, neither the Monitor nor any of the Sunterra Group entities shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim. This is unless written notice of such transfer or assignment, along with satisfactory evidence thereof, is received by the Monitor and acknowledged in writing by the Sunterra Group. Thereafter, such transferee or assignee shall be deemed the “Claimant” for that Claim, and the Sunterra Group and the Monitor shall only be required to correspond with such transferee or assignee. Any transferee or assignee shall be bound by any notices given or steps taken (or not

taken) with respect to the Claim in accordance with this Order prior to receipt by the Monitor and written acknowledgment by the Sunterra Group. Furthermore, a transferee or assignee takes the Claim subject to any rights of set-off to which the Sunterra Group and/or the applicable Directors and Officers may be entitled with respect to the Claim. A transferee or assignee shall not be entitled to set-off, apply, merge, consolidate, or combine any Claim assigned or transferred to them against any amounts owing by such Person to any of the Sunterra Group entities or the applicable Directors and Officers.

39. No transfer or assignment shall be effective for voting and/or distribution purposes at any Meeting unless sufficient notice and evidence of such transfer or assignment is received by the Monitor no later than 5:00 p.m. on the date that is seven (7) days prior to the date fixed by the Court for any Meeting. Failing such receipt, the original Claimant shall retain all applicable rights as the “Claimant” with respect to that Claim, as if no transfer or assignment had occurred.

STAY EXTENSION

40. The Stay Period is hereby extended until and including December 15, 2025.

SERVICE AND NOTICE

41. The Sunterra Group and the Monitor may, unless otherwise specified by this Order, serve and deliver—or cause to be served and delivered—the General Claims Packages, and any letters, notices, or other documents, to the appropriate Claimants or any other interested Persons. Such documents may be forwarded by prepaid ordinary mail, courier, personal delivery, or email to such Persons at the physical or electronic addresses shown in the books and records of the Sunterra Group entities or, where applicable, as set out in the Claimant’s Proof of Claim, or D&O Proof of Claim. Any service or delivery shall be deemed to have been received as follows:
- a. if sent by ordinary mail, on the third Business Day after mailing within Alberta (or the province in which the entity is registered), the fifth Business Day after mailing within Canada (other than Alberta), and the tenth Business Day after mailing internationally;
 - b. if sent by courier or personal delivery, on the next Business Day following dispatch; and
 - c. if delivered by email by 5:00 p.m. on a Business Day, on that Business Day, and if delivered after 5:00 p.m. or on a non-Business Day, on the following Business Day.
42. Any notice or communication required to be provided or delivered by a Claimant to the Monitor under this Order shall, unless otherwise specified herein, be in writing in substantially the form provided for in this Order and will be deemed sufficiently given only if delivered by prepaid ordinary mail, registered

mail, courier, personal delivery, or email addressed to:

FTI Consulting Canada Inc.,

in its capacity as Court-appointed Monitor of the Sunterra Group entities

520 Fifth Avenue S.W.

Suite 1610

Calgary, AB T2P 3R7

Attention: Sunterra Group Monitor

Email: **Sunterra@FTIConsulting.com**

Any such notice or communication delivered by a Claimant shall be deemed received upon actual receipt by the Monitor during normal business hours on a Business Day or, if delivered outside normal business hours, on the following Business Day.

43. If, during any period in which notices or other communications are being provided pursuant to this Order, a postal strike or general postal work stoppage occurs, then any notices or communications sent by ordinary or registered mail that are not received shall not be effective. During such a postal strike or work stoppage, notices and communications shall only be effective if given by courier, personal delivery, or email in accordance with this Order, unless the Monitor—acting in reasonable discretion and in consultation with the Sunterra Group —determines otherwise.

MISCELLANEOUS

44. The Sunterra Group or the Monitor may, from time to time, apply to this Court to extend the time for any action that they are required to take, if reasonably required to carry out their respective duties and obligations under this Order, or for advice and directions concerning the discharge of their powers and duties under this Order or the interpretation or application of this Order.
45. Any Claimant shall be entitled to apply to this Court in respect of advice and directions concerning the interpretation and application of this Order on notice to the Sunterra Group and the Monitor.
46. Nothing in this Order shall prejudice the rights and remedies of any Directors or Officers or other Persons under the Directors' Charge or any applicable insurance policy, nor shall it prevent or bar any Person from seeking recourse or payment from the Sunterra Group's insurance or from any Director's or Officer's liability insurance policy or policies designed to protect or indemnify such Persons. However, nothing in this Order shall create any rights in favour of any Person under any insurance policy, nor shall anything in this Order limit, remove, modify, or alter any defence available to the insurer.

under the policy or at law. Further, any Claim or portion thereof for which the Person receives payment directly from, or confirmation of coverage by, the Sunterra Group's insurance or any Director's or Officer's liability insurance policy or policies shall not be recoverable as against any Sunterra Group entity or Director or Officer, as applicable.

47. Without prejudice to Compeer, an application to amend this claims procedure

Order by NBC will be scheduled to be heard on September 5, 2025 at 2pm as it relates to implementing a claims procedure on such terms as the court may approve to identify any claims which Compeer intends to assert against NBC.

48. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body or agency having jurisdiction in Canada, the United States of

America, or any other foreign jurisdiction. Such bodies are requested to give effect to this Order and to assist the Sunterra Group, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals, and regulatory and administrative agencies are respectfully requested to make such orders and provide such assistance to the Sunterra Group and the Monitor, as an officer of this Court, as may be necessary to implement this Order or to assist the Sunterra Group entities and the Monitor and their respective agents.

Justice of the Court of King's Bench of Alberta

SCHEDULE “A”

NOTICE TO CLAIMANTS OF THE SUNTERRA GROUP

RE: NOTICE OF CLAIMS PROCESS FOR SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., AND SUNTERRA ENTERPRISES INC. (COLLECTIVELY, THE “SUNTERRA GROUP”) PURSUANT TO THE COMPANIES’ CREDITORS ARRANGEMENT ACT (THE “CCAA”)

PLEASE TAKE NOTICE that on July 24, 2025, the Court of King’s Bench of Alberta in Calgary issued an order (the “**Claims Procedure Order**”) in the CCAA proceedings of the Sunterra Group. Capitalized terms used in this notice have the meanings given to them in the Claims Procedure Order. The Claims Procedure Order requires that all Persons that wish to assert a claim against any of the Sunterra Group entities or the Directors and/or Officers of any of the Sunterra Group entities must file a Proof of Claim or D&O Proof of Claim, as applicable, with FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of the Sunterra Group (the “**Monitor**”) on or before 5:00 p.m. (Calgary time) on September 4, 2025 (the “**Claims Bar Date**”), or in the case of a Restructuring Period Claim or Restructuring Period D&O Claim, on or before the applicable Restructuring Period Claims Bar Date (as specified below).

The Monitor will also send or cause to be sent, on or before September 5, 2025, a General Claims Package (which will include the form of Proof of Claim and D&O Proof of Claim) to: (i) each Person that appears on the Service List (except Persons that are likely to assert only Excluded Claims, in the reasonable opinion of the Sunterra Group and the Monitor); (ii) any Person who has requested a Proof of Claim in respect of any potential Claim; and (iii) any Person known to the Sunterra Group or the Monitor as having a potential Claim based on the books and records of the Sunterra Group.

Claimants may also obtain the Claims Procedure Order, a General Claims Package, or further information or documentation regarding the Claims Process from the Monitor’s website at: <https://cfcanada.fticonsulting.com/Sunterra/> or by contacting the Monitor.

The Claims Bar Date is 5:00 p.m. (Calgary time) on September 4, 2025. Proofs of Claim in respect of Pre-Filing Claims and Pre-Filing D&O Claims must be completed and filed with the Monitor on or before the Claims Bar Date.

The Restructuring Period Claims Bar Date is 5:00 p.m. (Calgary time) on the date that is the later of:
(i) thirty (30) days after the date on which the Monitor sends a General Claims Package with respect to a

Restructuring Period Claim or Restructuring Period D&O Claim; and (ii) the Claims Bar Date. Proofs of Claim and D&O Proofs of Claim in respect of Restructuring Period Claims and Restructuring Period D&O Claims must be completed and filed with the Monitor on or before the Restructuring Period Claims Bar Date.

It is your responsibility to ensure that the Monitor receives your Proof of Claim or D&O Proof of Claim by the applicable Bar Date if you wish to assert any Claim. CLAIMS AND D&O CLAIMS WHICH ARE NOT RECEIVED BY THE APPLICABLE BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

A Proof of Claim or D&O Proof of Claim, as applicable, must be delivered to the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery, or email at the address below:

FTI Consulting Canada Inc.,
in its capacity as Court-appointed Monitor of the Sunterra Group entities
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB, Canada T2P 3R7
Attention: Sunterra Group Monitor
Email: **Sunterra@FTIConsulting.com**

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof during normal business hours on a Business Day, or if delivered outside normal business hours, on the next Business Day.

Dated this ____ day of ____, 2025.

SCHEDULE “B”

PROOF OF CLAIM INSTRUCTION LETTER

This instruction letter has been prepared to assist Claimants in completing the Proof of Claim form for Claims against the Sunterra Group¹. If you have any additional questions regarding completion of the Proof of Claim, please contact the Monitor whose contact information is set out below. Additional copies of the Proof of Claim form may be obtained from the Monitor’s website at:

<https://cfcanada.fticonsulting.com/Sunterra/>

Please note that this is a guide only and that in the event of any inconsistency between the terms of this guide and the terms of the Claims Procedure Order made on July 24, 2025 (the “**Claims Procedure Order**”), the terms of the Claims Procedure Order will govern. Capitalized terms used in this Proof of Claim Instruction Letter and not otherwise defined herein have the meanings ascribed to them in the Claims Procedure Order.

SECTION 1 – DEBTOR(S)

1. The full name of each Sunterra Group entity against which the Claim is asserted must be listed (see footnote 1 for a complete list of Sunterra Group entities), including the full name of any Sunterra Group entity that provided a guarantee in respect of the Claim. If there are insufficient lines to record each such name, attach a separate schedule showing the required information.

SECTION 2A – ORIGINAL CLAIMANT

2. A separate Proof of Claim must be filed by each legal entity or person asserting a Claim against one or more of the Sunterra Group entities.
3. The Claimant shall include any and all Claims that it asserts against the Sunterra Group entities in a single Proof of Claim filed.
4. The full legal name of the Claimant must be provided.
5. If the Claimant operates under a different name or names, please indicate these in a separate schedule in the supporting documentation.
6. If the Claim has been assigned or transferred to another party, Section 2B must also be

¹ The “Sunterra Group” entities are Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

completed.

7. Unless the Claim is validly assigned or transferred, all future correspondence, notices, etc., regarding the Claim will be directed to the address and contact indicated in this section.

SECTION 2B – ASSIGNEE, IF APPLICABLE

8. If the Claimant has assigned or otherwise transferred its Claim, then Section 2B must be completed and all documents evidencing such assignment or transfer must be attached.
9. The full legal name of the Assignee must be provided.
10. If the Assignee operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.
11. If the Sunterra Group, in consultation with the Monitor, are satisfied that an assignment or transfer has occurred, all future correspondence, notices, etc., regarding the Claim will be directed to the Assignee at the address and contact indicated in this section.

SECTION 3 – AMOUNT AND TYPE OF CLAIM

12. If the Claim is a Pre-Filing Claim (within the meaning of the Claims Procedure Order), indicate the amount each Sunterra Group entity is or was indebted to the Claimant (including interest, if applicable) in the “Amount of Claim” column. This amount should include all amounts outstanding up to and including April 22, 2025.
13. If the Claim is a Restructuring Period Claim (within the meaning of the Claims Procedure Order), indicate the Claim amount each Sunterra Group entity is or was indebted to the Claimant in the space reserved for Restructuring Period Claims (provided below the space reserved for Pre-Filing Claims).

For reference, a “Restructuring Period Claim” means any right or claim of any Person against any Sunterra Group entity in connection with any indebtedness, liability or obligation of any kind whatsoever of such Sunterra Group entity to that Person arising out of restructuring, disclaimer, termination, breach, or similar actions on or after the Filing Date of any contract, lease, or other agreement (whether written or oral), including any right or claim with respect to any Assessment.

14. If there are insufficient lines to record each Claim amount, attach a separate schedule with the

required information.

15. Indicate if the Claim is guaranteed by any other Sunterra Group entity.

Currency

16. The amount of the Claim must be provided in the currency in which it arose.

17. If the Claim is denominated in multiple currencies, use a separate line to indicate the Claim amount in each such currency. If there are insufficient lines, attach a separate schedule with the required information.

Priority Claim

19. Check this box **ONLY** if the Claim recorded on that line is a secured, priority, property, or trust Claim.

20. If the Claim is a secured, priority, property, or trust Claim, on a separate schedule provide full particulars describing such security, priority, right of ownership or title to property or assets, or nature of trust (deemed, statutory, express, implied, resulting, constructive, or otherwise), as applicable. Attach copies of any relevant documents evidencing your priority Claim.

SECTION 4 – DOCUMENTATION

21. Attach to the Proof of Claim form all particulars of the Claim and any available supporting documentation, including any calculation of the amount, a description of the transactions or agreements giving rise to the Claim, any assignment/transfer agreement (if applicable), the name of any guarantor (with supporting documents), details of invoices, credits, discounts, etc., and a description of any priority claims (if applicable).

SECTION 5 – CERTIFICATION

22. The person signing the Proof of Claim should:

- (a) be the Claimant or an authorized representative of the Claimant;
- (b) have knowledge of all circumstances connected with this Claim;
- (c) assert the Claim against the Debtor(s) as set out in the Proof of Claim and certify that all available supporting documentation is attached; and
- (d) if an individual is submitting the form, have a witness to its certification.

23. By signing and submitting the Proof of Claim, the Claimant is asserting the Claim against each

Sunterra Group entity named as a “Debtor” in the Proof of Claim.

SECTION 6 – FILING OF CLAIM AND APPLICABLE DEADLINES

24. If your Claim is a Pre-Filing Claim (within the meaning of the Claims Procedure Order), the Proof of Claim **MUST** be returned to and received by the Monitor on or before 5:00 p.m. (Calgary time) on September 4, 2025 (the “**Claims Bar Date**”).
25. If your Claim is a Restructuring Period Claim (within the meaning of the Claims Procedure Order), the Proof of Claim **MUST** be returned to and received by the Monitor by 5:00 p.m. (Calgary time) on the date (the “**Restructuring Period Claims Bar Date**”) that is the later of: (i) 30 days after the date on which the Monitor sends a General Claims Package with respect to a Restructuring Period Claim; and (ii) the Claims Bar Date.
26. Proofs of Claim must be delivered to the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery, or email at the address below:

FTI Consulting Canada Inc.
in its capacity as Court-appointed Monitor of the Sunterra Group
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB, Canada T2P 3R7

Attention: Sunterra Group Monitor

Email: **Sunterra@FTIConsulting.com**

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

Failure to file your Proof of Claim so that it is actually received by the Monitor on or before 5:00 p.m. (Calgary time) on the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, WILL result in your Claims being forever barred. Additionally, you shall not be entitled to further notice or to participate as a creditor in the Sunterra Group’s CCAA proceedings with respect to such Claims.

SCHEDULE "C"

**PROOF OF CLAIM FORM
FOR CLAIMS AGAINST THE SUNTERRA GROUP¹**

FOR CLAIMS AGAINST THE SUNTERRA GROUP¹

1. Name of Sunterra Group entity or entities (the "Debtor(s)") the Claim is being made against²:

Debtor(s): _____

2A. Original Claimant (the "Claimant")

Legal Name of Claimant: _____

Name of Contact: _____

Title: _____

Address: _____

City: _____

Prov/State: _____

Postal / Zip Code: _____

Phone #: _____

Fax #: _____

Email: _____

2B. Assignee, if claim has been assigned

Legal Name of Assignee: _____

Name of Contact: _____

Title: _____

Address: _____

City: _____

Prov/State: _____

Postal / Zip Code: _____

Phone #: _____

Fax #: _____

Email: _____

¹ The "Sunterra Group" entities are Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

² List the names(s) of any Sunterra Group entities that have guaranteed the Claim. If the Claim has been guaranteed by any Sunterra Group entities, provide all documentation evidencing such guarantee.

3. Amount and Type of Claim

The Debtor was and still is indebted to the Claimant as follows:

Pre-Filing Claims

Debtor Name:	Currency:	Amount of Pre-Filing Claim (including interest up to April 22, 2025) ³ :	Whether Claim is a Priority Claim ⁴ :
			Yes t:] No t:]
			Yes t:] No t:]
			Yes t:] No t:]

Restructuring Period Claims

Debtor Name:	Currency:	Amount of Restructuring Period	Whether Claim is a Priority Claim ⁴ :
		Claim	
			Yes t:] No t:]
			Yes t:] No t:]
			Yes t:] No t:]

4. Documentation

Provide all particulars of the Claim and all available supporting documentation, including any calculation of the amount and description of the transaction(s) or agreement(s) or legal breach(es) giving rise to the Claim. This should include any claim assignment/transfer agreement or similar document (if applicable), the name of any guarantor(s) which has guaranteed the Claim along with a copy of such guarantee documentation, details of invoices, particulars of all credits, discounts, etc. claimed, as well as a description of the circumstances and any applicable documentation giving rise to any priority Claim that is

³ Interest accruing from and after the Filing Date (April 22, 2025) shall not be included in any Claim.

⁴ A Priority Claim includes a secured, priority, property or trust Claim.

asserted.

5. Certification

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this Claim against the Debtor(s) as set out above.
4. All available documentation in support of this Claim is attached.

All information submitted in this Proof of Claim form must be true, accurate, and complete. Filing a false Proof of Claim may result in your Claim being disallowed in whole or in part and may also result in further penalties.

Signature:

Name:

Title (print):

Dated at _____ on this ____ day of _____, 2025.

Witness⁵: _

Print Name:

6. Filing of Claim and Applicable Deadlines

For Pre-Filing Claims, this Proof of Claim MUST be returned to and received by the Monitor by 5:00 p.m. (Calgary Time) on September 4, 2025 (the "Claims Bar Date").

For Restructuring Period Claims, this Proof of Claim MUST be returned to and received by the Monitor by 5:00 p.m. (Calgary Time) on the later of: (i) the date that is 30 days after the date on which the Monitor sends a General Claims Package with respect to a Restructuring Period Claim; and (ii) the Claims Bar Date (the "**Restructuring Period Claims Bar Date**").

Proofs of Claim must be delivered to the Monitor by prepaid ordinary mail, registered mail, courier,

⁵ If an individual is submitting the Proof of Claim form, have a witness to its certification.

personal delivery, or email at one of the applicable addresses below:

FTI Consulting Canada Inc.
in its capacity as Court-appointed Monitor of the Sunterra Group
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB, Canada T2P 3R7

Attention: Sunterra Group Monitor
Email: **Sunterra@FTIConsulting.com**

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

Failure to file your Proof of Claim so that it is actually received by the Monitor on or before 5:00 p.m. (Calgary time) on the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, WILL result in your Claims being forever barred, and you will be prevented from making or enforcing such Claims against the Sunterra Group entities. In addition, you shall not be entitled to further notice or to participate as a creditor in the Sunterra Group's CCAA proceedings with respect to any such Claims.

SCHEDULE "D"

NOTICE OF REVISION OR DISALLOWANCE

For Persons who have asserted Claims against the Sunterra Group¹ entities and/or D&O Claims against the Directors and/or Officers of the Sunterra Group

TO: [INSERT NAME AND ADDRESS OF CLAIMANT] (the "**Claimant**")

RE: Claim Reference Number:

Capitalized terms used but not defined in this Notice of Revision or Disallowance shall have the meanings ascribed to them in the Order of the Court of King's Bench of Alberta in Calgary in the CCAA proceedings of the Sunterra Group dated July 24, 2025 (the "**Claims Procedure Order**"). You can obtain a copy of the Claims Procedure Order on the Monitor's website at: <https://cfcanada.fticonsulting.com/Sunterra/>

Pursuant to the Claims Procedure Order, the Monitor hereby gives you notice that the Sunterra Group, in consultation with the Monitor, have reviewed your Proof of Claim or D&O Proof of Claim and have revised or disallowed all or part of your purported Claim set out therein for voting and/or distribution purposes. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be as follows:

Pre-Filing Claims

	Amount as submitted	Amount allowed by the Sunterra Group for voting purposes	Amount allowed by the Sunterra Group for distribution purposes:
Unsecured	\$	\$	\$
Priority	\$	\$	\$
D&O Claim	\$	\$	\$
Total Claim	\$	\$	\$

¹ The "Sunterra Group" entities are Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

Restructuring Period Claims

	Amount as submitted	Amount allowed by the Sunterra Group for voting purposes	Amount allowed by the Sunterra Group for distribution purposes:
Unsecured	\$	\$	\$
Priority	\$	\$	\$
D&O Claim	\$	\$	\$
Total Claim	\$	\$	\$

Reasons for Revision or Disallowance:

SERVICE OF DISPUTE NOTICES

If you intend to dispute your Claim specified in this Notice of Revision or Disallowance for voting and/or distribution purposes, you must, by no later than 5:00 p.m. (Calgary time) on the day that is thirty (30) days after this Notice of Revision or Disallowance is deemed to have been received by you (in accordance with the Claims Procedure Order), deliver a Notice of Dispute of Revision or Disallowance to the Monitor (by prepaid ordinary mail, registered mail, courier, personal delivery or email) at the address listed below.

If you do not dispute this Notice of Revision or Disallowance in the prescribed manner and within the aforesaid time period, your Claim shall be deemed to be as set out herein.

If you agree with this Notice of Revision or Disallowance, there is no need to file anything further with

the Monitor.

The address of the Monitor is set out below:

FTI Consulting Canada Inc.
in its capacity as Court-appointed Monitor of the Sunterra Group
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB, Canada T2P 3R7

Attention: Sunterra Group Monitor
Email: **Sunterra@FTIConsulting.com**

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

The form of Notice of Dispute of Revision or Disallowance is enclosed and can also be accessed on the Monitor's website at: <https://cfcanda.fticonsulting.com/Sunterra/>

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

DATED this ____ day of _____, 2025.

FTI CONSULTING CANADA INC., solely in its capacity as Court-appointed Monitor of the Sunterra Group, and not in its personal or corporate capacity

Per:

SCHEDULE "E"

NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

**With respect to Claims against the Sunterra Group¹ and/or D&O Claims against the Directors
and/or Officers of the Sunterra Group**

Capitalized terms used but not defined in this Notice of Dispute of Revision or Disallowance shall have the meanings ascribed to them in the Order of the Court of King's Bench of Alberta in Calgary in the CCAA proceedings of the Sunterra Group dated July 24, 2025 (the "**Claims Procedure Order**"). You can obtain a copy of the Claims Procedure Order on the Monitor's website at:
<https://cfcanada.fticonsulting.com/Sunterra/>

1. Particulars of the Holder of the Claim:

Claims Reference Number: _____

Full Legal Name of Claimant (include trade name, if different) (the "**Claimant**"): _____

Full Mailing Address of the Claimant: _____

Other Contact Information of the Claimant:

Telephone Number: _____

Email Address: _____

Fax Number: _____

Attention (Contact Person): _____

¹ The "Sunterra Group" entities are Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

2. Particulars of Original Claimant from Whom You Acquired the Claim (if**applicable):** Have you acquired this Claim by assignment?²☐ Yes ☐ No

If “Yes” and if not already provided, attach documents evidencing the assignment.

Full Legal Name of Original Claimant(s):**3. Dispute of Revision or Disallowance of Claim:**

The Claimant hereby disagrees with the value of its Claim as set out in the Notice of Revision or Disallowance dated _____, and asserts a Claim as follows:

Pre-Filing Claims

	Currency	Amount allowed by the Sunterra Group in the Notice of Revision or Disallowance for voting/distribution purposes:	Amounts claimed by Claimant for voting / distribution purposes:
A. Unsecured			
<i>Voting</i>			
<i>Distribution</i>			
B. Priority			
<i>Voting</i>			
<i>Distribution</i>			
C. D&O Claim			
<i>Voting</i>			

² Only select “Yes” if you have been transferred the Claim being referenced herein from another Person.

Distribution			
D. Total Claim Voting			
Distribution			

**Restructuring
Period Claims**

	Currency	Amount allowed by the Sunterra Group in the Notice of Revision or Disallowance for voting/distribution purposes:	Amounts claimed by Claimant for voting / distribution purposes:
A. Unsecured			
Voting			
Distribution			
B. Priority			
Voting			
Distribution			
C. D&O Claim			
Voting			
Distribution			
D. Total Claim			
Voting			
Distribution			

(Insert particulars of your Claim per the Notice of Revision or Disallowance, and the value of your Claim

as asserted by you.)

4. Reasons for Dispute:

Provide full particulars of why you dispute the Sunterra Group's revision or disallowance of your Claim as set out in the Notice of Revision or Disallowance, and supply all supporting documentation. This documentation should include the amount, a description of the transaction(s) or agreement(s) giving rise to the Claim, the name of any guarantor(s) that have guaranteed the Claim and the amount allocated thereto, the date and number of all invoices, particulars of all credits, discounts, etc. claimed, as well as a description of any security granted by the affected Sunterra Group entity to the Claimant along with the estimated value of such security. The particulars provided must support the value of the Claim as stated by you in item 3 above.

5. Certification

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant submits this Notice of Dispute of Revision or Disallowance in respect of the Claim referenced above.
4. All available documentation in support of the Claimant's dispute is attached.

All information submitted in this Notice of Dispute of Revision or Disallowance must be true, accurate, and complete. Filing false information relating to your Claim may result in your Claim being disallowed in whole or in part and may result in further penalties.

Signature: _

Name: ____

Title (print):

Witness Signature:

Name (Print): ____

Dated at _____ **on this** ____ **day of** _____ , 2025.

This Notice of Dispute of Revision or Disallowance MUST be returned to and received by the Monitor at the address below no later than 5:00 p.m. (Calgary Time) on the day that is thirty (30) days after this Notice of Revision or Disallowance is deemed to have been received by you (in accordance with the Claims Procedure Order). Delivery to the Monitor may be made by ordinary prepaid mail, registered mail, courier, personal delivery, or email to the address below:

FTI Consulting Canada Inc.
in its capacity as Court-appointed Monitor of the Sunterra Group
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB, Canada T2P 3R7

Attention: Sunterra Group Monitor
Email: **Sunterra@FTIConsulting.com**

In accordance with the Claims Procedure Order, notices shall be deemed received by the Monitor upon actual receipt during normal business hours on a Business Day or, if delivered outside of normal business hours, on the next Business Day.

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, YOUR CLAIM AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

SCHEDULE “F”

CLAIMANT’S GUIDE TO COMPLETING THE D&O PROOF OF CLAIM FORM FOR CLAIMS AGAINST DIRECTORS AND/OR OFFICERS OF THE SUNTERRA GROUP¹

This Guide has been prepared to assist Claimants in filling out the D&O Proof of Claim form for claims against the Directors and/or Officers of the Sunterra Group. If you have any additional questions regarding completion of the Proof of Claim, please contact the Monitor, whose contact information is set out below.

The D&O Proof of Claim form is ONLY for Claimants asserting a claim against any Directors and/or Officers of the Sunterra Group, and NOT for claims against the Sunterra Group entities themselves. For claims against the Sunterra Group entities, please use the form titled “Proof of Claim Form for Claims Against the Sunterra Group”, which is available on the Monitor’s website at:

<https://cfcanada.fticonsulting.com/Suntterra/>

Additional copies of the D&O Proof of Claim form may also be found on the Monitor’s Website.

Please note that this is a guide only, and that in the event of any inconsistency between the terms of this Guide and the terms of the Claims Procedure Order made on July 24, 2025 (the “**Claims Procedure Order**”), the terms of the Claims Procedure Order will govern. Capitalized terms used in this D&O Proof of Claim Instruction Letter and not otherwise defined herein have the meanings ascribed to them in the Claims Procedure Order.

SECTION 1 – DEBTOR(S)

1. The full name and position of all the Directors or Officers (present and former) of the Sunterra Group against whom the D&O Claim is asserted must be listed. If there are insufficient lines to record each such name, attach a separate schedule indicating the required information.

SECTION 2A – ORIGINAL CLAIMANT

2. A separate D&O Proof of Claim must be filed by each legal entity or person asserting a claim against the Sunterra Group’s Directors or Officers.
3. The Claimant shall include any and all D&O Claims that it asserts against the Sunterra Group’s

¹ The “Sunterra Group” entities are Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

Directors or Officers in a single D&O Proof of Claim.

4. The full legal name of the Claimant must be provided.
5. If the Claimant operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.
6. If the D&O Claim has been assigned or transferred to another party, Section 2B, described below, must also be completed.
7. Unless the D&O Claim is validly assigned or transferred, all future correspondence, notices, etc., regarding the D&O Claim will be directed to the address and contact indicated in this section.

SECTION 2B – ASSIGNEE, IF APPLICABLE

8. If the Claimant has assigned or otherwise transferred its claim, then Section 2B must be completed, and all documents evidencing such assignment or transfer must be attached.
9. The full legal name of the Assignee must be provided.
10. If the Assignee operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.
11. If the Sunterra Group, in consultation with the Monitor, are satisfied that an assignment or transfer has occurred, all future correspondence, notices, etc., regarding the claim will be directed to the Assignee at the address and contact indicated in this section.

SECTION 3 – AMOUNT AND TYPE OF D&O CLAIM

12. If the D&O Claim is a Pre-Filing D&O Claim within the meaning of the Claims Procedure Order, then indicate the amount that the Director(s) and/or Officer(s) were and still are indebted to the Claimant in the space reserved for Pre-Filing D&O Claims in the “Amount of Claim” column, including interest, if applicable, up to and including April 22, 2025.
13. If the D&O Claim is a Restructuring Period D&O Claim within the meaning of the Claims Procedure Order, then indicate the amount that the Director(s) and/or Officer(s) were and still are indebted to the Claimant in the space reserved for Restructuring Period D&O Claims (which is below the space reserved for Pre-Filing D&O Claims) in the “Amount of Claim” column.
14. If there are insufficient lines to record each D&O Claim amount, attach a separate schedule

indicating the required information.

15. The amount of the D&O Claim must be provided in the currency in which it arose.
16. Indicate the appropriate currency in the Currency column.
17. If the D&O Claim is denominated in multiple currencies, use a separate line to indicate the claim amount in each such currency. If there are insufficient lines to record these amounts, attach a separate schedule indicating the required information.

SECTION 4 – DOCUMENTATION

18. Attach to the D&O Proof of Claim form all particulars of the D&O Claim and all available supporting documentation, including the amount and description of transaction(s) or agreement(s), and the legal basis for the D&O Claim against the specific Director(s) or Officer(s) at issue.

SECTION 5 – CERTIFICATION

19. The person signing the D&O Proof of Claim should:
 - (a) be the Claimant or an authorized representative of the Claimant;
 - (b) have knowledge of all of the circumstances connected with this claim;
 - (c) assert the claim against the Debtor(s) as set out in the D&O Proof of Claim and certify that all available supporting documentation is attached; and
 - (d) if an individual is submitting the D&O Proof of Claim form, have a witness to its certification.
20. By signing and submitting the D&O Proof of Claim, the Claimant is asserting the claim against the Debtor(s) specified therein.

SECTION 6 – FILING OF D&O CLAIM AND APPLICABLE DEADLINES

21. If your D&O Claim is a Pre-Filing D&O Claim within the meaning of the Claims Procedure Order, the D&O Proof of Claim **MUST** be returned to and received by the Monitor on or before 5:00 p.m. (Calgary time) on September 4, 2025 (the “**Claims Bar Date**”).
22. If your D&O Claim is a Restructuring Period D&O Claim within the meaning of the Claims Procedure Order, the D&O Proof of Claim **MUST** be returned to and received by the Monitor by

5:00 p.m. (Calgary Time) on the later of (i) the date that is 30 days after the date on which the Monitor sends a General Claims Package with respect to a Restructuring Period D&O Claim and (ii) the Claims Bar Date (the “**Restructuring Period Claims Bar Date**”).

23. D&O Proofs of Claim must be delivered to the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery, or email at one of the applicable addresses below:

FTI Consulting Canada Inc.
in its capacity as Court-appointed Monitor of the Sunterra Group
520 Fifth Avenue S.W.
Suite 1610
Calgary, AB, Canada T2P 3R7

Attention: Sunterra Group Monitor
Email: **Sunterra@FTIConsulting.com**

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

Failure to file your D&O Proof of Claim so that it is actually received by the Monitor on or before 5:00 p.m. on the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, WILL result in your D&O Claims being forever barred and you will be prevented from making or enforcing such D&O Claims against the Directors and Officers of the Sunterra Group. In addition, you shall not be entitled to further notice of, and shall not be entitled to participate as a creditor in, the Sunterra Group's CCAA proceedings with respect to any such D&O Claims.

SCHEDULE "G"

D&O PROOF OF CLAIM FORM FOR CLAIMS AGAINST DIRECTORS OR OFFICERS OF THE SUNTERRA GROUP¹

This form is to be used only by Claimants asserting a Claim against any Directors and/or Officers of the Sunterra Group and NOT for Claims against the Sunterra Group entities themselves. For Claims against the Sunterra Group entities, please use the form titled "Proof of Claim Form for Claims Against the Sunterra Group," which is available on the Monitor's website at:

<https://cfcanada.fticonsulting.com/Suntterra/>

1. Name(s) and Position(s) of Officer(s) and/or Director(s)

List the names and positions of the Director(s) and/or Officer(s) (the "**Debtor(s)**") against whom the Claim is being made.

Debtor(s):

2A. Original Claimant (the "Claimant")

Please provide the following details:

Legal Name of Claimant:

Name of Contact:

Title:

Address:

Street: _

City: __

¹ The "Suntterra Group" entities are Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Beef Ltd., Lariagra Farms Ltd., Sunterra Farm Enterprises Ltd., and Sunterra Enterprises Inc.

Province/State: _

Postal/Zip Code:

Phone #:

Fax #:

Email:

2B. Assignee, If Claim Has Been Assigned

If the Claim has been assigned or transferred, complete this section and attach any supporting documents evidencing the assignment or transfer.

Legal Name of Assignee:

Name of Contact:

Title:

Address:

Street: _____

City: _____

Province/State: _

Postal/Zip Code:

Phone #:

Fax #:

Email:

3. Amount and Type of D&O Claim

The Debtor(s) was/were and still is/are indebted to the Claimant as follows:

Name(s) of Director(s) and/or Officer(s)	Currency	Amount of Pre-Filing D&O Claim (The Pre-Filing D&O Claim amount should include interest (if applicable) up to and including April 22, 2025)	Amount of Restructuring Period D&O Claim

4. Documentation

Attach all particulars of the D&O Claim and all available supporting documentation. This should include:

- The amount and description of transaction(s) or agreement(s)
- The legal basis for the D&O Claim against the specific Directors or Officers at issue

5. Certification

By signing this D&O Proof of Claim form, you certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this Claim against the Debtor(s) as set out above.
4. All available documentation in support of this Claim is attached.

All information submitted in this D&O Proof of Claim form must be true, accurate, and complete. Filing false information may result in your Claim being disallowed in whole or in part and may result in further penalties.

Signature: _____

Title (print): _____

Dated at _____ **on this** ____ **day of** _____ , 2025.

Witness²: (signature) _____

Name: _____

6. Filing of Claims and Applicable Deadlines

For Pre-Filing D&O Claims: This D&O Proof of Claim MUST be returned to and received by the Monitor on or before 5:00 p.m. (Calgary Time) on September 4, 2025 (the “Claims Bar Date”).

For Restructuring Period D&O Claims: This D&O Proof of Claim MUST be returned to and received by the Monitor by 5:00 p.m. (Calgary Time) on the later of: (i) the date that is 30 days after the date on which the Monitor sends a General Claims Package with respect to a Restructuring Period D&O Claim, and (ii) the Claims Bar Date (the “Restructuring Period Claims Bar Date”).

D&O Proofs of Claim must be delivered to the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery, or email at one of the applicable addresses below:

FTI Consulting Canada Inc.

in its capacity as Court-appointed Monitor of the Sunterra Group

520 Fifth Avenue S.W.

Suite 1610

Calgary, AB, Canada T2P 3R7

Attention: Sunterra Group Monitor

Email: **Sunterra@FTIConsulting.com**

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt during normal business hours on a Business Day, or if delivered outside normal

² If an individual is submitting this D&O Proof of Claim form, have a witness to its certification.

business hours, on the following Business Day.

Failure to file your D&O Proof of Claim so that it is actually received by the Monitor on or before 5:00 p.m. on the applicable Claims Bar Date WILL result in your D&O Claims being forever barred and you will be prevented from making or enforcing such D&O Claims against the Directors and Officers of the Sunterra Group. In addition, you shall not be entitled to further notice of, and shall not be entitled to participate as a creditor in, the Sunterra Group's CCAA proceedings with respect to any such D&O Claims.

SCHEDULE "H"

Clerk's Stamp:

COURT FILE NUMBER
COURT
JUDICIAL CENTRE OF

2501 – 06120
COURT OF KING'S BENCH OF ALBERTA
EDMONTON

**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
SUNTERRA FOOD CORPORATION, TROCHU
MEAT PROCESSORS LTD., SUNTERRA QUALITY
FOOD MARKETS INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED, SUNTERRA BEEF
LTD., LARIAGRA FARMS LTD., SUNTERRA FARM
ENTERPRISES LTD., SUNTERRA ENTERPRISES
INC.**

DOCUMENT

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT:

CONSENT ORDER (Scheduling Order)

BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Attention: Lincoln Caylor/Nathan J. Shaheen

Keely Cameron/Mathieu LaFleche

Telephone No.: 403-298-3100

Fax No.: 403-265-7219

Client File No.: 99329.1

**DATE ON WHICH ORDER WAS
PRONOUNCED:**

Thursday, July 24, 2025

**NAME OF JUDGE WHO MADE THIS
ORDER:**

The Honourable Justice M. J. Lema

LOCATION OF HEARING:

Edmonton Law Courts
1A Sir Winston Churchill Sq NW, Edmonton, AB

UPON the application of Compeer Financial, PCA (the "**Applicant**" or "**Compeer**"); **AND** **UPON** having read the Application for the Lifting of the Stay and other ancillary relief; the Amended and Restated Initial Order, granted on April 28, 2025 ("**ARIO**"); the Affidavit of Nic Rue, sworn June 19, 2025; the Affidavit of Steve Grosland, sworn June 20, 2025; the Affidavit of Sei Na, sworn on April 21, 2025; **AND** **UPON** hearing counsel for the Applicant, and any other interested parties appearing at the application; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") and supporting materials are deemed good and sufficient and this application is properly returnable today.

DETERMINATION OF COMPEER CLAIMS

2. The litigation plan attached hereto as Schedule "A" is approved and the steps provided therein may proceed.
3. Compeer's application for declaratory relief and summary judgment of its claims in Court of King's Bench Action No. 2501-06120 against the Defendants is adjourned to December 4 and 5, 2025 and shall proceed in accordance with Schedule "A" hereto.

"Michael J. Lema"

Justice of the Court of King's Bench of Alberta

Schedule "A"
Litigation Plan

1. This litigation plan may be amended only by written agreement between the parties to Court of King's Bench Action No. 2501-06120 (the "**Action**"), or by Court Order.
2. The Defendants in the Action shall file and serve their defences to the Statement of Claim filed in the Action and any affidavits in response to Compeer's application for declaratory relief and summary judgment in the Action filed on June 23, 2025 in these proceedings (the "**Application**") by September 5 2025 and shall advise Compeer Financial, PCA ("**Compeer**") what two additional current employees of Compeer, if any, it wishes to examine. Such examinations shall occur pursuant to Rule 6.8 of the Alberta *Rules of Court* unless the additional witnesses file Affidavits.
3. Each of Ray Price, Art Price, Debbie Uffelman and Craig Thompson (collectively, the "**Sunterra Witnesses**") shall attend for examination, by no later than October 24, 2025. Such examination shall be limited to 3 days to be apportioned by Compeer unless the parties otherwise agree or the Court directs. Such examinations shall occur pursuant to Rule 6.6 if they file affidavits or Rule 6.8 if they do not of the Alberta *Rules of Court*.
4. The Defendants shall conduct any examination of Nicholas Rue, Steve Grosland and the additional witness(es) identified in accordance with paragraph 2, if any, by no later than October 24, 2025. Such examination shall be limited to 3 days to be apportioned by counsel for the Defendants unless the parties otherwise agree or the Court directs.
5. Any amendments to the parties to the Application, shall be made by October 27, 2025.
6. Any undertaking responses shall be provided by October 30, 2025.
7. Compeer shall file its brief by November 10, 2025 and the Defendants shall file their briefs by November 24, 2025.
8. The Application shall proceed to judgement on a date fixed by the Court.
9. The parties to the Action are at liberty and are hereby authorized and empowered to apply to the Court for assistance in carrying out the terms of this plan and may seek to vary this plan on not less than seven day's notice.

Schedule "I"

Clerk's Stamp

COURT FILE NUMBER 2501-06120
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL DISTRICT EDMONTON

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 SUNTERRA FOOD CORPORATION,
TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY
FOOD MARKETS INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD.,
LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES
LTD., and SUNTERRA ENTERPRISES INC.

DOCUMENT **CONSENT ORDER (SCHEDULING)**

ADDRESS FOR SERVICE McCarthy Tétrault LLP
AND CONTACT Suite 4000, 421 - 7th Avenue SW
INFORMATION OF PARTY Calgary, AB T2P 4K9
FILING THIS DOCUMENT Attention: Sean Collins, KC / Sean Smyth, KC
 Phone: 403-260-3531 / 3698
 Fax: 403-260-3501
 Email: scollins@mccarthy.ca / ssmyth@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED: **July 24, 2025**

NAME OF THE JUDGE WHO MADE THIS ORDER: **The Honourable Justice M.J. Lema**

LOCATION OF HEARING: **Edmonton, Alberta**

UPON the application of National Bank of Canada (previously Canadian Western Bank)
(the "**Applicant**" or "**NBC**"); **AND UPON** hearing from counsel for the Applicant and any other
interested parties appearing at the application;

IT IS HEREBY ORDERED THAT:

DETERMINATION OF NBC'S CLAIM

1. The litigation plan attached hereto as Schedule "**A**" is approved and the steps provided therein may proceed.

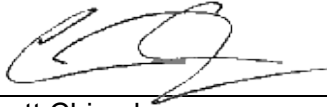
2. As at July 24, 2025, the outstanding balance for all amounts advanced by NBC under the Amended and Restated Commitment Letter, dated November 15, 2022, between NBC, as lender, and Sunterra Food Corporation, Trochu Meats Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., and Sunwold Farms Limited, as borrowers, exclusive of all accruing interest, fees, costs and expenses (all of which are recoverable by NBC), which outstanding balance, for clarity, also excludes the amounts claimed or to be claimed by NBC in respect of the NBC v. Sunterra Claim (as such term is defined in the attached Schedule "A"), is \$9,932,732.20.
3. The Statement of Claim issued by Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farm Enterprises Ltd., Lariagra Farms Ltd., Sunterra Enterprises Inc., Sunterra Beef Ltd., Sunterra Farms Greenhouse Ltd., Soleterra D'Italia Ltd., and Precision Diagnostics on March 24, 2025, under Court File Number 2501-04640, as against NBC, is exempt from the Claims Process and will be adjudicated after the conclusion of the CCAA proceedings.

"Michael J. Lema"

Justice of the Court of King's Bench of Alberta

**CONSENTED TO this ____ day of July,
2025**

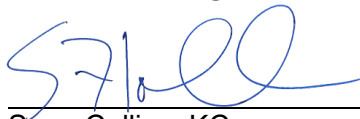
BLUE ROCK LAW LLP

Per: 

Scott Chimuk
Counsel to Sunterra Farms Ltd.,
Sunwold Farms Limited, Sunterra
Enterprises Inc., Ray Price, and
Debbie Uffelman

**CONSENTED TO this 24th day of July,
2025**

MCCARTHY TÉTRAULT LLP

Per: 

Sean Collins, KC
Counsel to NBC

SCHEDULE “A”

1. In this Schedule “A” annexed to the Consent Order granted by Justice M.J. Lema on July 24, 2025 in Court File Number 2501-06210:

- (a) **“Claim”** means the NBC v. Sunterra Claim.
- (b) **“Compeer”** means Compeer Financial, PCA;
- (c) **“Compeer v. NBC Claim”** means every claim Compeer has or may have against National Bank of Canada (as amalgamation successor to Canadian Western Bank) that is related to, arises from or is in anyway connected to Canadian Western Bank dishonoring cheques issued by Sunterra Farms Inc. or Sunwold Farms Limited in favour of the Sunterra US Entities;
- (d) **“Compeer v. Sunterra Claim”** means the claim Compeer has asserted in its application for declaratory relief and summary judgment of Compeer’s claims as set out in the Statement of Claim filed in Court of King’s Bench Action No. 2501 06120 by Compeer on or about June 23, 2025 naming the following as respondents: Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Enterprises Inc., Ray Price and Debbie Uffelman. Compeer and the Sunterra Entities have entered into a Claims Procedure Consent Order setting out the process for the adjudication of the Compeer v. Sunterra Claim;
- (e) **“Listed Witnesses”** means:
 - (i) Ray Price, Art Price, Debbie Uffelman and Craig Thompson of the Sunterra Parties; and
 - (ii) Sunterra to name 2 additional listed witnesses beyond the 2 or more NBC affiants by September 5, 2025.
- (f) **“NBC”** means National Bank of Canada;
- (g) **“NBC Action”** means the action commenced by NBC by way of Statement of Claim issued on March 17, 2025 in the Court of King’s Bench of Alberta, Judicial Centre of Calgary under Court File Number 2501-04252;

- (h) **"NBC Appeal"** means the appeal proceedings commenced by NBC by way of Civil Notice of Appeal on April 2, 2025 in the Court of Appeal of Alberta under Court of Appeal File Number 2501-0098AC;
- (i) **"NBC v. Sunterra Claim"** means every claim NBC has against the Sunterra Parties, or any of them, for:
 - (i) contribution and indemnity arising out of or in any way connected to the Compeer v. NBC Claim; and
 - (ii) damages,which claim shall exclude a claim for the NBC Indebtedness as set out in paragraph 2 of this Order;
- (j) **"Parties"** means, collectively, NBC and the Sunterra Parties;
- (k) **"Rule"** means a rule made under the Alberta *Rules of Court*;
- (l) **"Statement of Claim"** means the Statement of Claim filed by Compeer in the Compeer v. Sunterra Claim;
- (m) **"Sunterra Parties"** means, collectively, Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farm Enterprises Ltd., Lariagra Farms Ltd., Sunterra Enterprises Inc., Sunterra Beef Ltd., Ray Price and Debbie Uffelman and any officer or director of any of the foregoing;
- (n) **"Sunterra US Entities"** means, collectively, Sunterra Farms Iowa, Inc. and Sunwold Farms, Inc.

2. The NBC v Sunterra Claim shall be determined concurrently with the Compeer v. Sunterra Claim summarily pursuant to an application on the Commercial List such that both applications will take place on December 3, 2005 and December 4, 2005 (the **"Summary Application"**).

3. Nothing in this claims process will impact the NBC Appeal, the award of costs against NBC in the interim receivership application, the Statement of Claim filed by the Sunterra Parties against NBC in action number 2501-04640 or any counterclaim that the Sunterra Parties may have against NBC in the NBC Action.

4. On or before August 29, 2025, NBC shall file and serve the NBC v. Sunterra Claim, together with any affidavits in support of the NBC v. Sunterra Claim, upon counsel to the Sunterra Parties with a copy to counsel to Compeer.
5. On or before September 22, 2025 the Sunterra Parties shall file a written Notice of Objection all of its positions and defences and the principal allegations and facts on which they rely to oppose and defend against the NBC v. Sunterra Claim together with any affidavits in response to the NBC v. Sunterra Claim and serve same upon counsel to NBC with a copy to counsel to Compeer.
6. On or before September 29, 2025, NBC shall file any and all reply evidence on which they intend to rely in respect of the Claim, such reply evidence to be limited to matters raised in the evidence of the other Parties.
7. Each of the deponents of affidavits filed pursuant to this Schedule "B" may be questioned on their affidavits pursuant to Rule 6.6 by the Parties who are adverse in interest.
8. Each of the Listed Witnesses who do not file affidavits may be questioned pursuant to Rule 6.8 by the Parties who are adverse in interest.
9. Each of the witnesses that are identified by a Party as being additional individuals falling within the scope of Rules 5.17 and 5.18 pursuant to the process below shall be questioned pursuant to Rule 6.6 if they file affidavits and Rule 6.8 if they do not file affidavits, by the Parties who are adverse in interest.
10. On or before September 5, 2025, the Sunterra Parties shall advise NBC of the names of any two additional individuals who are current or former NBC employees, officers or directors within the scope of Rules 5.17 and 5.18 associated with NBC (apart from the deponents of affidavits filed by NBC and Listed Witnesses) and associated with NBC (apart from the deponents of affidavits filed by NBC), if any, it wishes to question under Rule 6.6 if they subsequently file affidavits and Rule 6.8 if they do not file affidavits in relation to the Claim. If the additional individuals are to file affidavits they are to do so by September 12, 2025.
11. Each deponent of an affidavit filed by the Sunterra Parties, each Listed Witness associated with the Sunterra Parties and each individual who is identified by NBC as falling within the scope of Rules 5.17 and 5.18 as they relate to the Sunterra Parties (collectively, the "**Sunterra Witnesses**") shall be made available for questioning by no later than October 24, 2025. Such questioning shall be limited to 3 days by NBC.

12. On or before August 29, 2025, NBC shall advise the Sunterra Parties the names of any two additional individuals excluding current or former officers and directors of the US Sunterra Entities within the scope of Rules 5.17 and 5.18 associated with the Sunterra Parties (apart from the deponents of affidavits filed by the Sunterra Parties and the Listed Witnesses), if any, it wishes to question under Rule 6.6 if they subsequently file affidavits and Rule 6.8 if they do not file affidavits in relation to the Claim. If the additional individuals are to file affidavits they are to do so by September 29, 2025.

13. Each deponent of an affidavit filed by NBC and each individual who is identified by the Sunterra Parties as falling within the scope of Rules 5.17 and 5.18 as they relate to NBC (collectively, the "**NBC Witnesses**") shall be made available for questioning by no later than October 24, 2025. Such questioning shall be limited to 3 days by the Sunterra Parties.

14. Any undertakings given by a witness or counsel shall be answered within 7 days of the conclusion of that witness's questioning.

15. If any Party wishes to compel a response to a question asked at questioning to which objection is taken, or an undertaking that is requested and refused, or for a further and better response to an undertaking response, that Party must apply to Justice Lema to compel the response within 7 days of the Questioning or undertaking reply (as the case may be).

16. On or before November 10 2025, NBC shall file its brief of argument in relation to the NBC v Sunterra Claim.

17. On or before November 24, 2025 the Sunterra Parties shall file their respondents' brief of argument in relation to brief submitted by NBC concerning the NBC v Sunterra Claim.

18. The Parties are at liberty and are hereby authorized and empowered to apply to the Court for assistance in carrying out the terms of the processes set out in this Schedule "A" on not less than seven day's notice.

19. This Schedule "A" may be amended only by written agreement between the Parties or further Order of this Honourable Court. Justice Lema shall remain seized of all matters pertaining to this Schedule "A".

TAB 29

Clerk's Stamp

COURT FILE NUMBER 2501-06120
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL DISTRICT EDMONTON

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 SUNTERRA FOOD CORPORATION,
TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY
FOOD MARKETS INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD.,
LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES
LTD., and SUNTERRA ENTERPRISES INC.

DOCUMENT **CONSENT ORDER (SCHEDULING)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
McCarthy Tétrault LLP
Suite 4000, 421 - 7th Avenue SW
Calgary, AB T2P 4K9
Attention: Sean Collins, KC / Sean Smyth, KC
Phone: 403-260-3531 / 3698
Fax: 403-260-3501
Email: scollins@mccarthy.ca / ssmyth@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED: July 24, 2025

NAME OF THE JUDGE WHO MADE THIS ORDER: The Honourable Justice M.J. Lema

LOCATION OF HEARING: Edmonton, Alberta

UPON the application of National Bank of Canada (previously Canadian Western Bank) (the "**Applicant**" or "**NBC**"); **AND UPON** hearing from counsel for the Applicant and any other interested parties appearing at the application;

IT IS HEREBY ORDERED THAT:

DETERMINATION OF NBC'S CLAIM

1. The litigation plan attached hereto as Schedule "**A**" is approved and the steps provided therein may proceed.

2. As at July 24, 2025, the outstanding balance for all amounts advanced by NBC under the Amended and Restated Commitment Letter, dated November 15, 2022, between NBC, as lender, and Sunterra Food Corporation, Trochu Meats Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farms Ltd., and Sunwold Farms Limited, as borrowers, exclusive of all accruing interest, fees, costs and expenses (all of which are recoverable by NBC), which outstanding balance, for clarity, also excludes the amounts claimed or to be claimed by NBC in respect of the NBC v. Sunterra Claim (as such term is defined in the attached Schedule "A"), is \$9,932,732.20.
3. The Statement of Claim issued by Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farm Enterprises Ltd., Lariagra Farms Ltd., Sunterra Enterprises Inc., Sunterra Beef Ltd., Sunterra Farms Greenhouse Ltd., Soleterra D'Italia Ltd., and Precision Diagnostics on March 24, 2025, under Court File Number 2501-04640, as against NBC, is exempt from the Claims Process and will be adjudicated after the conclusion of the CCAA proceedings.

Justice of the Court of King's Bench of Alberta

**CONSENTED TO this ____ day of July,
2025**

BLUE ROCK LAW LLP

Per: _____



Scott Chimuk
Counsel to Sunterra Farms Ltd.,
Sunwold Farms Limited, Sunterra
Enterprises Inc., Ray Price, and
Debbie Uffelman

**CONSENTED TO this 24th day of July,
2025**

MCCARTHY TÉTRAULT LLP

Per: _____



Sean Collins, KC
Counsel to NBC

SCHEDULE “A”

1. In this Schedule “A” annexed to the Consent Order granted by Justice M.J. Lema on July 24, 2025 in Court File Number 2501-06210:

- (a) **“Claim”** means the NBC v. Sunterra Claim.
- (b) **“Compeer”** means Compeer Financial, PCA;
- (c) **“Compeer v. NBC Claim”** means every claim Compeer has or may have against National Bank of Canada (as amalgamation successor to Canadian Western Bank) that is related to, arises from or is in anyway connected to Canadian Western Bank dishonoring cheques issued by Sunterra Farms Inc. or Sunwold Farms Limited in favour of the Sunterra US Entities;
- (d) **“Compeer v. Sunterra Claim”** means the claim Compeer has asserted in its application for declaratory relief and summary judgment of Compeer’s claims as set out in the Statement of Claim filed in Court of King’s Bench Action No. 2501 06120 by Compeer on or about June 23, 2025 naming the following as respondents: Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Enterprises Inc., Ray Price and Debbie Uffelman. Compeer and the Sunterra Entities have entered into a Claims Procedure Consent Order setting out the process for the adjudication of the Compeer v. Sunterra Claim;
- (e) **“Listed Witnesses”** means:
 - (i) Ray Price, Art Price, Debbie Uffelman and Craig Thompson of the Sunterra Parties; and
 - (ii) Sunterra to name 2 additional listed witnesses beyond the 2 or more NBC affiants by September 5, 2025.
- (f) **“NBC”** means National Bank of Canada;
- (g) **“NBC Action”** means the action commenced by NBC by way of Statement of Claim issued on March 17, 2025 in the Court of King’s Bench of Alberta, Judicial Centre of Calgary under Court File Number 2501-04252;

- (h) **"NBC Appeal"** means the appeal proceedings commenced by NBC by way of Civil Notice of Appeal on April 2, 2025 in the Court of Appeal of Alberta under Court of Appeal File Number 2501-0098AC;
- (i) **"NBC v. Sunterra Claim"** means every claim NBC has against the Sunterra Parties, or any of them, for:
 - (i) contribution and indemnity arising out of or in any way connected to the Compeer v. NBC Claim; and
 - (ii) damages,which claim shall exclude a claim for the NBC Indebtedness as set out in paragraph 2 of this Order;
- (j) **"Parties"** means, collectively, NBC and the Sunterra Parties;
- (k) **"Rule"** means a rule made under the Alberta *Rules of Court*;
- (l) **"Statement of Claim"** means the Statement of Claim filed by Compeer in the Compeer v. Sunterra Claim;
- (m) **"Sunterra Parties"** means, collectively, Sunterra Farms Ltd., Sunwold Farms Limited, Sunterra Food Corporation, Trochu Meat Processors Ltd., Sunterra Quality Food Markets Inc., Sunterra Farm Enterprises Ltd., Lariagra Farms Ltd., Sunterra Enterprises Inc., Sunterra Beef Ltd., Ray Price and Debbie Uffelman and any officer or director of any of the foregoing;
- (n) **"Sunterra US Entities"** means, collectively, Sunterra Farms Iowa, Inc. and Sunwold Farms, Inc.

2. The NBC v Sunterra Claim shall be determined concurrently with the Compeer v. Sunterra Claim summarily pursuant to an application on the Commercial List such that both applications will take place on December 3, 2005 and December 4, 2005 (the **"Summary Application"**).

3. Nothing in this claims process will impact the NBC Appeal, the award of costs against NBC in the interim receivership application, the Statement of Claim filed by the Sunterra Parties against NBC in action number 2501-04640 or any counterclaim that the Sunterra Parties may have against NBC in the NBC Action.

4. On or before August 29, 2025, NBC shall file and serve the NBC v. Sunterra Claim, together with any affidavits in support of the NBC v. Sunterra Claim, upon counsel to the Sunterra Parties with a copy to counsel to Compeer.
5. On or before September 22, 2025 the Sunterra Parties shall file a written Notice of Objection all of its positions and defences and the principal allegations and facts on which they rely to oppose and defend against the NBC v. Sunterra Claim together with any affidavits in response to the NBC v. Sunterra Claim and serve same upon counsel to NBC with a copy to counsel to Compeer.
6. On or before September 29, 2025, NBC shall file any and all reply evidence on which they intend to rely in respect of the Claim, such reply evidence to be limited to matters raised in the evidence of the other Parties.
7. Each of the deponents of affidavits filed pursuant to this Schedule "B" may be questioned on their affidavits pursuant to Rule 6.6 by the Parties who are adverse in interest.
8. Each of the Listed Witnesses who do not file affidavits may be questioned pursuant to Rule 6.8 by the Parties who are adverse in interest.
9. Each of the witnesses that are identified by a Party as being additional individuals falling within the scope of Rules 5.17 and 5.18 pursuant to the process below shall be questioned pursuant to Rule 6.6 if they file affidavits and Rule 6.8 if they do not file affidavits, by the Parties who are adverse in interest.
10. On or before September 5, 2025, the Sunterra Parties shall advise NBC of the names of any two additional individuals who are current or former NBC employees, officers or directors within the scope of Rules 5.17 and 5.18 associated with NBC (apart from the deponents of affidavits filed by NBC and Listed Witnesses) and associated with NBC (apart from the deponents of affidavits filed by NBC), if any, it wishes to question under Rule 6.6 if they subsequently file affidavits and Rule 6.8 if they do not file affidavits in relation to the Claim. If the additional individuals are to file affidavits they are to do so by September 12, 2025.
11. Each deponent of an affidavit filed by the Sunterra Parties, each Listed Witness associated with the Sunterra Parties and each individual who is identified by NBC as falling within the scope of Rules 5.17 and 5.18 as they relate to the Sunterra Parties (collectively, the "**Sunterra Witnesses**") shall be made available for questioning by no later than October 24, 2025. Such questioning shall be limited to 3 days by NBC.

12. On or before August 29, 2025, NBC shall advise the Sunterra Parties the names of any two additional individuals excluding current or former officers and directors of the US Sunterra Entities within the scope of Rules 5.17 and 5.18 associated with the Sunterra Parties (apart from the deponents of affidavits filed by the Sunterra Parties and the Listed Witnesses), if any, it wishes to question under Rule 6.6 if they subsequently file affidavits and Rule 6.8 if they do not file affidavits in relation to the Claim. If the additional individuals are to file affidavits they are to do so by September 29, 2025.

13. Each deponent of an affidavit filed by NBC and each individual who is identified by the Sunterra Parties as falling within the scope of Rules 5.17 and 5.18 as they relate to NBC (collectively, the "**NBC Witnesses**") shall be made available for questioning by no later than October 24, 2025. Such questioning shall be limited to 3 days by the Sunterra Parties.

14. Any undertakings given by a witness or counsel shall be answered within 7 days of the conclusion of that witness's questioning.

15. If any Party wishes to compel a response to a question asked at questioning to which objection is taken, or an undertaking that is requested and refused, or for a further and better response to an undertaking response, that Party must apply to Justice Lema to compel the response within 7 days of the Questioning or undertaking reply (as the case may be).

16. On or before November 10 2025, NBC shall file its brief of argument in relation to the NBC v Sunterra Claim.

17. On or before November 24, 2025 the Sunterra Parties shall file their respondents' brief of argument in relation to brief submitted by NBC concerning the NBC v Sunterra Claim.

18. The Parties are at liberty and are hereby authorized and empowered to apply to the Court for assistance in carrying out the terms of the processes set out in this Schedule "A" on not less than seven day's notice.

19. This Schedule "A" may be amended only by written agreement between the Parties or further Order of this Honourable Court. Justice Lema shall remain seized of all matters pertaining to this Schedule "A".

TAB 30

Clerk's Stamp:

COURT FILE NUMBER

2501 – 06120

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE OF

EDMONTON

**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
SUNTERRA FOOD CORPORATION, TROCHU
MEAT PROCESSORS LTD., SUNTERRA
QUALITY FOOD MARKETS INC., SUNTERRA
FARMS LTD., SUNWOLD FARMS LIMITED,
SUNTERRA BEEF LTD., LARIAGRA FARMS
LTD., SUNTERRA FARM ENTERPRISES LTD.,
SUNTERRA ENTERPRISES INC.**

DOCUMENT

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT:

CONSENT ORDER (Scheduling Order)

BENNETT JONES LLP

Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Attention: Lincoln Caylor/Nathan J. Shaheen
Keely Cameron/Mathieu LaFleche

Telephone No.: 403-298-3100
Fax No.: 403-265-7219
Client File No.: 99329.1

DATE ON WHICH ORDER WAS

PRONOUNCED:

Thursday, July 24, 2025

NAME OF JUDGE WHO MADE

THIS ORDER:

The Honourable Justice M. J. Lema

LOCATION OF HEARING:

Edmonton Law Courts
1A Sir Winston Churchill Sq NW, Edmonton, AB

UPON the application of Compeer Financial, PCA (the "**Applicant**" or "**Compeer**"); **AND**
UPON having read the Application for the Lifting of the Stay and other ancillary relief; the

Amended and Restated Initial Order, granted on April 28, 2025 ("**ARIO**"); the Affidavit of Nic Rue, sworn June 19, 2025; the Affidavit of Steve Grosland, sworn June 20, 2025; the Affidavit of Sei Na, sworn on April 21, 2025; **AND UPON** hearing counsel for the Applicant, and any other interested parties appearing at the application; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") and supporting materials are deemed good and sufficient and this application is properly returnable today.

DETERMINATION OF COMPEER CLAIMS

2. The litigation plan attached hereto as Schedule "A" is approved and the steps provided therein may proceed.
3. Compeer's application for declaratory relief and summary judgment of its claims in Court of King's Bench Action No. 2501-06120 against the Defendants is adjourned to December 4 and 5, 2025 and shall proceed in accordance with Schedule "A" hereto.

Justice of the Court of King's Bench of Alberta

Schedule "A"
Litigation Plan

1. This litigation plan may be amended only by written agreement between the parties to Court of King's Bench Action No. 2501-06120 (the "**Action**"), or by Court Order.
2. The Defendants in the Action shall file and serve their defences to the Statement of Claim filed in the Action and any affidavits in response to Compeer's application for declaratory relief and summary judgment in the Action filed on June 23, 2025 in these proceedings (the "**Application**") by September 5 2025 and shall advise Compeer Financial, PCA ("**Compeer**") what two additional current employees of Compeer, if any, it wishes to examine. Such examinations shall occur pursuant to Rule 6.8 of the Alberta *Rules of Court* unless the additional witnesses file Affidavits.
3. Each of Ray Price, Art Price, Debbie Uffelman and Craig Thompson (collectively, the "**Sunterra Witnesses**") shall attend for examination, by no later than October 24, 2025. Such examination shall be limited to 3 days to be apportioned by Compeer unless the parties otherwise agree or the Court directs. Such examinations shall occur pursuant to Rule 6.6 if they file affidavits or Rule 6.8 if they do not of the Alberta *Rules of Court*.
4. The Defendants shall conduct any examination of Nicholas Rue, Steve Grosland and the additional witness(es) identified in accordance with paragraph 2, if any, by no later than October 24, 2025. Such examination shall be limited to 3 days to be apportioned by counsel for the Defendants unless the parties otherwise agree or the Court directs.
5. Any amendments to the parties to the Application, shall be made by October 27, 2025.
6. Any undertaking responses shall be provided by October 30, 2025.
7. Compeer shall file its brief by November 10, 2025 and the Defendants shall file their briefs by November 24, 2025.
8. The Application shall proceed to judgement on a date fixed by the Court.
9. The parties to the Action are at liberty and are hereby authorized and empowered to apply

to the Court for assistance in carrying out the terms of this plan and may seek to vary this plan on not less than seven day's notice.