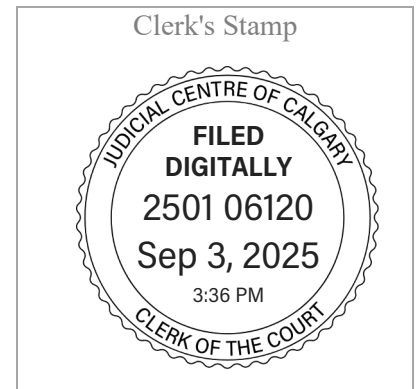


COURT FILE NO. 2501 06120
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



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

AND IN THE MATTER OF 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.

APPLICANTS 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 **BRIEF OF THE RESPONDENT, COMPEER FINANCIAL, PCA**

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Chambers Application Scheduled for 5th, September, 2025
before The Honourable Justice Lema

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I. INTRODUCTION

1. Compeer Financial, PCA ("**Compeer**") opposes the application of National Bank of Canada ("**NBC**"). NBC's application should be dismissed, with costs in favour of Compeer.

2. Even assuming for the purposes of this application that this Court has the jurisdiction to grant the relief sought by NBC on this application,¹ any resulting discretion should not be exercised in these circumstances to require Compeer to make any election in respect of a potential claim against NBC.

3. First, the evidence establishes that Compeer remains unable to identify and evaluate, let alone elect whether to pursue, a claim against NBC.

4. In seeking an investigative receivership, NBC recently took the position before this Court that relevant parties – *including Compeer* – lacked the information required to identify and evaluate their potential claims arising in connection with the cheque kiting scheme. In doing so, NBC admitted that it was concerned about facing claims by Compeer. Such concern reflects that NBC is best placed to understand and evaluate the claims that it may face by Compeer (and others). In contrast, Compeer has confirmed that it continues to lack the information required to meaningfully identify and evaluate any claims against NBC.

5. Second, and as NBC admits,² the election that NBC asks this Court to require of Compeer is unnecessary for the determination of its pending indemnity claim, which is the only stated purpose of seeking to put Compeer to an election at this stage.

6. Under the *Companies' Creditors Arrangement Act* ("**CCAA**"), this Court can – and routinely does – consider contingent claims without requiring an election of the nature sought by NBC, relief for which NBC has identified no legal precedent. In any event, as the party best placed to identify a potential claim by Compeer, NBC has already put forward a definition of such claim and identified its potential losses if that claim were to succeed. Contrary to NBC's

¹ No authority directly on point has been identified and the authorities cited by NBC acknowledge that in most cases it would be inappropriate to consider intercreditor disputes, acknowledging that the *CCAA* is designed to assess claims against debtors and their directors and officers, which NBC is neither. The Alberta Court of Appeal has recently granted leave to appeal in a case that engages with the issue of whether there is jurisdiction to prohibit claims by a creditor (such as Compeer) against solvent third parties (such as NBC): *Spartan Delta Corp v Alberta (Energy and Minerals)*, [2025 ABCA 181](#) [*Spartan*]. [TAB 1]

² Application of National Bank of Canada filed August 25, 2025 at para. 10.

submissions, it is not the case that "the scope of the NBC indemnity Claims [sic] remains ill defined and the potential quantum of same uncertain."³

7. In these circumstances, NBC's application appears to be a tactical ploy by NBC that, if permitted to succeed, would be highly prejudicial to Compeer. Knowing that Compeer lacks the relevant information, NBC asks this Court to bar, and therefore release NBC from, a claim by Compeer unless Compeer immediately elects to pursue such claim. Such relief between two creditors would be unprecedented and contrary to the purpose of the CCAA.

8. In addition, releasing NBC from a potential claim by Compeer in these circumstances would obliterate Compeer's rights, to the sole benefit of NBC, all despite NBC being unable to satisfy, and simply ignoring, the well-established factors relevant to granting a third party release. Such rights of Compeer include the right to advance a claim within the applicable limitation period. NBC asks this Court to abridge that limitation period to Compeer's prejudice, which this Court does not have authority to do.

9. It is only if NBC establishes a relevant indemnity *and* such indemnity is secured that any potential claim by Compeer against NBC may be material to this CCAA proceeding. Only in that case should consideration be given to whether the purpose of this CCAA proceeding may be furthered by Compeer making an election in respect of a claim against NBC. If NBC fails to establish such a secured indemnity, then any claim that Compeer may have against NBC will be of no relevance to the CCAA debtors or their stakeholders.

II. STATEMENT OF FACTS

10. This Court is well aware of the history of this CCAA proceeding in respect of Sunterra Farms Ltd., Sunterra Food Corporation, Sunterra Quality Food Markets Inc., Sunwold Farms Limited, Trochu Meat Processors Ltd., Sunterra Beef Ltd., Lariagra Farms Ltd, Sunterra Farm Enterprises Ltd. and Sunterra Enterprises Inc. (the "**CCAA Debtors**"). Compeer's brief therefore focuses on the facts most relevant to NBC's present application against Compeer.

³ NBC Bench Brief, filed August 25, 2025 at para. 44 [NBC Bench Brief].

11. Sunterra Farms Iowa Inc., Sunwold Farms Inc. and Lariagra Farms South Inc. (the "**US Subsidiaries**") are subsidiaries of certain of the CCAA Debtors. Compeer is a member-owned, Farm Credit cooperative and the senior secured creditor of the U.S. Subsidiaries.

12. On March 20, 2025, NBC, as the senior secured creditor of the CCAA Debtors, brought an application for appointment of an investigative receiver in respect of the CCAA Debtors and the US Subsidiaries. It did so following its discovery of the cheque kiting scheme.

13. Notably, in seeking the appointment of the investigative receiver, NBC repeatedly emphasized the lack of available information and the need to obtain that information in priority, including for the purpose of allowing all creditors to understand and assess their claims, including the claims of "any other financial institution that may also be a victim."⁴

14. For example, NBC argued that the appointment of the investigative receiver was required "for the protection of: (i) the Obligors' estates; (ii) the Lender's interests; and, (iii) *the interests of creditors of the Sunterra Group generally, and in particular parties who may have been affected by the Kiting Scheme and the Impugned Transactions.*"⁵

15. NBC similarly argued: "The appointment of the Interim Receiver is also *to the benefit of the Sunterra Group's creditors, generally*, for substantially the same reasons. The scope of affected parties is unknown and the proposed investigation will *permit the Interim Receiver to identify other parties, including financial institutions, who are affected by or hold claims arising from the Impugned Transactions and the Kiting Scheme.*"⁶

16. In seeking the investigative receiver, NBC was explicit that the financial institutions that may have been affected and hold claims include Compeer: "the possibility of further claims exists and the scope of the Kiting Scheme has not yet been determined. Additionally, it is *unknown to what extent any other financial institutions (most notably, Compeer) have been affected.*"⁷ In those circumstances, NBC advised this Court that "*Compeer will likely benefit from the completion of an investigation of the Impugned Transactions.*"⁸

⁴ March 20, 2025 Bench Brief of NBC in support of interim receivership application at para. 5. [TAB 2]

⁵ *Ibid* at para. 66.

⁶ *National Bank of Canada v Precision Livestock Diagnostics Ltd.*, [2025 ABKB 175](#) at para 35. [TAB 3]

⁷ *Supra* at para. 16.

⁸ *Supra* at para. 100.

17. At the same time, based on the information available to it, NBC made clear that it was concerned about eventually facing claims by Compeer. The representative of NBC (referred to at times as "CWB", the acronym for NBC's predecessor), Raymond Pai, admitted such concern under cross-examination on his affidavit filed in support of NBC's application for the appointment of an investigative receiver:⁹

Q. I'm going to suggest to you that the concern of CWB is not that there's insufficient security but, rather, the concern is that CWB is potentially going to be in litigation with Compeer; correct?

A. Yes.

Q. I'm suggesting to you that CWB's concern isn't that there is insufficient security but that CWB's concern to date is of potential litigation with Compeer relating to these issues?

A. Yes. It is one of our concerns.

18. On March 24, 2025, this Court denied NBC's receivership application. It did so for various reasons, none of which change the fact that NBC's position before this Court was that Compeer (which this Court's decision noted "supports NBC's application for an interim and (presumably) an investigative receiver") lacked the information it required to investigate and assess its potential claims. There is no evidence that the state of the information available to Compeer has changed since NBC's receivership application.

19. On April 22, 2025, the CCAA Debtors obtained from this Court an initial order to commence proceedings under the CCAA. Procedural steps in respect of the CCAA Debtors have taken place within the resulting CCAA proceeding since that time.

20. It is notable for purposes of this application that, on July 24, 2025, the Court granted a Claims Procedure Order and a consent order as between the CCAA Debtors and NBC (the "**NBC Consent Order**").¹⁰ The NBC Consent Order establishes a procedure for the determination of every claim that NBC has against the CCAA Debtors.

⁹ Transcripts from the Questioning of R. Pai held on March 17, 2025 at p.120 L11- p. 121 L8. [TAB 4]

¹⁰ NBC Consent Order. [TAB 5]

21. Among the claims contemplated by the NBC Consent Order are any claims for contribution and indemnity (the "**NBC Indemnity Claim**"), including arising out of or in any way connected to the "Compeer v. NBC Claim", which is defined as follows:

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 Ltd. or Sunwold Farms Limited in favour of the Sunterra US Entities or Compeer Financial, PCA.

22. The definition of the Compeer v. NBC Claim is notable. It was proposed by NBC, and is now contained in the NBC Consent Order signed by this Court to which Compeer did not consent and is not a party. By way of that definition, NBC has told this Court that it contemplates that any Compeer claim would relate to NBC "dishonouring cheques", which NBC did *after* the discovery of the cheque kiting scheme perpetrated by the CCAA Debtors.¹¹

23. The definition of the Compeer v. NBC Claim that is subject to the NBC Indemnity Claim therefore relates to a factual basis that is distinct from the claim that Compeer has advanced against certain of the CCAA Debtors and their principals, which advances fraud, conspiracy and oppression causes of action in respect of the perpetration of the cheque kiting scheme. For this reason, Compeer does not agree with the Monitor's Third Report (filed prior to Compeer's response to NBC's application) that any claim by Compeer against NBC would rely on the same facts and allegations as its claim against the CCAA Debtors and their principals. Based on the Compeer v. NBC Claim as defined by NBC, that cannot be true.

24. The defined Compeer v. NBC Claim that is the subject of the NBC Indemnity Claim relates to NBC's potential liability arising from "dishonouring cheques". NBC is asking this Court to consider only that conduct and the limited number of causes of action that could arise from it. Those causes of action would presumably not be fraud, conspiracy or oppression, as advanced by Compeer against certain of the CCAA Debtors and their principals.

¹¹ While not strictly relevant for this application, Compeer notes that, on the face of the definition of the Compeer v. NBC Claim, it is difficult to see how the NBC Indemnity Claim could succeed in respect of that claim. NBC's conduct *after* the discovery of the cheque kiting scheme that may have resulted in losses to Compeer is not, for any reason known to Compeer, conduct for which the CCAA Debtors could be liable on any credible theory of an indemnity that may apply to the defined Compeer v. NBC Claim. This is in contrast to any conduct by NBC, the CCAA Debtors and their principals (and potentially others) *prior to* the discovery of the cheque kiting scheme.

25. The fact that NBC has already defined the Compeer v. NBC Claim to be considered on the NBC Indemnity Claim is compounded by the fact that, in its claim delivered on August 29, 2025, which includes the particulars of the NBC Indemnity Claim, NBC has also stated its understanding of its exposure arising from a Compeer v. NBC Claim:¹²

if Compeer is unable to fully recover the amount of the Compeer Indebtedness, less the amount by which the Compeer Indebtedness was satisfied from the proceeds of the US Sunterra Sale (the net amount being the "Compeer Shortfall" which is estimated to be the range of USD\$15 million), Compeer will seek to recover the Compeer Shortfall from NBC.

26. By identifying its potential exposure in connection with its dishonouring cheques as USD\$15 million, NBC has revealed that it does not require Compeer to identify the "range of quantum" of Compeer's potential claim against NBC, despite seeking that relief on this application.

27. Accordingly, and contrary to its current submissions, it is not the case that "the scope of the NBC indemnity Claims [sic] remains ill defined and the potential quantum of same uncertain",¹³ which tellingly is the highest that NBC is able to put the purported need for Compeer to make the election sought on this application (and is consistent with NBC's admission that such election is unnecessary to determining the NBC Indemnity Claim).¹⁴

28. NBC's approach to the NBC Consent Order and in advancing the NBC Indemnity Claim also reflects that it is NBC – not Compeer – that is currently best placed to identify and evaluate any potential claim that Compeer may have against NBC. In this regard, and typical in claims against banks, NBC's potential liability to Compeer depends on the nature, timing and extent of NBC's internal conduct and knowledge, including in respect of the circumstances in which NBC dishonoured cheques following the discovery of the cheque kiting scheme. Notably, it is with the benefit of its unique lens into such conduct that NBC has admitted it is concerned about liability to Compeer.

¹² Claim of National Bank of Canada, filed on August 29, 2025 at para. 86. [TAB 6]

¹³ NBC Bench Brief, *supra* at para. 44.

¹⁴ Application of National Bank of Canada filed August 25, 2025 at para. 10.

29. In contrast, the details of NBC's conduct that are relevant to assessing NBC's potential liability are obviously not currently available to Compeer. NBC has previously provided evidence that the CCAA Debtors have refused to permit the sharing of information between their Canadian (NBC) and US (Compeer) financial institutions. Again, there is no reason to conclude that Compeer has further information at this stage than it did at the time that NBC pursued its application for the investigative receiver, which Compeer supported.

30. NBC is well aware that Compeer lacks relevant information both because it has not revealed the details of its internal conduct to Compeer (or presumably any third party), and because NBC has been advised of the fact that Compeer remains in the dark in respect of such relevant information. On July 24, 2025, Compeer's lawyers advised NBC's lawyers as follows:

while Compeer agrees with National and Sunterra that it may have a claim against National, it is simply not in a position to advance one at this time. It has been focusing its efforts on the issues as they relate to the Sunterra Entities and their directors and officers which are clearly relevant to these proceedings and has had inadequate time and information to consider or advance a claim in respect of National and it reserves its right to do so outside of the CCAA Proceedings in the ordinary course.¹⁵

31. Despite the foregoing, NBC seeks by way of this application to force Compeer to immediately elect whether it will pursue claims against NBC and to declare the factual and legal bases of such claims, failing which NBC asks this Court to bar, and therefore release NBC from, a claim by Compeer. In doing so, NBC fails to acknowledge that Compeer does not currently have the information required to identify or evaluate any claim against NBC.

32. NBC also does not acknowledge that the NBC Indemnity Claim relates not just to Compeer, but to "any third party". NBC has offered no explanation for why it is seeking to require only Compeer to make an immediate election to advance claims, failing which only Compeer's claims would be barred. Compeer is not aware of any reason that it would be treated differently than any other potential claimant as against NBC for the purpose of the NBC Indemnity Claim, particularly where NBC contemplates such other claimants.

¹⁵ Affidavit of Raymond Pai, sworn August 25, 2025 at Exhibit B [Pai Affidavit].

33. While Compeer currently does not have the information required to identify and evaluate any claim against NBC (consistent with the defined Compeer v. NBC Claim or otherwise), Compeer expects such information may become available in due course and while this CCAA proceeding is ongoing, such that this Court could then consider any claim should it become material to this proceeding.

34. Among other things, Compeer understands that various examinations are likely to occur by late October, and that both Compeer's application against certain of the CCAA Debtors and their principals, as well as the NBC Indemnity Claim, are likely to be adjudicated by early December. The US receiver of the US Subsidiaries has also brought an application to obtain further information, which may therefore be another avenue from which Compeer could obtain information relevant to its assessment of any claim against NBC.

35. However, the best source of information relevant to any claim by Compeer against NBC remains NBC, which, is uniquely situated to share the information going to its internal conduct, including its knowledge and processes leading to the dishonouring of cheques. This is consistent with how NBC has already identified the scope and quantum of any such claim.

III. ISSUES

36. In theory, there may be a threshold issue as to whether this Court has the jurisdiction to render the relief sought by NBC on this application.

37. The Alberta Court of Appeal has recently granted leave to appeal in a case that engages with the issue of whether there is jurisdiction to prohibit claims by a creditor (such as Compeer) against solvent third parties (such as NBC).¹⁶ Consistent with the unsettled state of the law, NBC has not identified legal precedent for a Canadian court forcing a creditor to elect to bring a claim against another creditor (let alone long before the expiry of any applicable limitation period or the conclusion of a CCAA proceeding), failing which that claim would be barred.

¹⁶ *Spartan* at paras. 24-30.

38. In doing so, NBC has downplayed or ignored that Canadian courts have repeatedly reached conclusions contrary to the relief sought on this application, such as that "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"¹⁷ and that the purpose of a CCAA proceeding "is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute."¹⁸

39. However, to determine NBC's application, the potential threshold issue need not be determined. Rather, there are two relevant issues specific to the circumstances of this application that lead to the conclusion that, even assuming for purposes of this application that the required jurisdiction exists, this Court should not exercise its discretion in this case to require Compeer to make any election in respect of a potential claim against NBC. Those two relevant issues are as follows:

- (a) Compeer is currently unable to make the election sought by NBC.
- (b) In any event, the election sought by NBC is unnecessary.

40. In these circumstances, granting the relief sought by NBC would not further any purpose of the CCAA and would inflict significant prejudice on Compeer. Accordingly, NBC's application should be dismissed, with costs payable to Compeer.

IV. DISCUSSION

Compeer is Unable to Make the Election Sought by NBC

41. For the reasons described above, the evidence establishes, and this Court should conclude, that Compeer remains unable to identify and evaluate, let alone elect whether to pursue, a claim against NBC. It also establishes that NBC is aware – and has indeed previously told this Court – that Compeer lacks such information, and that NBC uniquely has a lens into the information it purports to require. These facts alone should be fatal to NBC's application.

¹⁷ *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103 at para 72. [TAB 7]

¹⁸ *Re Stelco Inc.*, [2005 CanLII 42247 \(ON CA\)](#) at para. 30-32. [TAB 8]

42. In these circumstances, NBC's application appears to be a tactical ploy by NBC that, if permitted to succeed, would be highly and irreparably prejudicial to Compeer. The prejudice that would be occasioned upon Compeer by granting the relief sought is discussed below.

The Relief Sought by NBC is Unnecessary to the NBC Indemnity Claim

43. The relief sought by NBC on this application is also unnecessary.

44. Section 19 of the CCAA provides for consideration of contingent 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 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).

45. In considering section 19 of the CCAA, the Supreme Court of Canada has confirmed that a claim is provable in a CCAA proceeding even if it is a contingent claim, which is "a claim which may or may not ripen into a debt, according as some future event does or does not happen."¹⁹ Similarly, this Court has confirmed that a surety that has not been called on to pay by a creditor can advance a provable claim in the bankruptcy of a debtor.²⁰

46. Further, in evaluating the existence of a contingent claim, the test under section 19 of the CCAA is simply whether there is a claim that "might" be filed. The subjective choice of a party to hold off on advancing that claim for strategic or tactical reasons is not relevant.²¹

¹⁹ *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 at para 36. [TAB 9]

²⁰ *Auctioneers' Assn. of Alberta v. Hunter*, 2002 ABQB 28 at para. 50. [TAB 10]

²¹ *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1261 at para. 227-236. [TAB 11]

Indeed, there may be many reasons why a party may not advance a claim, including but not limited to the lack of information, costs or potential recovery from other parties.

47. Consistent with the unknown future nature of a contingent claim, the "criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative."²² That is, provided that the contingency is not too remote or speculative, a contingent claim can be established.

48. In turn, it is standard practice in CCAA proceedings for a contingent claim to be considered and valued in the absence of any third party being required to make an election as to whether to actually bring that claim (let alone be faced with a release if the election is not made). NBC has identified no legal precedent for requiring such an election or for the draconian consequence of imposing a Court-ordered release absent such election.

49. In this case, any potential claim by Compeer against NBC is a contingent claim under section 19 of the CCAA. Such a claim is plainly not too remote or speculative. To the contrary, NBC has admitted that it is "concerned" about a claim by Compeer,²³ has identified the scope of the Compeer v. NBC Claim that will be considered by this Court in evaluating the NBC Indemnity Claim, and has also identified the quantum of its potential loss arising from the defined Compeer v. NBC Claim.

50. In this scenario, NBC has – and admitted it has²⁴ – enough information to advance the NBC Indemnity Claim, which is the only stated purpose of seeking to put Compeer to an immediate election as to whether to advance a claim. This reflects the fact that NBC is uniquely and best situated to identify any claim against it, and the fact that with that unique vantage point NBC saw fit to define the Compeer v. NBC Claim, which is the claim that will be considered when this Court adjudicates that NBC Indemnity Claim later this year.

51. Consistent with NBC having all of the information it requires, NBC has already advanced the NBC Indemnity Claim (based on a schedule proposed by NBC and now contained in the NBC Consent Order). This further evidences that nothing is required from

²² *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012 SCC 67](#) at para. 36. [TAB 12]

²³ Pai Affidavit at Exhibit B.

²⁴ Application of NBC, filed on August 25, 2025 at para. 10.

Compeer to permit the adjudication of the NBC Indemnity Claim by this Court. If NBC truly believed it required additional information, it would have insisted on a schedule that saw the issue of a potential election by Compeer resolved in priority. NBC elected not to do so.

52. It is only if NBC succeeds on the NBC Indemnity Claim *and* if this Court finds that the resulting indemnity is secured, that any potential claim by Compeer against NBC would be material to this CCAA proceeding. Assuming that NBC fails to establish the existence of such a secured indemnity, which appears an entirely reasonable outcome, particularly given the defined Compeer v. NBC Claim, then any claim that Compeer may have against NBC will be of no relevance to the CCAA Debtors or their stakeholders. This again demonstrates why the election is unnecessary.

53. In these circumstances, where the election sought by NBC is unnecessary, the most reasonable conclusion is that, in seeking that relief, NBC is engaged in a self-serving attempt to elevate any potential claim by Compeer from a contingent claim to a crystalized claim (in circumstances that would be highly prejudicial to Compeer given, among other things, the lack of information available at this time). NBC is not entitled to this outcome, particularly as this Court has every ability under section 19 and on the facts of this case to evaluate a contingent claim by Compeer against NBC.

The Relief Sought by NBC Would Be Highly Prejudicial To Compeer

54. In all of the circumstances, the relief sought by NBC on this application would be highly prejudicial to Compeer.

55. Most obviously, despite being aware that Compeer lacks the relevant information, NBC asks this Court to bar, and therefore release NBC from, a claim by Compeer unless Compeer immediately elects to pursue such claim. Achieving such a release at this early stage appears to be another self-interested motivation behind NBC's application. Such a ploy by a creditor such as NBC is precisely the type of improper manipulation of a CCAA process that this Court concluded in *BA Energy Inc. (Re)* must be carefully guarded against.²⁵

²⁵ *BA Energy Inc. (Re)*, [2010 ABQB 507](#) at paras. 41-42. [TAB 13]

56. The release sought would also be unfair and contrary to public policy as it would further harm Compeer, which is currently bearing the full brunt of the losses caused by the CCAA Debtors' cheque kiting scheme (with NBC having suffered no losses as a result of that scheme), all while Compeer does not have the information required to identify and evaluate a potential claim against NBC that NBC is nonetheless seeking to have released.

57. Releasing NBC from a potential claim by Compeer in these circumstances would finally do away with Compeer's relevant rights vis-à-vis NBC, to the sole benefit of NBC (and without regard for the purpose of the CCAA), all despite NBC being unable to satisfy, and simply ignoring, the well-established factors relevant to granting a third party release in the context of a CCAA proceeding.

58. In *Re Metcalfe & Mansfield Alternative Investments II Corp*, the Ontario Court of Appeal identified the following factors relevant to a potential third party release:

- (a) The parties to be released are necessary and essential to the restructuring of the debtor;
- (b) The claims to be released are rationally connected to the purpose of the Plan and necessary for it;
- (c) The Plan cannot succeed without the releases;
- (d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- (e) The Plan will benefit not only the debtor companies but the creditor Noteholders generally;
- (f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and
- (g) The releases are fair and reasonable and not overly broad or offensive to public policy.

59. NBC cannot satisfy, and instead simply ignores, the foregoing factors. Among other things, at this stage of this CCAA proceeding, it is not even clear whether the CCAA Debtors will be restructured or whether NBC will take any steps that will be "essential" to such restructuring. There is no plan or arrangement that depends on the release sought by NBC, which is therefore not contributing in any way (let alone a tangible and realistic way) to such plan or arrangement. And, again, the release sought would benefit NBC, but there is no reason to conclude at this stage that it would benefit the creditors more generally. For these reasons, and the others noted above, any release in favour of NBC would be contrary to public policy.

60. In some cases Courts have also considered whether the party seeking to be released is entitled to indemnification by the debtor.²⁶ In this case, however, NBC has not established that any indemnity entitlement exists and may never do so in connection with the *Compeer v. NBC* Claim. Accordingly, if the "indemnification" factor is considered relevant, it also indicates that the release sought by NBC should not be ordered.

61. If NBC is not entitled to a release from *Compeer* at this stage (it clearly is not), this is another reason that the election sought by NBC should not be granted. Without a release, the concept of an election is empty, as a party put to the election would not be barred from advancing the claim at a later date. Accordingly, an election is only appropriate or meaningful at a time when a release can also be properly granted. Since NBC is not entitled to a release – particularly where *Compeer* lacks the information required to evaluate any claim that may be released – then it is neither appropriate nor meaningful, and rather is only prejudicial to *Compeer*, to require such an election.

62. In addition, the prospect of forcing *Compeer* to make an immediate election, failing which its potential claim would be barred, is all the more inappropriate where there are upcoming examinations and applications in the near-term in this CCAA proceeding. After those steps, and still well within this CCAA proceeding, *Compeer* may be better placed to identify and evaluate a claim, as well as to actually advance any such claim. At least until then, the prospect of barring that claim remains unfair and prejudicial.

²⁶ *Re Skylink Aviation Inc.*, [2013 ONSC 2519](#) at para. 33 [TAB 14]; *Re Cline Mining Corp.*, [2015 ONSC 622](#) at paras. 23-26. [TAB 15]

63. The outcome sought by NBC leads to various questions that highlight the unfairness and prejudice that would result from the relief sought by NBC. For example, if Compeer elected to bring a claim on the timeline sought by NBC, could it change its mind based on the information it later obtains through the upcoming examinations? Would it face cost consequences if it did so? If Compeer did elect to proceed and the bases for its claim evolved based on information learned after the election, would it be barred from amending its claim? From Compeer's perspective, there are no satisfactory answers to these and other questions.

64. The relief sought by NBC would also compromise Compeer's statutory entitlement to make a claim within the statutory limitation period. Under section 3(1) of the *Limitations Act*, Compeer has two years from the discovery of the facts giving rise to any claim against NBC to commence that claim. Yet NBC asks this Court to order that, instead, Compeer must make an election whether to pursue that claim, and advise of the factual and legal basis and quantum of such claim, within approximately seven months from when the cheque kiting scheme was discovered by Compeer in February 2025. This is also when NBC was "dishonouring cheques", as referred to in the defined "Compeer v. NBC Claim" that is subject to the NBC Indemnity Claim.

65. There is no jurisdiction to abridge the two-year limitation period.²⁷ This Court has confirmed that it is only after the two-year period that a party is entitled to immunity.²⁸ Courts have confirmed that limitations periods are not altered by the commencement of a CCAA proceeding.²⁹ While courts presiding over a CCAA proceeding can extend limitation periods (e.g., to protect stakeholders),³⁰ there is no known authority for abridging such timelines.

66. Under the Rules of Court, it is only after a party has actually brought a claim that the other party is entitled to know of the claim and of the bases on which that claim is being pursued. There is no obligation on any party to agree to short-circuit or circumvent that process, particularly where the limiting of rights may impair a party's entitlement to a fair and just result and cause that party undue prejudice.

²⁷ *Mailer v. Mailer*, [2021 ABQB 423](#) at para. 29. [TAB 16]

²⁸ *Kozina v. Redlick*, [2019 ABQB 749](#) at para. 33. [TAB 17]

²⁹ *Big Sky Farms inc (Re)*, [2010 SKQB 255](#) at paras. 28-41. [TAB 18]

³⁰ *In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, v. C-36, As Amended and In The Matter of a Plan of Compromise or Arrangement*, [2019 ONSC 2222](#) at para. 27. [TAB 19]

67. To avoid the prejudice that NBC seeks to occasion upon Compeer, this Court should not deviate from the current processes that it has approved in this CCAA proceeding. Compeer is not laying in the weeds. It has advanced the claim about which it is currently aware that may impact this CCAA proceeding, which is a claim against certain of the CCAA Debtors and certain of their principals. If, in the future, Compeer's information is different or, unlike presently, the CCAA process requires it, Compeer will consider whether it has further claims.

Conclusion

68. In exercising any discretion and having a view to the CCAA process as a whole, this Court should conclude that the unprecedented relief sought by NBC is unnecessary and, in turn, would provide little if any value to the NBC Indemnity Claim and to the creditors of the CCAA Debtors at large. These conclusions should then be balanced against the fact that such relief would be highly prejudicial to Compeer, including because NBC uniquely possesses the information relevant to the election sought by NBC. This Court should not further the self-interested tactical ploy in which NBC is engaged by pursuing this application.

V. RELIEF SOUGHT

69. Compeer requests that this Court dismiss NBC's application and award costs to Compeer.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 3rd day of September, 2025.

Estimated Time for
Argument: 45 minutes

BENNETT JONES LLP

Per:



Keely Cameron/Lincoln Caylor/Nathan
Shaheen, Counsel for the Respondent,
Compeer Financial, PCA

VI. TABLE OF AUTHORITIES AND DOCUMENTS

TAB

1. *Spartan Delta Corp v Alberta (Energy and Minerals)*, [2025 ABCA 181](#)
2. March 20, 2025 Bench Brief of NBC in support of interim receivership application
3. *National Bank of Canada v Precision Livestock Diagnostics Ltd.*, [2025 ABKB 175](#)
4. Transcripts from the Questioning of R. Pai held on March 17, 2025
5. NBC Consent Order
6. Claim of National Bank of Canada, filed on August 29, 2025
7. *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103
8. *Re Stelco Inc.*, [2005 CanLII 42247 \(ON CA\)](#)
9. *Orphan Well Association v Grant Thornton Ltd.*, [2019 SCC 5](#)
10. *Auctioneers' Assn. of Alberta v. Hunter*, [2002 ABQB 28](#)
11. *AbitibiBowater inc. (Arrangement relatif à)*, [2010 QCCS 1261](#)
12. *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012 SCC 67](#)
13. *BA Energy Inc. (Re)*, [2010 ABQB 507](#)
14. *Re Skylink Aviation Inc.*, [2013 ONSC 2519](#)
15. *Re Cline Mining Corp*, [2015 ONSC 622](#)
16. *Mailer v. Mailer*, [2021 ABQB 423](#)
17. *Kozina v. Redlick*, [2019 ABQB 749](#)
18. *Big Sky Farms inc (Re)*, [2010 SKQB 255](#)
19. *In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, v. C-36, As Amended and In The Matter of a Plan of Compromise or Arrangement*, [2019 ONSC 2222](#)

Tab 1

In the Court of Appeal of Alberta

Citation: Spartan Delta Corp v Alberta (Energy and Minerals), 2025 ABCA 181

Date: 20250522

Docket: 2501-0104AC

Registry: Calgary

Between:

Spartan Delta Corp. and Canadian Natural Resources Limited

Respondents

-and-

**His Majesty the King in right of Alberta as Represented by the Minister of Energy and
Minerals**

Applicant

**Reasons for Decision of
The Honourable Justice Kevin Feth**

Application for Leave to Appeal

**Reasons for Decision of
The Honourable Justice Kevin Feth**

Introduction

[1] His Majesty the King in Right of Alberta (“Alberta Energy”) applies for directions clarifying whether leave to appeal is required, and if so, for permission to appeal a chambers decision that found Alberta Energy is precluded from collecting certain royalty arrears associated with Bellatrix Exploration Ltd (Bellatrix).

Background

[2] The chambers application in the court below was brought by Spartan Delta Corporation (Spartan), which purchased Bellatrix’s interest in Crown mineral leases pursuant to insolvency proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA], and an Approval and Vesting order dated May 8, 2020 (“Vesting Order”). The Crown leases were jointly shared by Bellatrix and other co-lessees, including Canadian Natural Resources Limited (CNRL), as provided for under the *Mines and Minerals Act*, RSA 2000, c M-17 [MMA], and allowed Bellatrix to extract oil and gas from Crown land, subject to royalties owed to the Province.

[3] The Purchase and Sale Agreement (“Agreement”) between Bellatrix and Spartan provided that Spartan would assume all liabilities related to the Bellatrix Crown leases from the closing date onwards (post-filing), while Bellatrix retained those liabilities prior to the Agreement including payment of Crown lease royalties (pre-filing). The CCAA Monitor certified that the purchase and sale transaction closed on June 1, 2020. Pursuant to the transaction, the Monitor retained an \$8.5 million holdback to cover any post-filing liability claims against Beatrix up to the closing date, including any royalty arrears owed under the Crown leases.

[4] Under the MMA and its regulations, a lessee can provide data in relation to a royalty period up to three years after the end of the period, and Alberta Energy has a further 2.5 years to review that data for recalculations. On June 11, 2020, Alberta Energy sent a letter citing Bellatrix in default for royalties owed to the Crown for a period prior to closing. In October 2021, Alberta Energy determined that Spartan was not liable for Bellatrix’s royalty arrears, and that it would not pursue payment or take any collection action against Spartan for those arrears. Shortly thereafter, it further advised the Monitor that Bellatrix’s royalty deposit of \$710,392.13 was sufficient to cover the debt owed by Bellatrix.

[5] The holdback monies were ultimately released and a CCAA termination order issued on July 7, 2022. The Monitor terminated the CCAA proceedings on September 21, 2022. Pursuant to

the Vesting Order however, Spartan retained the right to seek further directions from the Court of King's Bench.

[6] In November 2024, Alberta Energy issued notices to Spartan and several of Spartan's working interest partners (co-lessees) in the Crown mineral leases, including CNRL, seeking payment of alleged Bellatrix royalty arrears. CNRL was alleged to owe \$255,848.88. Spartan brought an application in the Court of King's Bench pursuant to the Vesting Order, seeking relief including that Alberta Energy be precluded from collecting any payments in relation to the Bellatrix royalty arrears, and return to third party co-lessees any offset credits or payments in that regard.

[7] Alberta Energy responded that while it was not pursuing payment against Bellatrix or Spartan, it had the right to pursue third parties for arrears under the leases because the interests of the co-lessees were not conveyed under the Agreement to Spartan, and the Vesting Order did not release the third parties from joint liability under the MMA.

[8] The chambers judge found that Alberta Energy's claims related to the Bellatrix royalty arrears were unenforceable for three primary reasons: "Firstly, the claims are barred by the clear wording of the vesting order. Secondly, the claims undermine the integrity and finality of the Bellatrix CCAA process. And thirdly, the claims are not supported by the provisions of the *Mines and Minerals Act*."

[9] In particular, the chambers judge found that paragraphs 4 and 11 of the Vesting Order applied to bar Alberta Energy's claim to pre-filing royalties. The chambers judge further determined that Alberta Energy was on the CCAA notice list, knew about the \$8.5 million holdback for post-filing claims including royalties and in October 2021, after being approached by the Monitor, Alberta Energy confirmed that the Bellatrix deposit was "sufficient to offset the debt owed" and the Monitor may proceed "with the closing of the estate."

[10] As to his second finding regarding the integrity and finality of the CCAA process, the chambers judge relied on ***Peace River Hydro Partners v Petrowest Corp***, 2022 SCC 41, 475 DLR (4th) 1, and the Supreme Court of Canada's reiteration of the importance of a "single procedure model" centralizing all claims related to debtor's insolvency before a single court. Here the Monitor supervised the process for all of Bellatrix's liabilities, "including pre-filing royalty arrears" and "a post-filing liability process involving a holdback." The chambers judge concluded:

... Alberta Energy should have raised the issue of pre-filing royalty arrears during the [CCAA] process. It appears it elected not to do so. Third parties, like CNRL, relied on the processes established in the CCAA proceedings to assess the respective risks and rights ... the collection actions taken by Alberta Energy

undermined the integrity of the Bellatrix CCAA process and also offend fundamental principles of fairness.

[11] Thirdly, the chambers judge found that while s 20(2.1) of the MMA provides that registered participants on a lease are jointly responsible for obligations and liabilities under the lease, “no such liabilities and obligations currently exist with respect to the Bellatrix royalty arrears. They were expunged by the vesting order”, and particularly paragraph 11 which bars any further claims on the purchased assets. He also accepted the submissions of Spartan and CNRL that the royalty arrears had not existed on the filing date but were at most a “contingent liability” which only fully materialized after an audit was conducted post-filing; thus, the Vesting Order operated to prevent the Bellatrix royalty arrears from “crystallizing”.

[12] The chambers judge found one additional reason barring Alberta Energy from pursuing the royalty arrears. He determined that Alberta Energy’s “active participation” in the CCAA proceedings, including approval of the transfer of Bellatrix’s mineral lease agreements and its written release in “October 2021 prior to the release of the holdback, constitute[d] an estoppel or waiver by acquiescence of any claims for royalties”.

[13] Spartan’s application was granted, and Alberta Energy was precluded from collecting any payments related to the Bellatrix royalty arrears and was ordered to immediately return any credits.

Proposed issues for appeal

[14] Alberta Energy has identified three issues for appeal in this application:

- a) The effect of an insolvency vesting order with respect to obligations of solvent co-lessees who are jointly and severally liable under the MMA;
- b) The effect of an alleged estoppel by representation or promise to the debtor and/or Monitor with respect to separate claims against solvent third parties; and
- c) Interpretation of the MMA and its interaction with insolvency processes.

Is leave to appeal required?

[15] Pursuant to s 13 of the CCAA, leave is required to appeal an order or decision made under that statute:

Leave to appeal

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[16] As set out in *Hurricane Hydrocarbons Ltd v Komarnicki*, 2007 ABCA 361 at paras 14- 15, 425 AR 182, the requirement of leave is intended to further the objectives and purpose of the CCAA, which is to enable insolvent companies to carry on business or otherwise deal with their assets in a planned manner considered by their creditors and by the court, in order to resolve matters and bring finality. Requiring leave to appeal “similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious or arguable grounds of significance to the parties.” As such, the “scope of CCAA proceedings has been interpreted expansively ... because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements.” See also *Sandhu v MEG Place LP Investment Corporation*, 2012 ABCA 91 at paras 14-17; *Aurora v Safeguard Real Estate Investment Fund LP*, 2012 ABCA 58 at paras 2-7; *Luscar Ltd v Smoky River Coal Ltd*, 1999 ABCA 62 at para 20, 237 AR 83.

[17] Alberta Energy argues that leave is not required because the chambers judge’s decision was not made in the context of supervising a restructuring or liquidation under the CCAA, citing *Essar Steel Algoma Inc (Re)*, 2016 ONCA 138 [*Essar*]. More specifically, the chambers judge was not exercising his discretion under the CCAA because the insolvency process had long-since finished, and the chambers judge was merely interpreting the Agreement, the Vesting Order and the MMA.

[18] A s 13 analysis is “purpose-focused”: *Essar* at para 33. When considering whether leave to appeal an order or decision is required, this Court must “ascertain whether the order was made in a CCAA proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the CCAA ... If the order resulted from such an exercise of judicial decision-making, then it is an order ‘made under’ the CCAA for the purposes of s. 13”. This necessarily includes whether the issue before the judge raised questions about the “finality” of a CCAA order.

[19] *Essar* listed various indicia in considering whether a decision was “made under” the CCAA. The list is non-exhaustive and includes whether:

- a) the decision was necessarily incidental to a proceeding under the CCAA or any order made thereunder;

- b) the decision required the interpretation of a previous order made under the CCAA proceeding;
- c) the decision “determined rights arising under an agreement that arose out of and that was related entirely to the CCAA proceeding”: *Re Hemosol Corp*, 2007 ONCA 124 at para 3;
- d) CCAA considerations informed the decision or exercise of discretion by the chambers judge;
- e) the claim is being prosecuted by virtue or as a result of the CCAA;
- f) the notice of motion and reasons of the chambers judge explicitly state that the matter is a CCAA proceeding; and,
- g) there was an independent originating process in the court below.

Many of these indicia are present in this matter.

[20] I conclude that leave is required under s 13 of the CCAA. While Alberta Energy correctly submits that the CCAA insolvency process is complete, Spartan’s application came before the chambers judge by way of Part 17 of the Vesting Order issued under that CCAA process, and which specifically reserved Spartan’s right as the “Purchaser” of Bellatrix’s assets, including its interest in Crown mineral leases, to apply for “further advice, assistance and direction” from the court about the Vesting Order. There was no independent originating process in this matter.

[21] As acknowledged by Alberta Energy, the chambers judge’s decision interprets the Vesting Order issued under the CCAA, and Alberta Energy took no issue in the court below with the application being a CCAA proceeding and the chambers judge’s jurisdiction thereunder. The chambers judge’s analysis also interpreted the CCAA, including that the “Court’s broad authority under the CCAA ensures that all disputes, claims, and matters related to insolvency are dealt with expeditiously in the best interests of the debtor’s creditors” under a “single procedure model”. Further, the parties to the application before this Court are the same parties involved in the CCAA proceedings, including Alberta Energy, and the chambers judge’s decision arguably affects the certainty and finality of the commercial reorganization that was approved through the CCAA process and the Vesting Order, and upon which parties to that proceeding rely.

Test for leave to appeal

[22] As recently reiterated in *Henenghaixin Corp v Long Run Exploration Ltd*, 2025 ABCA 58 at paras 11-12, an applicant seeking leave to appeal under s 13 of the CCAA must establish

serious and arguable grounds of real and significant interest to the parties. The proposed grounds are considered under the following four criteria:

- a) whether the issues raised by the proposed appeal are significant to the practice;
- b) whether the issues are of significance to the action itself;
- c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- d) whether the appeal will unduly hinder the progress of the action.

[23] Generally, decisions made by judges supervising CCAA proceedings are entitled to significant deference and will only be interfered with if the judge acted unreasonably, erred in principle or made a manifest error. Appellate courts exercise their discretion to grant leave sparingly.

Analysis

[24] The respondents fairly concede that the issues identified by Alberta Energy are of significance to the practice and will not otherwise unduly hinder the progress of the CCAA proceeding. They maintain however that the appeal is not *prima facie* meritorious.

[25] I agree that this application comes down to whether serious and arguable grounds for appeal have been established. At its core, Alberta Energy's argument is that while the Vesting Order released any possible royalty claims against the assets purchased by Spartan from Bellatrix, its claims for royalty arrears against Bellatrix's third-party co-lessees were not released under the Vesting Order or the CCAA and are otherwise enforceable under the MMA. Alberta Energy maintains that it has the right to pursue those arrears against the co-lessees' interests not sold under the Agreement, and the chambers judge erred in finding otherwise.

[26] Alberta Energy further argues that its claim for arrears did not offend the single procedure model of the CCAA, which was never meant to prohibit claims against solvent third parties, but rather to process all actions against the debtor. It maintains that third party liability does not impact such concerns and to require creditors to bring actions against solvent third parties under the CCAA umbrella or to foreclose such actions on the same basis is an unwarranted expansion of the single procedure model.

[27] In contrast, the respondents maintain that no reason arises to challenge the finding of the chambers judge that the Vesting Order barred or "expunged" Alberta Energy's claims to Bellatrix royalties in their entirety. Bellatrix's interest in the Crown mineral leases were purchased assets

under the Agreement, and the royalties arise therefrom; as a result, *any* claims for those royalties arising from the pre-filing period are barred by the Vesting Order. Further, they state that the chambers judge's reliance on s 20(2.1) of the MMA was correct. That provision must be narrowly construed in creating joint responsibility among co-lessees for any liabilities, and there are no current liabilities with respect to the Bellatrix royalties due to the Vesting Order. While the co-lessees are admittedly still liable for their own obligations and royalty accounts, this dispute is about Bellatrix's lease interests which have been dealt with under the CCAA.

[28] At the hearing of this application, all parties agreed that the Vesting Order in this matter is in fairly standard form. This is in keeping with the respondents' concession that the issues raised in this appeal are of importance to the practice. The parties also agreed that a clear dispute exists between the Alberta Crown and sophisticated participants in the oil and gas industry on the language used in the Vesting Order, and how it should be interpreted together with the CCAA and the obligations and liabilities created in the MMA.

[29] No one disagrees that the interpretation of this standard form Vesting Order is in issue, and that what it means for third party co-lessees and pre-filing arrears is significant. The respondents raise issues of finality when it comes to both CCAA proceedings and the reach of the Vesting Order in this matter, and the concern that Alberta Energy is improperly trying to extend the time to collect on an extinguished claim. As they note, third parties who participate in good faith in CCAA proceedings assess their own risk based on the representations made therein and the orders that result. However, those very points also serve to inform the importance of granting permission to appeal for a full panel to assess the interpretation of this Vesting Order, and the critical interplay of the CCAA and the MMA.

[30] I have considered the specific arguments raised by Alberta Energy on the merits and the respondents' counter-arguments. I find that Alberta Energy has met its burden of establishing sufficiently serious and arguable issues warranting a full appeal before a panel of this Court.

Conclusion

[31] The application is allowed and permission to appeal is granted on the following issues:

1. Did the chambers judge err in finding that the Alberta Crown's claims for pre-filing Bellatrix royalty arrears are not recoverable from the other co-lessees under the lease agreements because of the Vesting Order?
2. Did the chambers judge err in finding that the Alberta Crown's claims for post-filing Bellatrix royalty arrears are not recoverable from the other co-lessees under the lease agreements?

[32] As a final note, I must comment on the excessive amount of application material that was placed before this Court. All parties are reminded that relevance and efficiency guide the selection of materials submitted on a leave application. An indiscriminate “document dump” of the materials filed in the court below, rather than curating them for the specific issues raised by the application, wastes judicial resources and prolongs proceedings. This Court has repeatedly admonished the practice of including irrelevant and excessive materials, including the written arguments filed in the court below. Such a practice can lead to costs awards.

Application heard on May 8, 2025

Reasons filed at Calgary, Alberta
this 22nd day of May, 2025

Feth J.A.

Appearances:

J. Reynaud

M. Zouravlioff

K. Bansaccal (no appearance)

for the Respondent Spartan Delta Corp.

E. Paplawski

for the Respondent Canadian Natural Resources Limited

D.S. Nishimura

T.A. Batty (no appearance)

for the Applicants

Tab 2

COURT FILE NUMBER

Clerk's Stamp

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

PLAINTIFF

NATIONAL BANK OF CANADA

DEFENDANTS

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., PRECISION LIVESTOCK DIAGNOSTICS LTD., SOLETERRA D'ITALIA LTD., SUNWOLD FARMS, INC., and SUNTERRA FARMS IOWA, INC.

DOCUMENT

BENCH BRIEF OF NATIONAL BANK OF CANADA

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

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BENCH BRIEF OF NATIONAL BANK OF CANADA

**APPLICATION TO BE HEARD BY
THE HONOURABLE JUSTICE M.J. LEMA**

March 20, 2025 at 10:00 a.m.

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I. INTRODUCTION

1. National Bank of Canada (as successor to Canadian Western Bank) (the “**Lender**”) is the victim of a cheque kiting scheme (the “**Kiting Scheme**”), which involved the circulation of billions of dollars between various Canadian and U.S. bank accounts. The Lender brings this application for the appointment of FTI Consulting Canada Inc. as the interim receiver (the “**Interim Receiver**”) of the present and after-acquired bank accounts, monies, funds, receivables, cheques, choses in action, and books and records (collectively, the “**Account Property**”) of those Defendants which granted Security¹ or Guarantees to the Lender, along with enhanced investigation powers with respect to the entire Sunterra Group, the Impugned Transactions, the CWB Accounts, the Compeer Accounts (each as defined below) and related matters.

2. The defendants are part of a broader corporate group of which various members operate a cross-border farming and livestock business primarily focused on pork raising, production, processing, and retail operations in Canada and the United States, and collectively hold 28 accounts (the “**CWB Accounts**”) with the Lender.

3. The Lender first discovered an issue with the Sunterra Group’s CWB Accounts in February, 2025. Specifically, as at February 14, 2024, the Sunterra Group’s CWB Accounts (as defined and described below) had accumulated unauthorized overdrafts (the “**Unauthorized Overdrafts**”) in excess of US\$43 million (the “**Overdraft Indebtedness**”). The Lender immediately commenced an investigation and undertook certain Risk Management Processes (as defined below), which reduced the Overdraft Indebtedness to zero.

4. The Lender soon discovered that certain Defendants appear to have conducted a highly sophisticated Kiting Scheme, involving bank accounts in Canada and the United States, in which Sunterra Farms Ltd. (“**Sunterra Canada**”) and Sunwold Farms Limited (“**Sunwold Canada**”, and collectively with Sunterra Canada, the “**Impugned Canadian Entities**”), circulated at least \$7 billion Canadian dollars through their CWB Accounts by issuing at least 3,493 cheques, in the approximate amount of \$3.561 billion, from their CWB Accounts; the vast majority of which were made payable to Sunterra Farms Iowa, Inc. (“**Sunterra Iowa**”) and Sunwold Farms, Inc. (“**Sunwold US**”, and collectively with Sunterra Iowa, the “**U.S. Impugned Entities**”, the Canadian Impugned Entities and the U.S. Impugned Entities are collectively referred to as, the “**Impugned**

¹ Capitalized terms used herein and not otherwise defined have the same meaning as ascribed to such terms in the Pai Affidavit.

Entities") and, in exchange, received at least 2,890 cheques, in the approximate amount of \$3.549 billion, mainly from the U.S. Impugned Entities' Compeer Accounts (as defined below); in just the last nine (9) months. This equates to an average of approximately 23 cheques being issued and deposited, each business day.

5. The Lender's investigation of the Kiting Scheme is ongoing. The Lender requires access to information concerning the Compeer Accounts (as defined below), and from any other financial institution that may also be a victim, with which the Impugned Entities hold accounts, the full and frank disclosure of all necessary information by the Sunterra Group, and further investigatory powers, in order to assess the scope of the Kiting Scheme, identify all involved and affected parties, and assess the risk of claims that could arise against it and the Impugned Entities. The Sunterra Group (as defined below), in the immediate aftermath of confessing that it undertook the Kiting Scheme, promised the Lender that it would consent to the Lender and Compeer being able to discuss and provide documents. They have since backtracked on that promise.

6. The proposed appointment of the Interim Receiver over the Account Property, rather than all of the property, assets, and undertakings of the Obligors (as defined below), is narrowly-tailored and limited in scope to ensure that the Defendants' operations will continue while the investigation is ongoing. There is no other viable means of addressing and investigating the Kiting Scheme and related Impugned Transactions, and ensuring that all available funds are used for legitimate purposes, with the degree of urgency required by the circumstances. The Lender will fund the Interim Receiver with the funding request model contemplated by the proposed form of order (the "**Interim Receivership Order**"). The appointment of the Interim Receiver is necessary to ensure the protection and preservation of the Lender's rights and interests and the estates of the applicable Defendants, while the investigation is carried out.

II. THE FACTS

A. Background

7. The factual background, including the details of the Sunterra Group's business, management, and operations, is described in the Affidavit of Raymond Pai, sworn on March 14, 2025 (the "**Pai Affidavit**").

8. The Defendants consist of: (i) Sunterra Canada, Sunwold Canada, Sunterra Food Corporation ("**Sunterra Food**"), Trochu Meat Processors Ltd. ("**Trochu**"), Sunterra Quality Food

Markets Inc. ("**Sunterra Markets**", Sunterra Markets, Trochu, Sunterra Food, Sunwold Canada, and Sunterra Canada, are collectively referred to as, the "**Borrowers**"; (ii) Sunterra Beef Ltd. ("**Sunterra Beef**"), Sunterra Iowa, Sunwold US, Sunterra Enterprises Inc. ("**Sunterra Enterprises**"), Sunterra Farm Enterprises Ltd. ("**Sunterra Farm Enterprises**"), Lariagra Farms Ltd. ("**Lariagra**", the Borrowers, Lariagra, Sunterra Farm Enterprises, Sunterra Enterprises, Sunterra Beef, Sunwold US, and Sunterra Iowa, when referred to in their capacity as guarantors, are collectively referred to as the "**Guarantors**", the Guarantors and the Borrowers are collectively referred to as, the "**Obligors**", and Precision Livestock Diagnostics Ltd. ("**Precision**") and Soleterra d'Italia Ltd. ("**Soleterra**", Soleterra and Precision are collectively referred to as, the "**Additional Sunterra Entities**", the Additional Sunterra Entities and the Obligors are collectively referred to as, the "**Sunterra Group**").

9. As of March 11, 2024, the Obligors were indebted to the Lender, in the amount of \$17,532,351.57, plus accruing interest, fees, costs, and expenses (collectively, the "**Indebtedness**").

10. As of March 11, 2025, the Lender holds an unappropriated cash in the accounts of the Borrowers, Sunterra Beef, and the Guarantors, in the amount of \$4,739,176.82.

11. The Lender's Security is described in further detail in the Pai Affidavit. At a high level: (i) the Borrowers and Sunterra Beef have granted security, to the Lender, over all of their present and after-acquired personal property; (ii) Trochu has also granted a mortgage, to and in favour of the Lender, over certain lands; (iii) each of the Guarantors has granted unconditional guarantees, to the Lender, with respect to the indebtedness, liabilities, and obligations of the Borrowers, to the Lender; and, (iv) the Additional Sunterra Entities are not borrowers or guarantors but hold CWB Accounts with the Lender.

12. The Sunterra Group is a family-owned enterprise. The ultimate principal shareholders of the Sunterra Group are members of the Price Family. The core guiding minds to the entities are Ray Price, Douglas Price, Glen Price, David Price, and Art Price, who are all directors and shareholders of various members of the Sunterra Group.

13. In February, 2025, the Lender became aware that the Sunterra Group's CWB Accounts had accumulated the Unauthorized Overdrafts, with Overdraft Indebtedness, then in excess of US\$43 million.

14. Immediately upon the discovery of the Overdraft Indebtedness, the Lender contacted the Chief Executive Officer and President of the Sunterra Group, Mr. Ray Price.

15. On February 14, 2025, in response to an email sent by the Lender, Ray Price advised (the “February 14 Email”), that (emphasis added):

- “1. Because of the benefit of having our Canadian Farming entities (Sunwold Canada and Sunterra Farms Ltd) on a cash tax basis, and the U.S. entities on an accrual basis, we invoice for pigs (creating a deduction in the U.S.) but not pay for them right away (don’t have to include it as income in Canada). We then would pay from the U.S. to Canada, but in order to keep the U.S. entities with the appropriate cash, we would move money back down to the U.S. 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 is [sic] ended up happening.**
2. Our plan for repayment. At this point, I don’t have any quick access to money to cover the overdraft. Here are some of the actions that we will consider:
 - a. **[Redacted]**
 - b. I will work with Compeer to see if they are willing to keep our existing operating line in place. If they allow that, we have about \$4.0 million of room that could come here. It might take a week or two before we know if they are comfortable or not.
 - c. The U.S. pig operations will be generating about \$500,000 per week of net cash flow from now through the end of the summer. We have hedges in place that will guarantee that cash flow.
 - d. We will be limiting the payment of Accounts Payable. We may be able to stretch our total A/P by \$5,000,000 for a period of time without negatively affecting our business.
 - e. Asset sales

[Redacted]

I will think about other alternatives over the weekend, and put them in an email to you. I don’t know if a suggestion is appropriate, but my preference, if possible at all, would be for something like a term loan with payments of \$1,000,000 per month plus the settlement for insurance or other one off cash injections going against the principal. I think there is quite a lot of second security available between the pig operations, and the Markets, so I thought I would mention it.”

16. Following receipt of the February 14 Email, the Lender immediately: (a) implemented the Risk Management Processes (as defined and described below); and, (b) undertook a preliminary

examination of the CWB Accounts to identify the sources and uses of any payments giving rise to the Unauthorized Overdraft, which preliminary review, working backwards from February 14, 2025, has, to date, only covered the period of May 1, 2024 to January 31, 2025 (the “**Preliminary Review Period**”).

17. The Lender has discovered that the following concerning transactions had occurred in the preceding nine (9) month period:

- (a) Sunterra Canada received incoming cheques, mainly from the U.S. Impugned Entities’ bank accounts (collectively, the “**Compeer Accounts**”) held with Compeer Financial, ACA (“**Compeer**”) in the United States, in the aggregate amount of approximately \$2.230 billion, and issued outgoing cheques, mainly to the U.S. Impugned Entities’ Compeer Accounts, in the aggregate amount of approximately \$2.238 billion; and,
 - (b) Sunwold Canada received incoming cheques, mainly from the U.S. Impugned Entities’ Compeer Accounts, in the aggregate amount of approximately \$1.319 billion, and issued outgoing cheques, mainly to the U.S. Impugned Entities’ Compeer Accounts, in the aggregate amount of approximately \$1.323 billion,
- (collectively, the “**Impugned Transactions**” and the cheques comprising same are collectively referred to as, the “**Impugned Cheques**”).

B. The Kiting Scheme

18. Cheque kiting is an unauthorized activity that takes advantage of the conditional liquidity provided by banks, to their customers, in connection with cheque deposits. Generally, when depositing cheques, provisional liquidity is provided to the depositing customer, due to the sequencing between the deposit of the cheque, the customer having access to those funds, and the clearing and settlement process of a cheque, through the Automated Clearing and Settlement System (“**ACSS**”) or the United States Bulk Exchange (“**USBE**”), as applicable. The ACSS or USBE provide the Lender with a final settlement, from the third party banks whose account was used to draw the cheque. The Lender, like most banks, “conditionally credits” cheque deposits to recipients’ accounts; before final settlement through ACSS or USBE.

19. The Sunterra Group, like many commercial banking customers, were not subject to holds on cheque funds. Therefore, cheques deposited into the Sunterra Group’s accounts were

immediately available for use, in the amount of their face value, by way of conditional credit, before underlying funds were actually settled through ACSS or USBE, as applicable.

20. The conditional credit is just that, “conditional”. Its availability is conditioned on the cheque clearing as a result of available funds. Importantly, this condition is premised on the issuer of the cheque not creating the appearance of the cheque has cleared by using non-existent funds.

21. The Kiting Scheme exploited the availability of this conditional credit, to the applicable Sunterra Group entities’ benefit. Based upon the Lender’s preliminary investigations to date, it appears that the applicable Sunterra Group entities continuously issued new and additional cheques, as between various members of the Sunterra Group, in increasing numbers over time, to create existing and outstanding conditional credit, which was then satisfied by new conditional credit (accruing with the issuance of new cheques); on an ongoing basis.

22. Due to the significant volume of cheques, issued on a daily basis, and the manual steps required to be undertaken in reviewing same, the Lender’s internal fraud accounting specialists have, at present, only completed a review of Impugned Transactions and Impugned Cheques for the period between November 14, 2024 to February 14, 2025 (the “**Specific Review Period**”).

23. The Lender’s current understanding of the particulars of the Kiting Scheme is set out in detail in the Pai Affidavit. Both the volume and value of the Impugned Transactions vastly exceed, by many multiples: (i) the consolidated monthly gross revenue of all Borrowers, as set out in the Borrowers’ financial reporting to the Lender under the Commitment Letter (the “**Reporting Statements**”); (ii) both the value and volume of cheques issued and deposited by the Canadian Impugned Entities and the U.S. Impugned Entities, which the Lender currently believes were not part of the Kiting Scheme, as compared to the value and volume of cheques which appear to form part of the Kiting Scheme; (iii) the value of all payments made (whether by cheque or otherwise), of all Borrowers, on a consolidated monthly basis; and, (iv) the total receivables (associated or otherwise), of all Borrowers, as reported in the Reporting Statements.

24. Furthermore, the total annual revenue of all Borrowers, on a consolidated basis, was approximately \$143.968 million, for the fiscal year ending December 31, 2024, as reported in the Reporting Statements. Comparatively, approximately \$3.138 billion deposited by the Canadian Impugned Entities, for just the period of May 1, 2024 to December 31, 2024.

25. The total amount of cash circulated by the Impugned Transactions, as part of the Kiting Scheme, during the nine (9) month Preliminary Review Period, exceeds \$7 billion Canadian dollars.

26. The following describes the basic mechanics of the Kiting Scheme, as currently understood by the Lender:

- (a) **Step 1:** A U.S. Impugned Entity would issue a cheque ("**Cheque #1**"), from one of the U.S. Impugned Entities' Compeer Accounts, for an amount under \$1 million, which would then be deposited into one of the Canadian Impugned Entities' CWB Accounts;
- (b) **Step 2:** The Lender would "conditionally credit" the applicable CWB Account, for the face value of Cheque #1, upon deposit. As a result, the face value of Cheque #1 would be available for use by the applicable Canadian Impugned Entity, even though Cheque #1 had not cleared pursuant to the clearing rules;
- (c) **Step 3:** A Canadian Impugned Entity would then, prior to Cheque #1 being returned by Compeer, due to there being insufficient funds, issue one or more new cheques, each under \$1 million (collectively, "**Cheque #2**") to one or both of the U.S. Impugned Entities, from the corresponding CWB Account, by utilizing the conditional credit provided by the Lender in connection with Cheque #1;
- (d) **Step 4:** Assuming Cheque #2 was deposited into the Compeer Accounts, Compeer would then "conditionally credit" the applicable U.S. Impugned Entity's Compeer Account, for the face value of Cheque #2. As a result, the face value of Cheque #2 would be available for use by the applicable accountholder, to cover the U.S. Impugned Entities' liquidity needs and the obligations arising in connection with Cheque #1;
- (e) **Step 5:** A U.S. Impugned Entity would then proceed to issue one or more new cheques, each under \$1 million (collectively, "**Cheque #3**"), to one or both of the Canadian Impugned Entities, from the corresponding U.S. Impugned Entities' Compeer Account, utilizing the conditional credit provided in connection with Cheque #2; and,

- (f) **Step 6:** The Lender would then “conditionally credit” the applicable Canadian Impugned Entity’s CWB Account, for the face value of Cheque #3, upon deposit. As a result, the face value of Cheque #3 would be available for use by the applicable accountholder, to cover the Canadian Impugned Entities’ liquidity needs and the obligations arising in connection with Cheque #2.

27. The above cycle repeated itself, thousands of times. Mr. Art Price, confirmed that in order to ensure that the Canadian Impugned Entities’ CWB Accounts and the U.S. Impugned Entities Compeer Accounts had sufficient conditional credit to satisfy their respective obligations, the Impugned Entities maintained an active log of all available conditional credit, under the Impugned Cheques on a rolling three (3) day basis.

28. Neither the Canadian Impugned Entities nor the U.S. Impugned Entities had the cash to satisfy the face value of the issued Impugned Cheques; absent unauthorized conditional credit.

29. The Impugned Entities undertook this elaborate scheme, on an almost daily basis, so as to ensure that there was always sufficient conditional credit available to cover the outstanding Impugned Cheque obligations and to create the illusion that fresh funds were being deposited into each account.

30. There is no legitimate commercial purpose for the completion of the Impugned Transactions, despite the Obligors’ explanation that there was a tax-based purpose (as described in the Pai Affidavit), as the volume and frequency of the Impugned Transactions is not consistent with the cash requirements, operations, or value, of the business. The fashion by which the Kiting Scheme took place does not align with the February 14 Email’s tax-based explanation, which leaves the impression that funds were transferred only between the vendor and buyer of the Livestock. The actual flow of funds, in the ordinary course of business, involved a complex flow of Livestock and corresponding receivables (the payment of which was delayed up to 2 years) between five entities.²

31. The Impugned Transactions include certain commonalities, as between them, which are strongly indicative of a Kiting Scheme, including that:

² A table demonstrating the flow of livestock and receivables is set forth following paragraph 40 of the Pai Affidavit.

- (a) the Lender's preliminary count of issued cheques discloses that, during the nine (9) months Preliminary Review Period, the Canadian Impugned Entities issued over 3,493 cheques from the CWB Accounts, the overwhelming majority in favour of the U.S. Impugned Entities, which averages approximately 12 cheques, on a daily basis, and received a similar number of cheques in return;
- (b) based upon the review of the three (3) month Specific Review Period, the vast majority of the Impugned Cheques issued were in an amount ranging from \$800,000 to \$999,000, marginally less than the \$1,000,000 threshold, at which such Impugned Cheques would undergo additional scrutiny by the US clearing bank;
- (c) the thousands of Impugned Transactions were undertaken by way of physical cheques, rather than by EFT or wire transfer, which would be more typical in cross-border related entity transactions;
- (d) based upon the Lender's review to date, it appears that substantially all the cheques had no memo line or reference to any existing invoice or ledger;
- (e) Mr. Ray Price confirmed to the Lender, that the Canadian Impugned Entities and the U.S. Impugned Entities utilized conditional credit, under the applicable Compeer Accounts and CWB Accounts, to cause the Impugned Cheques to clear, by issuing further and additional Impugned Cheques, on an ongoing basis; and,
- (f) Mr. Art Price, confirmed that in order to ensure that the Canadian Impugned Entities' CWB Accounts and the U.S. Impugned Entities Compeer Accounts had sufficient conditional credit to satisfy their respective obligations, the Impugned Entities maintained an active log of all available conditional credit, under the Impugned Cheques on a rolling three (3) day basis.

C. Investigation and Information Requirements

32. The Lender believes that the Kiting Scheme likely extends beyond the Specific Review Period and the Preliminary Review Period. The Lender continues to assess the situation but based on the available information is not able to finalized a review of all Impugned Transactions and Impugned Cheques.

33. Currently, the Lender does not have access to the account statements regarding the Compeer Accounts or any other activities of the Sunterra Group, not involving the CWB Accounts. The Sunterra Group has refused to provide this information, despite previously having agreed to, and ongoing requests made for same by the Lender and the Financial Advisor (as defined below).

34. It is not possible to complete any definitive review of the Impugned Cheques or the Impugned Transactions without access to information concerning the Compeer Accounts, the full and frank disclosure of all necessary information by the Sunterra Group, and the various further investigatory powers. As a result, the Lender is not in a position to determine the full scope of the Kiting Scheme or the Impugned Transactions and therefore seeks the appointment of the Interim Receiver over the Account Property with further investigatory powers to accomplish same.

D. Risk Management Processes and Permitted Payments

35. On and after February 14, 2025, the Lender implemented the Risk Management Processes, as described in the Pai Affidavit.

36. By implementing the Risk Management Processes, the Lender has been able to mitigate the effect of the Impugned Transactions and the Unauthorized Overdraft has been eliminated. However, it is unknown to what extent any other financial institutions (most notably, Compeer) have been affected. It is possible, and in the Lender's assessment likely, that the Compeer Accounts were in an overdraft position. The Lender has been unable to determine whether this is the case, because the Sunterra Group backtracked on promises made in February 2025, to provide the required information (including the account statements for the Compeer Accounts) to the Financial Advisor or the Lender.

E. Default and Demands

37. As a result of the aforementioned, the Obligor has committed events of default under the Commitment Letter, the Security, and the CWB Account Agreements (each as defined in the Pai Affidavit), including, among others:

- (a) completing the Impugned Transactions and permitting the Unauthorized Overdrafts to accrue;
- (b) incurring the Overdraft Indebtedness; and,

(c) the occurrence of a material adverse change in the financial condition of the Obligors,

(collectively, the “**Default Events**”).

38. As a result of the continuing and unremedied Default Events, the Lender, through its counsel, delivered a Notice of Default and Reservation of Rights Letter, dated March 5, 2025 (“**Notice of Default and Reservation of Rights Letter**”), to the Obligors, which: (i) informed the Obligors that, pursuant to the terms of the Commitment Letter, the Security, and the Guarantees, the Obligors had committed the Default Events; (ii) reserved all of the Lender’s rights and remedies, as against the Obligors; and, (iii) requested that the Obligors cooperate with the Lender’s investigation, including by, among other things, providing the account statements for the Compeer Accounts and any other information in the possession of the Sunterra Group that will identify, even on a preliminary basis, the deficit which may exist in the Compeer Accounts.

39. The Sunterra Group indicated through counsel that it does not agree with the assertions made and has reserved all rights.

40. The Default Events are incapable of being cured.

41. The Lender, through its counsel, delivered a demand letter, dated March 14, 2025 (the “**Demand Letter**”), to the Obligors, which, among other things, advised the Obligors of the Default Events and demanded that the Obligors immediately repay, to the Lender, all amounts outstanding under and pursuant to the Commitment Letter and the Security. The Demand Letter also enclosed: (i) six (6) Notices of Intention to Enforce Security (collectively, the “**244 Notices**”), under and pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the “**BIA**”), with respect to each of the Borrowers and Sunterra Beef; and, (ii) Notices of Intention by Secured Creditor (the “**FDMA Notices**”), in accordance with section 21 of the *Farm Debt Mediation Act*, SC 1997, c. 21 (the “**FDMA**”), with respect to each of the Obligors, other than the U.S. Impugned Entities.

42. The Lender has cancelled any unused portion of the Borrower’s demand revolving loan, in accordance with the Commitment Letter. The Borrowers have no margining ability in any event. The current funds available in the CWB Accounts are insufficient to repay the Indebtedness.

F. Lack of Cooperation and Loss of Faith in Management

43. Following the discovery of the Impugned Transactions and the Unauthorized Overdrafts, the Lender and the Sunterra Group's management engaged in discussions concerning the Impugned Transactions, the Unauthorized Overdraft, and the Default Events. The purpose of such discussions was to: (i) mitigate against the risk occasioned by the Impugned Transactions, (ii) assess and formalize the Risk Management Processes, (iii) obtain additional information, and (iv) allow the Lender and the Sunterra Group to work to address the Default Events and to take appropriate steps to both deal with the existing Impugned Transactions and prevent further unauthorized Impugned Transactions from occurring.

44. It initially appeared that the Sunterra Group's management was willing to work collaboratively with the Lender to address the Impugned Transactions and the Unauthorized Overdraft, in an attempt to maintain the delicate balance between funding the Sunterra Group's critical payments, and preserving the Lender's rights; while the Lender continued to investigate the Impugned Transactions and assess the risks resulting from the Impugned Transactions.

45. As part of such initial collaborative efforts:

- (a) the Obligors executed and delivered a copy of the engagement letter between McCarthy Tétrault LLP, counsel to the Lender, and FTI, dated February 22, 2025, appointing FTI as financial advisor (the "**Financial Advisor**", when acting in such capacity) to provide privileged and confidential advice to McCarthy Tétrault LLP, for the purpose of McCarthy Tétrault LLP advising the Lender in relation to the Impugned Transactions; and,
- (b) a draft forbearance agreement was provided to the Sunterra Group, on February 22, 2025.

46. At a meeting on February 24, 2025, Messrs. Art Price and Glen Price, directors of the Sunterra Group, made various clear and unequivocal statements to the Lender's representatives, including, among others, that: (i) the Impugned Transactions and Unauthorized Overdrafts were caused by Ray Price; (ii) they were unaware of the Impugned Transactions undertaken by Ray Price, and are upset and disappointed with Ray Price for having undertaken the Impugned Transactions; (iii) the Impugned Transactions were a mistake; (iv) Ray Price would be removed as a signatory on all Sunterra Group banking transactions; (v) the Sunterra Group would fully

cooperate with the Financial Advisor, including by providing timely responses for requests for information; (vi) the Sunterra Group would provide written consent to the Lender and Compeer, being the holder of the Compeer Accounts, to facilitate and allow Compeer and the Lender to discuss all aspects of the Impugned Transactions; (viii) the Sunterra Group would provide information to the Lender relating to the Impugned Transactions, including, without limitation, by providing up to date account statements for the Compeer Accounts; and, (ix) the Sunterra Group would immediately review and provide comments, to the Lender, upon receiving the Lender's Revised Draft Forbearance Agreement (as defined below), but many of the high level terms discussed were agreeable.

47. Based on the discussions and comments received from the Sunterra Group at the Meeting, the Lender subsequently provided a revised draft forbearance agreement to the Sunterra Group, on February 25, 2025 (the "**Revised Draft Forbearance Agreement**").

48. On March 3, 2025: (i) the Sunterra Group advised the Financial Advisor that it was in possession of spreadsheets from Compeer (the "**Compeer Spreadsheets**") which identified, on a preliminary basis, the deficit in the Compeer Accounts; and, (ii) the Financial Advisor requested copies of Compeer Spreadsheets.

49. The Sunterra Group has refused to provide the Compeer Spreadsheets or the necessary consents so that the Lender and Compeer can discuss and share information concerning the Impugned Transactions. The parties have also been unable to come to terms regarding the Revised Draft Forbearance Agreement.

50. As a result of the Impugned Transactions and the Sunterra Group's subsequent inability or unwillingness to take urgent action and share the necessary information (including the Compeer Accounts), the Lender has lost faith in the Sunterra Group's management.

51. The Lender believes that there is likely an unauthorized overdraft in the Compeer Accounts, as a result of the Impugned Transactions, including because: (i) the Sunterra Group has refused to provide information which would confirm whether this is the case; (ii) any cheque kiting scheme will typically result in one or more financial institutions suffering a loss, as a result of the fact that conditional credit is utilized to unlawfully obtain funds which do not exist; and, (iii) the Financial Advisor has advised the Lender that, while its analysis is ongoing, its present assessment is that the kiting losses are likely in the Compeer Accounts, but that additional information and co-operation is necessary to complete its investigation.

III. ISSUES

52. The issues are:

- (a) Is the appointment of the Interim Receiver necessary to protect the Lender's interests and the estates of the Obligor's? **Answer: Yes.**
- (b) Is it just and convenient to appoint the Interim Receiver? **Answer: Yes.**
- (c) Should the Interim Receiver be granted possession and control of the Account Property? **Answer: Yes.**
- (d) Should the Interim Receiver be granted enhanced investigation powers? **Answer: Yes.**

IV. LAW

A. Cheque Kiting

i. Overview of Cheque Kiting

53. Cheque kiting is an unauthorized activity, described as follows:

- "7 Essentially, the illegal practice of "cheque kiting" begins when a cheque is issued from a bank account whose balance is insufficient to cover it. To create confusion, money is recorded in more than one bank account at one moment in time. In most cases, the money is in transit or quite simply fictitious. The circulation of cheques between various accounts is jointly controlled. [...]
- 8 Thus, cheques and registered funds are circulated from one bank to another and from one account to another, in a manner that maintains fictitious bank balances in some accounts while depositing the very same amounts in other accounts.
- 9 Obviously, masterminds who undertake this type of fraud take advantage of the clearance periods that are inherent to cheque processing in the banking system.
- 10 Cheques are circulated so quickly that an account at one banking institution is debited one day and credited the next. Over time, the false increase in bank balances varies from one bank to another, until one of the banks involved realizes that it is part of a kiting scheme and denounces the fraud. The system then collapses and any amounts credited are frozen. [...]

- 11 A picture is worth a thousand words: think of the game of musical chairs, where there are not enough chairs for the number of players when the music stops. [...]
- 12 The time that elapses between the moment a cheque is deposited into a first bank account and the moment that same cheque is recorded in, or deducted from, the bank account from which it is drawn is known as the "float time".
- 13 The float time permits a depositor-in this case the bankrupt debtors-to withdraw the money deposited before the cheque is cleared by the bank from which the money was drawn. This is how dishonest persons are able to profit from the deception.
- 14 The simultaneous presence of duplicate amounts in two different bank accounts at the same time creates what is referred to as "float". The float represents the over-evaluation of the balance of a bank account as the result of suspicious transactions at a specific moment in time, if the signs of kiting are identifiable.

Location Bristar Idealease Inc., Re, 2012 QCCS 211, at paras. 7-14 [BOA TAB 20].

B. Jurisdiction to Appoint the Interim Receiver

i. Section 47 of the BIA

54. Section 47 of the BIA states, in pertinent part:

Appointment of interim receiver

47 (1) If the **court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may**, subject to subsection (3), **appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of**

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c) the expiry of 30 days after the day on which the interim receiver was appointed or of **any period specified by the court.**

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) **take possession of all or part of the debtor's property mentioned in the appointment;**
- (b) **exercise such control over that property, and over the debtor's business, as the court considers advisable;**
- (c) **take conservatory measures;** and
- (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) **the debtor's estate;** or
- (b) **the interests of the creditor who sent the notice under subsection 244(1).**

BIA, at s. 47[emphasis added] [BOA TAB 1].

55. The BIA defines "debtor" as follows:

debtor includes **an insolvent person and any person who, at the time an act of bankruptcy was committed by him**, resided or carried on business in Canada and, where the context requires, includes a bankrupt;

BIA, at s. 2 (definition of "debtor") [emphasis added] [BOA TAB 1].

56. The BIA defines the term "insolvent person" as follows:

Insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and:

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

BIA, at s. 2 (definition of “insolvent person”) [BOA TAB 1].

ii. Section 13(2) of the Judicature Act

57. Section 13(2) of the *Judicature Act* states:

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Judicature Act, R.S.A. 2000, c. J-2, at s. 13(2) [BOA TAB 5].

iii. Section 65 of the Personal Property Security Act

58. Section 65(7) of the *Personal Property Security Act* (“PPSA”) states:

65(7) On the application of any interested person, the Court may

(a) appoint a receiver

Personal Property Security Act, R.S.A. 2000, c P-7, at s. 65(7) [emphasis added] [BOA TAB 6].

iv. Section 99 of the Business Corporations Act

59. Section 99 of the *Alberta Business Corporations Act* (“ABCA”) states:

99 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver’s or receiver-manager’s accounts;

Business Corporations Act, R.S.A. 2000, c B-9, at s. 99(a) [emphasis added] [BOA TAB 2].

v. Authority for Interim Receiver to Borrow Funds

60. Section 47.2 of the *BIA* addresses an interim receiver’s borrowings, and states, in pertinent part:

Orders respecting fees and expenses

47.2 (1) If an appointment of an interim receiver is made under section 47 or 47.1, **the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper, including an order giving the interim receiver security, ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees or disbursements,** but the court shall not make such an order unless it is satisfied that **all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court.**

Meaning of disbursements

(2) In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.

BIA, at s. 47.2(1)-(2) [**emphasis added**] [BOA TAB 1].

vi. Farm Debt Mediation Act

61. Sections 21 and 22 of the *Farm Debt Mediation Act* ("**FDMA**") state, in pertinent part:

Notice by secured creditors

21 (1) Every secured creditor who intends to

(a) enforce any remedy against the property of a farmer, or

(b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer

shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application under section 5.

Time of notice

(2) The notice must be given to the farmer and to an administrator, in the form established by the Minister and in accordance with the regulations, at least 15 business days before the doing of any act described in paragraph (1)(a) or (b).

[...]

Contravention by creditor

22 (1) Subject to subsection (2), any act done by a creditor in contravention of section 12³ or 21 is null and void, and a farmer affected by such an act may seek appropriate remedies against the creditor in a court of competent jurisdiction.

Farm Debt Mediation Act, S.C. 1997, c. 21 at ss. 21(1), 22(1) [BOA TAB 4].

V. ARGUMENT

i. The Interim Receiver Should be Appointed

All Threshold Requirements Under the BIA are Satisfied

62. This Court has the discretion to appoint an interim receiver, at any time, following the delivery of the 244 Notices, pursuant to Section 47 of the BIA.

63. The threshold statutory requirement under Section 47 of the BIA, that a notice under Section 244 of the BIA “is about to be sent or was sent” to a debtor, has been met by the delivery of the 244 Notices to the Borrowers and Sunterra Beef.

64. The Borrowers and Sunterra Beef are “debtors” as contemplated by the BIA. The BIA defines an “insolvent person” as including a corporation who:

- (a) **is not bankrupt** – the Obligors are not bankrupt;
- (b) **carries on business or has property in Canada** – each of the Obligors (i) carries on business in Canada, (ii) is an Alberta corporation, and (iii) among other assets, holds a CWB Account, in Canada;
- (c) **whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars** – each of the Obligors is liable for the Indebtedness, pursuant to the Commitment Letter, the Security, the Borrowers’ Cross Guarantee, and the Guarantees. The Lender’s claims alone greatly exceed \$1,000; and,
- (d) **is for any reason unable to meet their obligations as they generally become due**. In determining whether a party is unable to meet their obligations as they generally come due, particularly in the context of a bankruptcy application, the applicant is typically

³ Section 12 of the FDMA describes the stay of proceedings which comes into effect when an application made by a “farmer” under the FDMA is granted by the Administrator.

required to prove the existence of more than one unpaid liability. However, a bankruptcy order may be granted where “special circumstances” exist, which includes cases where:

“the debt is significantly large and there is fraud or suspicious circumstances in the way the debtor has handled its assets which required that the processes of the bankruptcy of the Act be set in motion”.

***ATB Financial v Corecent Partnership*, 2020 ABQB 587 at paras. 88, 105, citing *Solid Holdings Ltd, Re*, 2019 BCSC 126 at para. 15 and *Valente, Re*, 2004 CanLII 8018 (ON CA).**

In this case, the Obligors are insolvent, and special circumstances exist which justify a relaxation of the typical requirement for proof of multiple unpaid debts, as: (i) the Demand Letters gave demanded the repayment, in full, of the Indebtedness, for which all Obligors are liable; (ii) the Obligors, as a whole, do not have sufficient funds to repay the Indebtedness, nor any other creditors, and have no further access to revolving credit; and, (iii) the Lender, which is owed over \$17 million, has provided strong evidence concerning suspicious circumstances in the way that the Sunterra Group, as a whole, has handled its assets. The Sunterra Group is an integrated business operation with shared management and ultimate shareholders, shared secured liabilities, and which engages in numerous intercompany transactions. Accordingly, it is appropriate to extend the application of the “special circumstances” test to all of the Obligors.

The Appointment of the Interim Receiver is Necessary for the Protection of the Debtor’s Estate and the Lender’s Interests

65. Section 47(3) of the BIA provides for two circumstances in which such appointment may be made; specifically, where necessary for the protection of (a) “the debtor’s estate”; or (b) “the interests of the creditor who sent the notice under subsection 244(1)”.

***BIA*, s. 47(3) [BOA TAB 1].**

66. Both factors are met in this case, as the appointment of the Interim Receiver is necessary for the protection of: (i) the Obligors’ estates; (ii) the Lender’s interests; and, (iii) the interests of creditors of the Sunterra Group generally, and in particular parties who may have been affected by the Kiting Scheme and the Impugned Transactions.

67. The requirements for the appointment of the Interim Receiver, under Section 47 of the BIA, are satisfied, as:

- (a) **The appointment is necessary for protection of the Lender's interests and the interests of creditors generally:** The Lender has serious, well-founded concerns in relation to the Impugned Transactions and the Kiting Scheme. Among other things, the Lender faces potential exposure and risk as a result of the Kiting Scheme, for which there was no legitimate commercial purpose. While the Lender has mitigated against the over US\$43 million in Overdraft Indebtedness, due to the implementation of the Risk Management Processes, the possibility of further claims exists and the scope of the Kiting Scheme has not yet been determined. Additionally, it is unknown to what extent any other financial institutions (most notably, Compeer) have been affected. It is possible, and in the Lender's assessment likely, that the Compeer Accounts were in an overdraft position; but the Sunterra Group has refused to provide the information which would prove (or disprove) whether this is the case.

In light of the sheer scale of the Impugned Transactions, and the period of time over which they were undertaken, it is necessary to ensure that a neutral third party with appropriate powers is in place to investigate the Impugned Transactions and prevent further Impugned Transactions from occurring. The Lender faces significant prejudice as a result of the Kiting Scheme. While the management of the Sunterra Group has advised that the Impugned Transactions were caused by Ray Price and that Mr. Price would be removed as an account signatory for the Sunterra Group, (i) Mr. Price is the sole director of Sunterra Beef, Precision, and Soleterra, and a director of each Borrower; and, (ii) the Sunterra Group has ceased cooperating with the Lender. As a result, absent the appointment of the Interim Receiver, the Lender is unable to assess what further steps may be necessary to protect its interests.

The appointment of the Interim Receiver is also to the benefit of the Sunterra Group's creditors, generally, for substantially the same reasons. The scope of affected parties is unknown and the proposed investigation will permit the Interim Receiver to identify other parties, including financial institutions, who are affected by or hold claims arising from the Impugned Transactions and the Kiting Scheme.

- (b) **The appointment is necessary for protection of the Obligors' Estates:** While risk to the assets of the debtor company is a relevant consideration, it is not necessary for the party seeking appointment of an interim receiver to produce evidence of actual or immediate danger of the dissipation of assets if the factors set out in the BIA, concerning protection of the estate or a creditor's interests, are met. The prejudice to the Obligors is limited as the Interim Receiver's appointment will only be over the Account Property, the Obligors will continue operating, and a funding request model will be put in place.

CWB Maximum Financial Inc. v 2026998 Alberta Ltd., 2020 ABCA 118 at paras. 12-17 [BOA TAB 17], citing *Royal Bank v Canadian Print Music Distributors Inc.*, 2006 CanLII 21048, 23 CBR (5th) 42 (ON SC); *Trez Capital Corporation v UC Investments Inc.*, 2013 NSSC 381 at para. 57 [BOA TAB 31]; and *Royal Bank v Zutphen Brothers Construction Ltd.*, 17 CBR (3d) 314, 1993 CarswellNS 22 (WL Can) (NS SC).

The current situation is untenable, and there is a serious risk of deterioration of the Account Property – and the Lender's collateral as a whole – in the short term. While the Lender's review of the Impugned Transactions is ongoing, there is strong evidence of a Kiting Scheme, which greatly exceeds the "more than a suspicion or speculation" threshold identified in the case law (as discussed below) concerning the risk to assets of a debtor company. The Borrowers have no further access to revolving credit, and it is unclear how the Sunterra Group intends to operate in the absence of further credit. The Lender is prepared to advance funds, to the Interim Receiver, in order to enable the Interim Receiver to carry out its mandate; which, in turn, will permit funding requests to be made for required operational payments. Given that the Kiting Scheme was ongoing, for an indeterminate but potentially significant period of time, there is a risk that there are significant but as yet unknown claims against the Obligors. The appointment of the Interim Receiver, and corresponding investigation powers, are necessary to: (i) ensure that no further Impugned Transactions occur; (ii) ensure the protection and preservation of the Account Property; (iii) enable a neutral third-party to assess, review, and locate information concerning the Impugned Transactions and identify any further or related transactions which may exist; and, (iv) assess any claims against the Obligors resulting from the Impugned Transactions or the Unauthorized Overdrafts, including any claims by Compeer or others;

***Maximum Financial Services Inc. v Corporate Cars Limited Partnership*, 2006 CanLII 40988 (ONSC) at para. 15
[*Maximum v Corporate Cars*] [BOA TAB 21].**

- (c) **The Lender has lost confidence in the debtors' management:** Whether the secured creditors of the debtor company have lost confidence in the management of the debtor company is also a relevant factor in considering whether the appointment is warranted:

"I accept that there must be more than a suspicion or speculation concerning the assets of a company before an interim receiver is warranted. Where, as here, the major secured creditors who have the most at risk have with legitimate reason lost confidence, I do not think that there has to be an actual immediate risk to assets."

***Maximum v Corporate Cars* at para. 15 [BOA TAB 21].**

The Lender has lost confidence in the management of the Sunterra Group, on numerous reasonable grounds, including as a result of: (i) the Sunterra Group's inability or unwillingness to take urgent action to address the Impugned Transactions and share the necessary information, including the Compeer Accounts; and, (ii) the Sunterra Group's decision to cease cooperating with the Lender's investigation of the Impugned Transactions and to backtrack on promises made to the Lender in February 2025.

68. It is not required that an applicant prove "actual misfeasance and wrongdoing such that assets are being misappropriated or dissipated", and even where there are possible explanations regarding alleged wrongdoing by a debtor company, the applicant will succeed if it can establish "on a balance of probabilities the need for an immediate interim receivership to assure conservation of the Respondents' assets, and hence, protection of the interests of the Bank through its security".

***Royal Bank of Canada v Canadian Print Music Distributors Inc.*, 2006 CanLII 21048 (ON SC), at paras. 16-18
[BOA TAB 26].**

69. Facts demonstrating a *prima facie* case of borrower misconduct or defaults, including material misrepresentations to lenders and/or serious breaches of the loan agreements, have been sufficient to appoint an interim receiver.

***Royal Bank of Canada v Applied Energy Systems Inc.*, 2009 CanLII 69785 (ON SC), at para. 24 [BOA TAB 24].**

70. In the context of the BIA, a requirement to establish a *prima facie* case has been interpreted as requiring that a claim be supported by evidence and not “mere allegations” or “obviously spurious”, but the threshold is not particularly high. The Lender has met and exceeded this threshold and there is no credible, commercially reasonable justification for the occurrence of the Impugned Transactions or the Kiting Scheme.

***Smith v PricewaterhouseCoopers Inc.*, 2013 ABCA 288, at para. 19 [BOA TAB 29].**

71. Accordingly, it is respectfully submitted that the appointment of the Interim Receiver over the Account Property of the Borrowers and Sunterra Beef, pursuant to Section 47 of the BIA, is just, convenient, and necessary to ensure the protection of the Lender’s interests and the respective estates of the Borrowers and Sunterra Beef.

It Is Just and Convenient to Appoint the Interim Receiver Under Section 13(2) of the Judicature act

72. Section 13(2) of the *Judicature Act* provides for the appointment of a receiver, including an interim receiver on an interlocutory basis, where it is “just or convenient” that the appointment be made.

73. The test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, including: (i) a preliminary assessment of the merits of the case to ensure that there is a serious issue to be tried; (ii) the establishment of irreparable harm to the plaintiff if the application is refused; and, (iii) an assessment of the balance of convenience.

***Anderson v. Hunking*, 2010 ONSC 4008 at para. 15 [BOA TAB 9];**

***Murphy v Cahill*, 2012 ABQB 446 at para. 40 [BOA TAB 22].**

74. Where, as is the case with respect to the Borrowers and Sunterra Beef, the creditor seeking court appointment of an interim receiver has the right to appoint a receiver under its security, the nature of the remedy is less extraordinary; the applicant does not need to establish that it will suffer irreparable harm if an interim receiver is not appointed.

***Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 (CanLII) at para. 28**

[“*Paragon*”] [BOA TAB 23];

***Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007 at paras. 24, 29 [BOA TAB 12].**

75. Furthermore, this Court has previously held that the consideration regarding the appointment of an interim receiver under the BIA and the Judicature Act are substantially similar:

[...] The requirements set out in the authorities with respect to interim receiverships, both under the BIA and under the Judicature Act, (that an appointment must be necessary for the protection of an estate of the debtor and that a receiver should not be appointed lightly, but only after careful consideration of the equities) serve as a curb on the inappropriate or overly-broad use of the remedy. It is neither necessary nor advisable to impose a limitation that is not found in the legislation.

***Alberta Health Services v Networx Health Inc.*, 2010 ABQB 373 (CanLII) at para. 19 [BOA TAB 8].**

76. Accordingly, the same considerations raised above in the context of Section 47 of the BIA apply equally in the context of Section 13(2) of the *Judicature Act*.

77. In *BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, the Ontario Superior Court of Justice considered an application for the appointment of an interim receiver under the *Courts of Justice Act*, which permits such appointment “where it appears to a judge of the court to be just or convenient to do so”. Justice Koehnen noted that in making such determination, the Court may consider, among other factors, whether: (i) the lender’s security is at risk of deteriorating; (ii) there is a need to stabilize and preserve the debtors’ business; (iii) loss of confidence in the debtors’ management; and (iv) positions and interests of the other creditors.

***BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII) at paras 44-51 [BOA TAB 14]; *Courts of Justice Act*, RSO 1990, c C.43 at s. 101(1) [BOA TAB 3].**

78. The first three factors are addressed in the context of Section 47 of the BIA, above. The final factor, regarding the positions and interests of other creditors, also militates toward the appointment of the Interim Receiver in this case, as: (i) it appears that there is likely an overdraft position in the Compeer Accounts, and Compeer will likely benefit from the completion of an investigation of the Impugned Transactions; (ii) the appointment of the Interim Receiver will permit the Sunterra Group to continue operations, with minimal impact on third-party creditors and stakeholders; (iii) there may be other financial institutions or parties impacted by the Impugned Transactions and who will benefit from identification of the claims against the Sunterra Group arising from the Kiting Scheme and the Impugned Transactions; and, (iv) the funding of the Interim Receiver, by the Lender, by way of the Interim Receiver’s Borrowings Charge, will ensure the preservation of the Sunterra Group’s property and business while investigations are ongoing.

79. In considering whether it is just or convenient to appoint a receiver, the Court may also consider, among others, the following factors set forth in *Paragon*:

Paragon, at para. 27 [BOA TAB 23].

- (a) **whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation:** In the case of the Borrowers and Sunterra Beef, the applicable GSAs and Mortgage specifically authorize the Lender to seek appointment of a receiver upon default. With respect to all Obligors, there is also a clear risk of irreparable harm to the Lender, such as: (i) the potential erosion of collateral, including as the Sunterra Group has refused to cooperate with the Lender's investigation of the Impugned Transactions and does not have the means, absent the Lender's agreement, to permit critical payments; (ii) the Obligors' inability or failure to cure their Default Events; (iii) the Overdraft Indebtedness having been eliminated only by the Lender's implementation of the Risk Management Processes; and, (iv) the possibility that there may be unknown claims arising from the previous Impugned Transactions;
- (b) **the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place:** The Obligors' equity in the assets is unknown but, for the reasons set forth above, there is a need to protect and safeguard the Account Property while the Impugned Transactions are investigated, and the Obligors are unable to satisfy the Lender's demand for repayment of the Indebtedness;
- (c) **the nature of the property:** The Account Property is limited in scope and can be administered by the Interim Receiver without material interruption to the Obligors' business. Any investigatory, preservatory, and administrative actions can be completed by the Interim Receiver, more simply and cost-effectively than any available alternative means. The Interim Receiver's possession and control of the Account Property will also prevent further Impugned Transactions from occurring and ensure the preservation and accessibility of relevant records;

- (d) **the preservation and protection of the property pending judicial resolution:** As set forth above, the best available means of preserving and protecting the Account Property is through the appointment of the Interim Receiver. There is a history of the Impugned Transactions and the Sunterra Group have ceased cooperating with the Lender. The Lender will not continue to bank the Sunterra Group. Furthermore, the appointment of the Interim Receiver will preserve the Sunterra Group's assets, property, and undertakings more generally, as the proposed Interim Receivership Order contemplates a funding request model and process for the approval of disbursements required to continue the Sunterra Group's operations;
- (e) **the balance of convenience to the parties:** This factor favours the appointment of the Interim Receiver, because: (i) the Obligors are unable to comply with their obligations to the Lender, and have committed multiple Default Events which are incapable of being cured; (ii) the Impugned Entities have taken unilateral, prejudicial actions in breach of their obligations under the Commitment Letter, Security, and Account Agreements, as applicable; and, (iii) the Interim Receiver's appointment will be narrow in scope, mitigating against the potential interruption to the Sunterra Group's business and permitting the Sunterra Group to continue in possession and control of all of their assets, other than the Account Property, which will remain available to fund operations in accordance with the proposed Interim Receivership Order and cash flow forecasts;
- (f) **the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others:** The Sunterra Group's refusal to provide the Compeer Spreadsheets and account statements for the Compeer Accounts evidences a clear intention to ignore the Lender's interests;
- (g) **the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly:** While appointment of a receiver is extraordinary relief, in the case of the Borrowers and Sunterra Beef, the applicable Security provides the Lender the right to apply for such appointment. The appointment of the Interim Receiver over the other Obligors is a necessary corollary to ensure that the Interim Receiver has access to all information, and

control over all disbursements, which will enable the Interim Receiver to carry out its mandate efficiently and effectively;

- (h) **the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently and the goal of facilitating the duties of the receiver;** Appointment of the Interim Receiver, by court order, is necessary to facilitate the Interim Receiver's duties, as the Obligors have refused to cooperate with requests to provide critical information, advised that they disagree with the Lender's assertions, and reserved their rights, suggesting litigation may result. Additionally, the investigation powers contemplated by the Interim Receivership Order are not available to a privately-appointed receiver. There is urgency in commencing the investigation, given the suspicious circumstances and Impugned Transactions, which make the ordinary civil litigation process unsuitable for addressing the Impugned Transactions;
- (i) **the effect of the order upon the parties:** The proposed form of Interim Receivership Order is minimally intrusive and the Interim Receiver's appointment is narrow in scope. This must be balanced against the available alternatives, which are effectively limited to more intrusive and potentially value-eliminating enforcement of the Lender's security interests against each of the Borrowers and Sunterra and litigation against the Guarantors. There is no other available means of completing the necessary investigation of the Impugned Transactions;
- (j) **the conduct of the parties:** The Lender and the Sunterra Group were initially working cooperatively to address the Default Events and facilitate the investigation of the Impugned Transactions. Now, the Sunterra Group refuses to provide information; and,
- (k) **the length of time that a receiver may be in place:** The appointment of the Interim Receiver is proposed for a limited period of time, of up to 120 days. This is intended to ensure that the Interim Receiver has sufficient time to complete its investigations, while providing a reasonable end date to the interim receivership (subject to any further extension of the appointment, if warranted in the circumstances).

80. It is just and convenient to appoint the Interim Receiver, with enhanced investigatory powers, following the occurrence of the Impugned Transactions and the Unauthorized Overdrafts, including as: (i) the Impugned Transactions and Impugned Cheques arise from an unlawful Kiting Scheme; (ii) it is not currently possible to obtain the remaining information which is necessary to evaluate, assess, and determine the scope of the Kiting Scheme and Impugned Transactions, identify any other wrongdoers, and assess any claims against the Obligors resulting from the Impugned Transactions or the Unauthorized Overdrafts; (iii) the Obligors have ceased cooperating with the Lender; (iv) there is a need to protect and preserve the Account Property; and, (v) the Lender has lost confidence in the management of the Sunterra Group.

ii. It Is Appropriate, Just and Convenient to Grant the Interim Receiver Investigation Powers

81. The Lender also seeks the granting of enhanced investigation powers, to the Receiver, with respect to the Impugned Transactions, the Account Property, and the Sunterra Group.

82. As Justice Gill recently noted in the 2024 decision, *AutoCanada Capital Motors GP Inc v Mirbach*: (i) the appointment of an interim receiver may be made on “any terms and conditions the Court thinks just”, which may include terms in relation to an investigation; and, (ii) there is little case law in Alberta or elsewhere concerning the appointment of an “investigative receiver”, or receiver whose purpose is to investigate certain specified matters. However, it is clear that the appropriateness of such an appointment is fact-specific and must be determined in the circumstances at hand:

“[...] The leading case from Ontario provides several basic principles which are not in dispute to this case. The primary objective of an investigative receiver is to gather information and “ascertain the true state of affairs” concerning the dealings the Receiver was appointed to investigate. *Akagi v Synergy Group (2000) Inc*, 2015 ONCA 368 at para 90, citing *GE Real Estate v Liberty Assisted Living*, 2011 ONSC 4136 at para. The cases do not address the circumstances of a receiver specifically directed by the court to provide factual findings and legal opinions.

[30] **What is clear from the case law is that a receiver’s mandate is to be determined from the specific context, the specific wording of the order and considering all the circumstances of the case.** The Receiver derives its powers solely from the court. [...]”

AutoCanada Capital Motors GP Inc. v Mirbach, 2024 ABKB 645 (CanLII), at paras. 27, 29-30 [emphasis added] [BOA TAB 11], citing *Akagi v Synergy Group (2000) Inc.*, 2015 ONCA 368 at para. 90 [Akagi] [BOA TAB 7], citing *GE Real Estate v Liberty Assisted Living*, 2011 ONSC 4136 at para. 103 [BOA TAB 18].

83. In *Akagi v Synergy Group*, the Ontario Court of Appeal summarized the considerations in determining whether an investigative receiver is warranted, as follows:

[...] Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions -- including even, in proper circumstances, the affairs of and transactions concerning related non-parties -- will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*.

[...] Some consistent themes emerge from these authorities:

The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.), at paras. 10, 14 and 16.

The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric* (Div. Ct.), at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, *supra*, at para. 75.

Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see, e.g., *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.), at para. 17; *Century Services*.

Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

***Akagi*, at paras. 66, 90 [BOA TAB 7].**

84. In this case, the Lender has identified a clear rationale for granting the Interim Receiver investigation powers, over the Sunterra Group as a whole, which have been appropriately tailored to the circumstances at hand:

- (a) there is evidence of unauthorized and inappropriate transactions undertaken on behalf of certain members of the Sunterra Group. There are also potentially suspicious transactions involving other members of the Sunterra Group. For instance, the Internal Fraud Group's review of the Impugned Transactions, during the Specific Review Period, also identified a cheque issued, by Sunterra Canada, in the amount of approximately Cdn.\$4.364 million, to and in favour of Sunterra

Farms Greenhouse Ltd., with a corresponding cheque received, by Sunterra Canada, in the amount of Cdn. \$4.5 million, from Sunterra Farms Greenhouse Ltd.;

- (b) the Financial Advisor has advised the Lender that, while its analysis is ongoing, its present assessment is that the kiting losses are likely in the Compeer Accounts at present, but additional information and co-operation is necessary to complete its investigation;
- (c) in particular, it is not possible to fully investigate the Impugned Transactions, without access to information held by third parties (including the Compeer Spreadsheets and the account statements for the Compeer Accounts), and to obtain access to such information the Sunterra Group's consent must be obtained;
- (d) the Sunterra Group has refused to cooperate and consent to the provision of such information notwithstanding the seriousness of the situation; and,
- (e) while the Impugned Transactions identified to date were between the Impugned Entities, the extension of the investigation to related members of the Sunterra Group is justified as a result of: (i) the fact that the Lender holds security from each of the Borrowers and Sunterra Beef, unlimited guarantees from each of the Obligors, and provides commercial banking services to the Additional Sunterra Entities; (ii) the numerous links between different aspects of the Sunterra Group's business and frequency and complexity of the intercompany and cross-border transfers, which the Interim Receiver will likely need to investigate; (iii) the current lack of information necessary to determine the scope of, and participants or beneficiaries of, the Impugned Transactions; and, (iv) the Sunterra Group, as a whole, obstructing investigation efforts to date. A limited investigation of only the Impugned Entities would be unable to obtain necessary information in the event that the remaining Sunterra Group continue to withhold their consent to disclosure, in the absence of a court order requiring such information to be provided.

85. The provision of investigation powers, to the Interim Receiver, is therefore necessary in order to: (i) determine the breadth and scope of the Kiting Scheme; (ii) enable a neutral third-party to assess, review, and locate information concerning the Impugned Transactions and identify any further or related transactions which may exist; (iii) identify the parties involved (including any additional members of the Sunterra Group involved in the Impugned Transactions or related

transactions), and the victims of the Kiting Scheme; and, (iv) assess any claims against the Obligors resulting from the Impugned Transactions or the Unauthorized Overdrafts, including any claims by Compeer.

86. The proposed investigation powers are also the most minimally intrusive means of obtaining the required information. The Interim Receiver is not proposed to take possession of any property, other than the Account Property; nor is the Lender seeking any sort of freezing order or similar relief (such as a Mareva injunction). In the absence of consent from the Sunterra Group, it is necessary to compel the delivery of the information. The Interim Receiver's proposed powers in relation to the preparation of a cash flow forecast, approval of disbursements, taking possession and control of the Account Property, obtaining access to bank accounts and records, and conducting examinations under oath, are consistent with the investigation powers given to interim receivers in other recent cases.

Interim Receivership Order, granted on August 23, 2022, by the Honourable Justice Hillier, in *Royal Bank of Canada v Faissal Mouhamad Professional Corporation, et al.*, Court File No. 2203-12557 (ABKB), at paras.

3(h)-(i), (o), and 5 [BOA TAB 25];

Order (Appointing Interim Receiver), granted on April 12, 2024, by the Honourable Justice Steele, in *Bank of Montreal v True North Freight Solutions Inc., et al.*, Court File No. CV-24-00718318-00CL (ONSC (Comm.

List)), at paras. 2(a)-(e), (h) [BOA TAB 13].

iii. The Proposed Interim Receiver's Charge Should be Approved

87. The Interim Receiver's investigation will require funding, as will its administration of the Account Property.

88. The Lender has agreed to fund the Interim Receiver's borrowings, under a priority charge, on the terms set out in the Pai Affidavit and proposed form of Interim Receivership Order.

89. Section 47.2 of the BIA provides the jurisdiction to grant an interim receiver a priority charge as security over the assets of a debtor in respect of the interim receiver's claim for fees or disbursements, provided that the affected secured creditors have been given notice (as is the case here). The Court has a broad jurisdiction to make "any order ... that it considers proper."

BIA, s. 47.2(1) [BOA TAB 1].

90. The Lender respectfully requests that this Court grant the requested Interim Receiver's Borrowing Charge, which is necessary for the administration and preservation of the Account Property and to enable the Interim Receiver to carry out its duties.

iv. The FDMA Does Not Preclude the Appointment of the Interim Receiver

91. The appointment of an interim receiver does not violate the FDMA waiting period provisions. As stated in *Jacob's Hold Inc. v Canadian Imperial Bank of Commerce* ("**Jacob's Hold**"):

The appointment by the court of a receiver is for the purposes of preserving the estate of the bankrupt for the benefit of the creditors. It is not formally or otherwise a proceeding for the recovery of a debt, the realization of a security or the taking of any property of a farmer.

Jacob's Hold Inc. v Canadian Imperial Bank of Commerce, 2000 CanLII 22730 (ONSC) at p. 3 [BOA TAB 19].

92. The Supreme Court of British Columbia came to a different conclusion in *Canadian Imperial Bank of Commerce v Foxtrot Farms ULC* ("**Foxtrot**"), holding that a secured creditor's interim receivership application could not proceed until the FDMA notice period has expired. While the Court in *Foxtrot* did not state that there are no circumstances in which an interim receivership application could proceed prior to the expiration of an FDMA notice period: however, it did "not find it necessary for the appointment of an interim receiver, which is an extraordinary remedy". Instead, the Court ordered the farmer to disclose certain information concerning a management agreement to the creditor immediately and granted leave to reappear "should further matters arise regarding the proper management of the operation and assets and should further risks be identified".

Canadian Imperial Bank of Commerce v Foxtrot Farms ULC, 2024 BCSC 1019 at paras. 19, 22, 30 [**Foxtrot**] [BOA TAB 15].

93. *Foxtrot* is distinguishable from the present circumstances, as:

- (a) the creditor in *Foxtrot* sought the appointment of an interim receiver with full possession and control of the debtor's business, unlike the proposed appointment of the Interim Receiver over only the Account Property;
- (b) the creditor in *Foxtrot* specifically intended to seek the appointment of "a full receiver under s. 243 of the BIA and s. 39 of the *Law and Equity Act*" once all

notice periods had elapsed, and the interim receivership was intended as a stepping stone to more fulsome enforcement measures. In this case, the Lender seeks the appointment of the Interim Receiver primarily to facilitate an investigation and ensure no further Impugned Transactions occur. The Borrowers have advised they are actively seeking to repay the Indebtedness and the Lender hopes this will occur;

- (c) while the debtor company in *Foxtrot* was in default under its credit facilities and had failed to make payments, there were no allegations of improper transactions and no apparent urgency to the application, unlike the present circumstances. The Court in *Foxtrot* specifically found that the appointment of an interim receiver appeared not to be necessary in light of the debtor's management of the business and that an offer had been received for the assets; and,
- (d) the Court placed significant emphasis on the purpose of the FDMA, which is "intended to enable farmers to continue operating while benefiting from a grace period before entering into arrangements with their creditors" [emphasis added]. The appointment of an interim receiver in *Foxtrot* would have prevented the debtor company from managing its business. The appointment of the Interim Receiver over the Account Property is, in contrast, minimally intrusive and will not prevent operations by the Sunterra Group from continuing in the ordinary course, subject to the Interim Receiver's oversight and approval of disbursements.

Foxtrot, at paras. 4, 7-9, 16, 18, 21-22 [BOA TAB 15], citing *Corp. Les Produits de la Jardiniere v National Bank of Canada*, [1996] F.C.J. No. 460 at para. 14 [BOA TAB 16].

94. Justice Côté, in the dissenting reasons in *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.* ("**Lemare Lake**"), cited *Jacob's Hold* for the proposition that "the [FDMA] stay does not preclude the appointment of an interim receiver under the BIA". The majority reasons did specifically address whether an interim receiver may be appointed notwithstanding the 15 day waiting period under the FDMA, as the issue in *Lemare Lake* related to whether Section 243 of the BIA conflicts with the stay and waiting periods under *The Saskatchewan Farm Security Act*. However, the majority noted that the BIA contemplates that an interim receiver may be appointed over a farmer, and that Sections 47 and 243 of the BIA serve different purposes, with Section 47 aimed at permitting timely, urgent relief:

“Other provisions of the BIA further support a more narrow reading of s. 243’s purpose. Notably, s. 47 of the BIA empowers a court to appoint an interim receiver where a notice of intention to enforce a security was sent or is about to be sent under s. 244(1). Where there is an urgent need for the appointment of a receiver, the BIA thus provides a mechanism for the appointment of an interim receiver.

[...] While s. 48 of the BIA provides that ss. 43 to 46 do not apply to individuals whose principal occupation is farming, the provision does not exempt farmers from the operation of s. 47. **This shows that Parliament thinks farmers generally warrant special consideration, but not in cases where an interim receiver under s. 47 is found to be warranted. Promptness and timeliness is a concern that Parliament appears to have addressed precisely through the interim receivership regime.** The potential conflict, if any, between s. 47 of the BIA and Part II of the SFSA is not, however, at issue in this appeal.

[...] Amicus has, with respect, been unable to satisfy his burden to prove that ss. 9 to 22 of the SFSA conflict with the purpose of s. 243 of the BIA. Parliament’s purpose of providing bankruptcy courts with the power to appoint a national receiver is not frustrated by the procedural and substantive conditions set out in the provincial legislation. While these conditions require a secured creditor to seek leave before bringing an application for the appointment of a receiver under s. 243 — a process which takes at least 150 days and imposes other procedural and substantive requirements — they **do not hinder the purpose of allowing for the appointment of a national receiver.**”

Saskatchewan (Attorney General) v Lemare Lake Logging Ltd., 2015 SCC 53, at paras. 50, 73 (per Abella and Gascon JJ, for the majority) and 106 (per Côté J, in dissent) [BOA TAB 28].

95. Appointment of the Interim Receiver is the most minimally intrusive available means of addressing the urgent and significant concerns raised by the Lender concerning the Impugned Transactions and the Kiting Scheme, and the proposed scope of the Interim Receiver’s powers is consistent with the purposes of both the BIA and the FDMA. It is respectfully submitted that: (i) it is not necessary to resolve any potential conflict between *Jacob’s Hold* and *Foxtrot* as the latter is distinguishable in light of the facts and the proposed scope of the Interim Receiver’s powers and appointment; and, (ii) *Jacob’s Hold* should be followed and the Interim Receiver appointed notwithstanding that the FDMA notice period has not lapsed.

VI. ORDER REQUESTED

96. The Lender respectfully requests that the Application be granted, including: (i) the appointment of the Interim Receiver over the Account Property of the Obligors; and, (ii) the granting of investigation powers to the Interim Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF MARCH, 2025

A handwritten signature in dark ink, appearing to read 'NSt', is written over a horizontal line.

Sean Collins, KC / Pantelis Kyriakakis /
Nathan Stewart / Samantha Arbor
McCarthy Tétrault LLP
Counsel to National Bank of Canada

VII. LIST OF AUTHORITIES

Statutes

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, at sections 2, 47(1)-(3), and 47.2(1)-(2);
2. *Business Corporations Act*, RSA 2000, c B-9, at section 99(a);
3. *Courts of Justice Act*, RSO 1990, c C-43, at section 101(1);
4. *Farm Debt Mediation Act*, SC 1997, c 21, at sections 21(1) and 22(1);
5. *Judicature Act*, RSA 2000, c J-2, at section 13(2);
6. *Personal Property Security Act*, RSA 2000, c P-7, at section 65(7);

Case Law

7. *Akagi v Synergy Group (2000) Inc.*, 2015 ONCA 368;
8. *Alberta Health Services v Networc Health Inc.*, 2010 ABQB 373 (CanLII);
9. *Anderson v. Hunking*, 2010 ONSC 4008;
10. *ATB Financial v Coredent Partnership*, 2020 ABQB 587;
11. *AutoCanada Capital Motors GP Inc. v Mirbach*, 2024 ABKB 645 (CanLII);
12. *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007;
13. *Bank of Montreal v True North Freight Solutions Inc., et al.*, Court File No. CV-24-00718318-00CL (ONSC (Comm. List)), Order (Appointing Interim Receiver), granted on April 12, 2024, by the Honourable Justice Steele;
14. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII);
15. *Canadian Imperial Bank of Commerce v Foxtrot Farms ULC*, 2024 BCSC 1019;
16. *Corp. Les Produits de la Jardiniere v National Bank of Canada*, [1996] F.C.J. No. 460;
17. *CWB Maximum Financial Inc. v 2026998 Alberta Ltd.*, 2020 ABCA 118;
18. *GE Real Estate v Liberty Assisted Living*, 2011 ONSC 4136;
19. *Jacob's Hold Inc. v Canadian Imperial Bank of Commerce*, 2000 CanLII 22730 (ONSC);
20. *Location Bristar Idealease Inc., Re*, 2012 QCCS 211;

21. *Maximum Financial Services Inc. v Corporate Cars Limited Partnership*, 2006 CanLII 40988 (ONSC);
22. *Murphy v. Cahill*, 2012 ABQB 446;
23. *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 (CanLII);
24. *Royal Bank of Canada v Applied Energy Systems Inc.*, 2009 CanLII 69785 (ON SC);
25. *Royal Bank of Canada v Faissal Mouhamad Professional Corporation, et al.*, Court File No. 2203-12557 (ABKB), Interim Receivership Order, granted on August 23, 2022, by the Honourable Justice Hillier;
26. *Royal Bank of Canada v Canadian Print Music Distributors Inc.*, 2006 CanLII 21048, 23 CBR (5th) 42 (ON SC);
27. *Royal Bank of Canada v Zutphen Brothers Construction Ltd*, 17 CBR (3d) 314, 1993 CarswellNS 22 (WL Can) (NS SC);
28. *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, 2015 SCC 53;
29. *Smith v PricewaterhouseCoopers Inc.*, 2013 ABCA 288;
30. *Solid Holdings Ltd, Re*, 2019 BCSC 126;
31. *Trez Capital Corporation v UC Investments Inc*, 2013 NSSC 381; and,
32. *Valente, Re*, 2004 CanLII 8018 (ON CA).

Tab 3

Court of King's Bench of Alberta

Citation: National Bank of Canada v Precision Livestock Diagnostics Ltd., 2025 ABKB 175

Date: 20250324
Docket: 2501 04252
Registry: Calgary

Between:

National Bank of Canada

Plaintiff

- and -

**Precision Livestock Diagnostics Ltd., Sunterra Food Corp., Soleterra D'Italia Ltd.,
Sunwold Farms Inc., Sunterra Farms Iowa Inc., Trochu Meat Processors Ltd., Sunterra
Quality Food Markets Inc., Sunterra Farms Ltd., Sunwold Farms Limited, Lariagra
Farms Ltd., Sunterra Farm Enterprises Ltd., Sunterra Enterprises Inc. and Sunterra Beef
Ltd.**

Defendants

**Endorsement
of the
Honourable Justice M.J. Lema**

I. Introduction

[1] Should an interim receiver be appointed under s. 47 of the *Bankruptcy and Insolvency Act* where the predominant purpose seems to be information gathering about possible cheque kiting by some of the defendant corporations?

[2] If not, should a receiver be appointed under the *Judicature Act* or other Alberta statutes authorizing such an appointment?

[3] The answers are no and no, as explained below.

II. Appointment of interim receiver under s. 47 BIA

A. Legislative provision

[4] Here is s. 47 BIA:

- (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of
 - (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
 - (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
 - (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.
- (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
 - (a) take possession of all or part of the debtor's property mentioned in the appointment;
 - (b) exercise such control over that property, and over the debtor's business, as the court considers advisable;
 - (c) take conservatory measures; and
 - (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.
- (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be **necessary for the protection of**
 - (a) the debtor's estate; or
 - (b) the interests of the creditor who sent the notice under subsection 244(1).
- (4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
[emphasis added]

[5] It is common ground that NBC issued a notice of intention to enforce security under s. 244 BIA on March 14, 2025.

[6] What prompted the issuance of that notice and NBC's reasons for seeking an interim receiver are discussed next

B. Background

[7] In mid-February 2025, NBC apparently identified irregular chequing activity among various defendants and took immediate steps to control further drawdowns from the defendants' various NBC accounts, by cheque or otherwise, and to recover an apparent overdraft of approximately \$43 million stemming from that activity.

[8] That overdraft draft was cleared, in various ways, within 15 days of being identified.

[9] No further overdraft or other new debt to NBC, arising from the identified chequing activity or otherwise and owing directly by any of the defendants, has since been identified.

[10] NBC has called its loans, which currently stand at approximately \$17 million.

[11] It issued a notice of intention to enforce its security, per s. 244 BIA, on March 14, 2025.

[12] Since approximately February 18, 2025, FTI, a licensed insolvency trustee, has, with the defendants' consent, been monitoring the group's financial transactions (or at least its Canadian operations) on NBC's behalf, albeit an informal (i.e. non-court-appointment) basis.

[13] NBC now seeks an interim receiver under s. 47 BIA for two central purposes:

1. preservation of and control over the "Account Property" i.e. "present and after-acquired bank accounts, money, funds, receivables, cheques, choses in action, and books and records" of the defendant; and
2. investigation of certain "Impugned Transactions" (defined in supporting affidavit), namely, the above-noted irregular chequing activity.

C. Analysis

[14] I start by reproducing NBC's detailed arguments on the preservation aspect, followed by my comments on each.

[15] Here are the first two: NBC's potential exposure and risk, and the effects on third parties.

1. "Potential exposure and risk"

[16] NBC argued:

[NBC] has serious, well-founded concerns in relation to the Impugned Transactions and the Kiting Scheme. Among other things, [NBC] faces potential exposure and risk as a result of the Kiting Scheme, for which there was no legitimate commercial purpose. While the Lender has mitigated against the over US\$ 43 million in Overdraft Indebtedness, due to the implementation of the Risk Management Processes, the possibility of further claims exists and the scope of the Kiting Scheme has not yet been determined. Additionally, it is unknown to what extent any other financial institutions (most notably, Compeer [Financial, ACA, an American bank]) have been affected. It is possible, and in [NBC's] assessment likely, that the Compeer Accounts were in an overdraft position; but the Sunterra Group has refused to provide the information which would prove (or disprove) whether this is the case. [emphasis added]

[17] NBC acknowledges that it has eliminated an approximately US\$43 million overdraft apparently stemming from the Impugned Transactions.

[18] It has also instituted strict internal monitoring over and debit restrictions on all NBC accounts held by any of the defendants. In other words, it has closed the barn door against further drawdowns occurring without its approval.

[19] Finally, it has provided notice of various defaults under its lending agreements, demanded payment of its aggregate debt (as noted, approximately \$17 million), and closed off any further financing of any of the defendants (i.e. other than advances contemplated under the proposed interim receivership).

[20] NBC did not explain or particularize its “potential exposure or risk” here.

[21] Even if it extended the scope of its inquiry earlier than the nine or so months already reviewed (back to May 1, 2024) and discovered (for instance) that more of the high-volume and high-value back-and-forth chequing activities had occurred in the previous (for example) three years, it did not explain how that would or might affect the group’s current financial position with NBC.

[22] In other words, how any such uncovered activities would translate to any different overdraft or other debt position with NBC than it faced in mid-February of this year and which it has now cleared.

[23] As far as I can tell, whatever further irregular chequing activities occurred and whenever and in whatever amounts, the net result of them was reflected in the mid-February position in the relevant NBC accounts then. That is, it is not apparent what after-shock effects, if any, NBC is or would be facing even if it uncovered similar chequing activities in earlier periods, at least in terms of a changed, or even a risk of a changed, current financial position for the group with NBC.

[24] NBC’s evidence and argument did not show otherwise.

2. Effects on third parties

[25] As for effects on third parties (e.g. Compeer), s. 47’s second branch (i.e. after “[protecting] ... the debtor’s estate”) focuses on the interests of the “**creditor**” applying for relief i.e. not any other actual or potential creditor or the creditors (actual or potential) generally.

[26] Accordingly, I do not find the possibly of unearthing information showing the impact of the chequing activities on Compeer or other creditors a meaningful reason for seeking an interim receiver.

3. Need to investigate chequing activities

[27] NBC then argued:

In light of the sheer scale of the Impugned Transactions, and the period of time over which they were undertaken, it is necessary to ensure that a neutral third party with appropriate powers is in place to **investigate the Impugned Transactions and prevent further Impugned Transactions from occurring. [NBC] faces significant prejudice as a result of the Kiting Scheme.** While the management of the Sunterra Group has advised that the Impugned Transactions

were caused by Ray Price and that Mr. Price would be removed as a signatory for the Sunterra Group, (i) Mr. Price is the sole director of Sunterra Beef, Precision, and Soleterra, and a director of each Borrower; and (ii) the Sunterra Group has ceased cooperating with [NBC]. As a result, **absent the appointment of the Interim Receiver, [NBC] is unable to assess what further steps may be necessary to protect its interests.** [emphasis added]

[28] On investigating the Impugned Transactions, NBC did not explain why an interim receivership is needed for such an investigation (assuming one is needed) to occur.

[29] It alluded briefly to “litigation”, presumably meaning possible future litigation between it and the defendants or some of them about the chequing activities or possibly litigation between it and other lenders in respect of those activities.

[30] But it did not explain why the document production, document review, and questioning dimensions of any such litigation would be inadequate to investigate those activities.

[31] It did not argue that the defendants or any of them will or even may destroy documentary, electronic, or other records.

[32] It did not offer a detailed comparative analysis of “investigation via IR” and “investigation via litigation.”

[33] To the extent urgency is a consideration, it did not show what benefits a possibly faster investigation via IR would yield. As discussed above, NBC did not explain how a fuller understanding of the breadth and scope of the chequing activities would or could change the defendants’ current financial position with NBC i.e. how learning more about those activities would or could inform anything that NBC might do now in reaction i.e. identify “what further steps” it might take or why they might be necessary.

[34] As noted above, NBC did not explain or particularize the asserted “significant prejudice” faced by it.

4. Benefits for other creditors

[35] NBC then argued:

The appointment of the Interim Receiver is also for the **benefit of the Sunterra Group’s creditors generally**, for substantially the same reasons. The scope of affected parties is unknown and the **proposed investigation will permit the Interim Receiver to identify other parties, including financial institutions who are affected by or hold claims arising from the Impugned Transactions and the Kiting Scheme.**

[36] As discussed above, the focus on creditor impact is necessarily limited to the interests of NBC itself.

[37] Other possibly affected creditors can take whatever steps they see as necessary to protect and advance their interests.

[38] I discuss this aspect further below.

5. Dissipation of assets

[39] Next NBC argued:

While risk to the assets of the debtor company is a relevant consideration [under s. 47], it is not necessary for the party seeking appointment of an interim receiver to produce evidence of actual or immediate danger of the dissipation of assets if the factors set out in the *BIA*, concerning protection of the estate or a creditor's interests, are met. The prejudice to the Obligors is limited as the Interim Receiver's appointment will only be over the Account Property, the Obligors will continue operating, and a funding request model will be put in place. [authorities omitted]

[40] This does not explain how appointment of an interim receiver is necessary to protect the debtors' estates.

[41] NBC did not show a material risk of prejudice to those estates.

[42] It did not provide evidence or argue that the debtors or any of them are dissipating property or that there is a material risk of that occurring.

[43] They did not provide evidence showing any material risk of continuation of similar chequing activities. Given NBC's steps since mid-February 2025, I cannot see how any such activities affecting NBC itself could occur.

[44] At the hearing on March 17, Canadian counsel for Compeer provided a copy of a document apparently showing that Compeer has begun or will soon be starting proceedings in South Dakota for certain relief against some of the defendants.

[45] I infer from the initiation of such proceedings that Compeer is aware of some or all of the chequing activities and that it is also taking steps to eliminate the risk of any further such chequing activities involving Compeer, which (from the record here) I infer is or was the defendants' principal (if not exclusive) US banker.

[46] NBC did not argue that the very existence of the chequing activities translates to a risk of the defendants or any of them taking prejudicial-to-NBC-or-others steps in respect of their assets.

[47] Instead, NBC's focus was on preventing the repetition of the chequing activities and investigating those which have already occurred.

[48] In the absence of evidence showing a material risk of such activities recurring or of the defendants taking other steps to dissipate their assets, and in the absence of evidence showing any other need for protection of the debtors' estates, this dimension of s. 47 (i.e. para 47(3)(a)) is not engaged here.

6. Risk of chequing activities continuing (and recap of earlier factors)

[49] NBC then argued:

The current situation is untenable, and there is a **serious risk of deterioration of the Account Property – and [NBC's] collateral as a whole – in the short term.** While [NBC's] review of the Impugned Transactions is ongoing, there is strong evidence of a Kiting Scheme, which greatly exceeds the “more than a suspicion or speculation” threshold identified in the case law (as discussed below) concerning the **risk to assets of a debtor company.** The Borrowers have no further access to revolving credit, and it is unclear how the Sunterra Group intends to operate in the absence of further credit. [NBC] is prepared to advance funds, to the Interim

Receiver, in order to enable the Interim Receiver to carry out its mandate[,] which in turn, will permit funding requests to be made for required operational payments. Given that the Kiting Scheme was ongoing, for an indeterminate but potentially significant period of time, there is a **risk that there are significant but as yet unknown claims against the Obligors**. The appointment of the Interim Receiver, and corresponding investigation powers, are necessary to (i) ensure that **no further Impugned Transactions occur**; (ii) ensure the **protection and preservation of the Account Property**; (iii) enable a third party to **assess, review, and locate information concerning the Impugned Transactions** and identify any further or related transactions which may exist; and (iv) **assess any claims against the Obligors resulting from the Impugned Transactions or the Unauthorized Overdrafts**, including any claims by Compeer or others[.] [emphasis added]

[50] Again, NBC did not explain or particularize the asserted “serious risk of deterioration of the Account Property – and [its] collateral as a whole.”

[51] As for a “risk that there are significant but as yet unknown claims against the Obligors”, that does not translate to a risk to the debtors’ estates or to NBC’s position as the first-ranking creditor against most of the defendants. (Farm Credit Corporation is the first-ranking creditor on three of the defendants, with NBC in second position.)

[52] The priorities are what they are. Flushing out (possible) further claims against the defendants or any of them is not a convincing reason to install an interim receiver.

[53] Again, I do not see a material risk of further similar chequing activities here or any material risk to the Account Property, given the protective steps already taken by NBC.

7. Loss of confidence in management

[54] Here are NBC’s further arguments:

Whether the secured creditors of the debtor company have **lost confidence in the management** of the debtor company is also a relevant factor in considering whether the appointment is warranted:

I accept that there must be more than a suspicion or speculation concerning the assets of a company before an interim receiver is warranted. Where, as here, the major **secured creditors who have the most at risk** have with legitimate reason lost confidence, I do not think that there has to be an actual immediate risk to assets. [citing *Maximum Financial Services v Corporate Cars Limited Partnership*, 2006 CanLII 40988 (ONSC) at para 15]

[NBC] has lost confidence in the management of the Sunterra Group, on numerous reasonable grounds, including as a result of: (i) the **Suntterra Group’s inability or unwillingness to take urgent action to address the Impugned Transactions and share the necessary information, including the Compeer Accounts**; and, (ii) the Sunterra Group’s decision to **cease cooperating with [NBC’s] investigation of the Impugned Transactions** and to backtrack on promises made to [NBC] in February 2025.

It is not required that an applicant prove “actual misfeasance and wrongdoing such that assets are being misappropriated or dissipated”, and even where there are possible explanations regarding alleged wrongdoing by a debtor company, the applicant will succeed if it can establish “on a balance of probabilities the **need for an immediate interim receivership to assure conservation of the Respondents’ assets, and hence, protection of the interests of the Bank through its security.**” [citing *RBC v Canadian Print Music Distributors Inc*, 2006 CanLII 21048 (ONSC) at paras 16-18]

Facts demonstrating a *prima facie* case of borrower misconduct or defaults, including material misrepresentations to lenders and/or serious breaches of the loan agreements, have been sufficient to appoint an interim receiver [citing *RBC v Applied Energy Systems Inc*, 2009 CanLII 69785 (ONSC) at para 24].

In the context of the *BIA*, a requirement to establish a *prima facie* case has been interpreted as requiring that a claim be supported by evidence and not “mere allegations” or “obviously spurious”, but the threshold is not particularly high. [NBC] has met and exceeded this threshold and there is **no credible, commercially reasonable justification for the occurrence of the Impugned Transactions or the Kiting Scheme.** [citing *Smith v PricewaterhouseCoopers Inc*, 2013 ABCA 288 at para 19] [emphasis added]

[55] Again, NBC did not demonstrate material risk to its interests here.

[56] It may well have lost confidence in Sunterra management, but it did not show material risk to its position if an interim receiver is not appointed e.g. how management’s decisions will or could make the current circumstances worse for NBC.

[57] Even if NBC could learn more about the scope and breadth of the chequing activity, including how Compeer or possibly other financial institutions may have been involved and, if so, how those other parties are or may have been affected, that does not show why any such information is or might be necessary to protect or help protect NBC’s current position.

[58] In *RBC v Applied Energy* (cited above), Cumming J. found (among other things) that “the security of RBC [had] been compromised” and that “there is a real danger assets will disappear.”

[59] I have not found similar circumstances here.

8. No justification for chequing activities

[60] Even if no “credible, commercially reasonable justification” exists for the chequing activities, that on its own is not a material factor i.e. where NBC has recovered the overdraft in question, no material risk exists of further such activities, and no evidence shows that any as-yet-unexplored earlier activities have the potential to change NBC’s current position with the defendants (in the sense of additional debt owing by any of them to NBC).

9. Limited powers of interim receiver

[61] Here I also emphasize the limited powers that can be given to an interim receiver, per ss. 47(2) *BIA*:

The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) **take possession of all or part of the debtor's property** mentioned in the appointment;
- (b) **exercise such control over that property, and over the debtor's business**, as the court considers advisable;
- (c) **take conservatory measures**; and
- (d) summarily **dispose of property that is perishable or likely to depreciate** rapidly in value.

[62] These are hold-the-line powers, which I have already found are not required here i.e. with no material risk shown of dissipation or other deterioration of the defendants' estates or NBC's position.

[63] Such powers do not extend to conducting investigations, at least not where it is unclear how the outcome of the investigations (i.e. learning everything about the irregular chequing activities) could affect the extent of the defendants' available assets or NBC's position on those assets or its position vis-à-vis the debtors or any of them.

10. Conclusion on s. 47 BIA

[64] For these reasons, I conclude that the evidence does not warrant the appointment of an interim receiver under s. 47 BIA.

III. No "preserve rights" receiver possible for four key defendants in any case

[65] In any case, as discussed below, no receiver, interim or otherwise, can be appointed for at least four of the defendants, which four happen to be the defendants most centrally (if not exclusively) involved in the irregular chequing activities, at least to the extent the proposed receivership is preservation-of-rights focused.

[66] The reason is a current stay or hold-action period in effect in respect of those defendants under the *Farm Debt Mediation Act*.

[67] I discuss this in detail below.

A. Legislative provisions

[68] The *FDMA* imposes an initial stay or hold period when a farmer (see definition below) is facing enforcement and other actions by one or more creditors.

[69] Here is the definition of "farmer", from s 2 *FDMA*:

farmer means any person, cooperative, partnership or other association of persons that is engaged in farming for commercial purposes and that meets any prescribed criteria. (*agriculteur*)

[70] I believe it is common ground that Sunterra Farms Ltd., Sunwold Farms Ltd., Sunterra Farms Iowa Inc., and Sunwold Farms Inc. are farmers so defined.

[71] I believe it is also common ground that all four are insolvent within the meaning of (at minimum) one of the conditions identified in subsection 6(a), (b), and (c) *FDMA*.

[72] Here is the *FDMA* provision requiring interpretation here:

21 (1) Every secured creditor who intends to

- (a) **enforce any remedy against the property of a farmer**, or
- (b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer

shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application under section 5.

(2) The notice must be given to the farmer and to an administrator, in the form established by the Minister and in accordance with the regulations, at least 15 business days before the doing of any act described in paragraph (1)(a) or (b). [emphasis added]

[73] NBC is a secured creditor within the meaning of ss. 21(1).

[74] NBC issued a ss 21(2) notice to the defendants or at least the four in question on March [14], 2025.

[75] Section 5 *FMDA* (referenced in ss. 21(1)) provides (in part):

(1) Subject to section 6, a **farmer may apply to an administrator for either**

- (a) **a stay of proceedings against the farmer by all the farmer's creditors**, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement; or
- (b) a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's secured creditors for the purpose of assisting them to reach a mutually acceptable arrangement.

[76] The four defendants ("the Farmers") argue that the 15-day hold period imposed by s. 21 bars the appointment of an interim or other receiver now or at any point prior to the expiry of that period.

[77] NBC argues that the appointment of an interim receiver falls outside the scope of s. 21.

[78] I find for the Farmers on this point, for the following reasons.

[79] NBC relies on *Jacob's Hold Inc. v Canadian Imperial Bank of Commerce*, 2000 CanLII 22730 (ONSC) (Jarvis J.). Here is the key segment of that decision:

It seems sensible to deal first with the matters raised by Mr. Fallis. He says, essentially, that the order appointing the Interim Receiver is null and void and that all proceedings taken by PW pursuant to that authority are of no effect and that no immunity ought to be ordered in their favour in the circumstances. He argues that **ss. 21 and 22 of the *Farm Debt Mediation Act*, S.C. 1997, c. 21 operate as an automatic stay of any action taken against a farmer and that an application to appoint an Interim Receiver pursuant to the *Bankruptcy and Insolvency Act*,**

R.S.C. 1985, c. B-3 constitutes a proceeding to which those sections apply. **The appointment by the court of a receiver is for the purposes of preserving the estate of the bankrupt for the benefit of the creditors. It is not formally or otherwise a proceeding for the recovery of a debt, the realization of a security or the taking of any property of a farmer.** [emphasis added]

[80] Assuming for the moment appointing a *BIA* interim receiver falls into one of the latter three categories of action (i.e. the activities described in para 21(1)(b) *FDMA*), the question remains whether doing so constitutes a “enforc[ing] any remedy against the property of a farmer” under para. 21(1)(a).

[81] *Jacob’s Hold* is silent on this aspect.

[82] It is clear that a preservation order, an attachment order, and other hold-the-line orders constitute a remedy against property i.e. without necessarily being linked to actual or possible future enforcement against the property. In *Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 SCR 417, the Supreme Court of Canada found that “remedy”, in the context of the *BIA*, should be interpreted broadly and as extending to preservative orders:

Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word “remedy”, giving to it and to the words “*autres procédures*” (“other proceedings”) a **very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial**. *Black’s Law Dictionary* (5th ed. 1979), defines “remedy”:

The means by which a right is enforced or **the violation of a right is prevented**, redressed, or compensated.

and below:

Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

Jowitt’s Dictionary of English Law (2nd ed. 1977), vol. 2, gives an almost identical definition:

the means by which the **violation of a right is prevented**, redressed, or compensated. [paras 21 and 22] [emphasis added]

[83] See also *Dowd et al. v. Skip the Dishes Restaurant Services Inc.*, 2020 MBQB 155 (CanLII) (Perlmutter ACJ):

While an attaching order is obviously a different form of pre-judgment remedy than an order for the preservation of property, in light of the intrusive nature of both remedies including the potential hardship or harm to the party who is the subject of these pre-judgment orders, in my view, similar weighty considerations arise. It is my view that these considerations are sensibly reflected in the analysis of the Ontario Superior Court of Justice Divisional Court in *BMW Canada Inc. v. Autoport Limited*, 2019 ONSC 4299, which reformulated the following test for motions brought under the equivalent Ontario Rule 45.01 (*Rules of Civil Procedure*, RRO 1990, Reg 194, s 45.01) (which is worded identically to the Manitoba Rule) (para. 53):

- a. **the property sought to be preserved is the property in question in a proceeding or relevant to an issue in the proceeding;**
- b. there is a serious issue to be tried with regard to the property;
- c. **the interim preservation or custody of the property is necessary to enable a party to advance or defend its claim;** and
- d. the balance of convenience favours granting the relief sought by the applicant or moving party. [para 13] [bold and italics emphases added]

[84] And *Montreal Trust Company of Canada v. R M Holdings Ltd.*, 2000 NFCA 27:

On appeal, Montreal Trust did not submit that the applications judge was wrong in his construction or application of s. 66 or **Rule 29.10(g)**. Instead, **it argued that the applications judge failed to give the Act a broad and liberal interpretation to effect its remedial purposes (which include the preservation of a debtor's exigible property before entry of final judgment to ensure that any resulting judgment can be made effective)** and, more specifically, failed to consider or apply s. 33(4) of the Act. ... [para 7] [bold and italics emphases added]

[85] And *Coast Tractor & Equip. Ltd. v. Halliday*, 1987 CanLII 2760 (BC SC) (Gibbs J.):

Earlier in these reasons **garnishee before judgment was referred to as one of a genus of preservation of assets remedies together with others including the power of injunction. In *Aetna Fin. Services Ltd. v. Feigelman*, 1985 CanLII 55 (SCC), [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 971 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 4 C.P.R. (3d) 145, 15 D.L.R. (4th) 161, 32 Man. R. (2d) 241, 56 N.R. 241, during the course of determining whether a Mareva injunction should remain in place, Estey J., for the court, discussed the rationale for the power of the court to make orders for the preservation of assets. ... [para 12] [bold and italics emphases added]**

[86] These authorities confirm that a preservation-of-assets-focused order is a form of remedy against property.

[87] I find that that characterization extends to a s. 47 BIA interim receivership i.e. as a mechanism aimed at preserving the status quo, as reflected (as discussed above) in the limited powers that can be given to such a receiver.

[88] This conclusion is supported by *Canadian Imperial Bank of Commerce v Foxtrot Farms ULC*, 2024 BCSC 1019 (Masuhara J.):

In respect to the argument of nullity advanced by Foxtrot, **CIBC submits that s. 21(1) and (2) of the FDMA are not applicable because the present application is not one seeking to enforce a remedy against the property of a farmer or the recovery of debt, realization of the security, or the taking of any property of a farmer. CIBC submits that it is only taking steps to**

protect and preserve its security, and it is a future step in which it will seek a full receiver to which the notice period under s. 21(1) and (2) apply. Reliance is placed upon the Ontario case of *Jacob's Hold v. CIBC*, 2000 CanLII 22730 (ON SC), [2000] O.J. No. 5702; 52 O.R. (3d) 776.

Foxtrot relies upon the decision of Justice Joyce in *Community Futures Development Corp. v. Litzenberger*, 2006 BCSC 856, where Justice Joyce reviewed and summarized the purpose of the *FDMA* and the approach to be taken in applying the *Act*, the approach being that the *Act* is to be given "**such fair, large and liberal construction and interpretation as best ensures the attainment of its objects**" and that the "**words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation.**"

He noted the case of *Corp. Les Produits de la Jardiniere v. National Bank of Canada*, [1996] F.C.J. No. 460, which states at para. 14 in relation to the *FDMA*'s predecessor act that:

the *Act* sets out a set of temporary measures intended to enable farmers to continue operating while benefiting from a grace period before entering into arrangements with their creditors with the assistance of a panel of experts acting as a conciliator.

Foxtrot also relies upon the decision of *Westminster Savings Credit Union v. Font*, 2006 BCSC 1308, a decision of Justice Cullen (as he then was) in which he considered s. 21(1)(a), and held that the **registration of a CPL "falls within the scope of s. 21 either as part of the enforcement of a remedy or the commencement of proceedings or action execution or other proceedings for the recovery of a debt or realization of security or taking of any property of a farmer"**. *CIBC* attempted to distinguish the *Westminster* case from the present by noting the differences between a CPL and a preservation order.

I am not persuaded that the distinction assists here given the context of the **broad encompassing words "any remedy against property" and the liberal approach that is to be taken. *The language encompasses, in my view, a procedural remedy such as a preservation order. This would be much more consistent with the scheme and language of the FDMA.***

With respect to the case of *Jacob's Hold*, first, I am not bound by the Ontario decision of *Jacob's Hold*. Further, the decision does not address the broad scope of s. 21(1), thus the commentary does not assist me in the interpretation of s. 21(1). [paras 14-19] [bold and italics emphases added]

[89] And by *North 40 Farms (Re)*, 1999 CanLII 14089 (MBQB) (Reg Sharp) at paras 13-18.

[90] Per ss 21(2) *FMDA*, no step that constitutes enforcing a remedy against a farmer's property can be taken until expiry of the 15-day waiting period i.e. ss. 21(2) provides an implicit stay of proceedings in advance of any further stay that may be triggered under s. 5 *FMDA*.

[91] Accordingly, even if a s. 47 *BIA* interim receivership were warranted, NBC moved prematurely here i.e. in applying in respect of the Farmers before expiry of the implicit ss. 21(2) stay.

[92] The same applies to any form of receivership -- whether under the Judicature Act or other provincial statute authorizing the appointment of a receiver -- to the extent it is aimed at preserving the status quo i.e. providing a remedy in respect of the Farmers' property.

[93] I find that, concerning NBC's arguments in favour of a Judicature Act or other provincial-statute-based receiver that is preservation-focused, the same FMDA bar operates against them in the present circumstances i.e. concerning the Farmers.

[94] That leaves NBC's arguments in favour of an "investigative receivership."

IV. Investigative receivership

[95] To the extent NBC is seeking investigative powers for a preservation-focused receiver, the answer is that, with no preservation-focused receivership warranted or possible here, it is not necessary to consider the investigative dimension of such a receivership.

[96] If NBC is alternatively seeking a stand-alone investigative receivership, I have already explained why such is not available here as part of a s. 47 BIA interim receivership i.e. with its necessarily preservative focus and with no evidence showing how an investigation will or is likely to assist in preservation efforts.

[97] The spotlight shifts then to whether a stand-alone investigative receivership is possible and, if so, warranted here, under one or more of the Judicature Act or other provincial statutes.

[98] At paragraph 76 of its brief, NBC argued that the arguments raised in support of a s. 47 interim receiver addressing the risk of the lender's security deteriorating, the need to stabilize and preserve the debtor's business, and the loss of confidence in the debtors' management, apply equally in support of a "just or convenient" receiver under s. 13 of the Judicature Act.

[99] In answer I make the same arguments as above on those aspects.

[100] NBC provided a more detailed argument on a fourth aspect, namely, "positions and interests of other creditors." At para 78 it argued (in part):

... The final factor, regarding the positions and interests of other creditors, also militates toward the appointment of [an] Interim Receiver in this case, as (i) it appears that there is **likely an overdraft position in the Compeer Accounts, and Compeer will likely benefit from the completion of an investigation of the Impugned Transactions;** (ii) the appointment of [an] Interim Receiver will **permit the Sunterra Group to continue operations** with minimal impact on third-party creditors and stakeholders; (iii) there may be **other financial institutions or parties impacted by the Impugned Transactions and who will benefit from identification of the claims against Sunterra Group** arising from the Kiting Scheme and the Impugned Transactions; and (iv) the funding of [an] Interim Receiver, by [NBC], by way of the [proposed] Interim Receiver's Borrowing Charge, will **ensure the preservation of the Sunterra Group's property and business** while investigations are ongoing.

[101] At the hearing on March 20, Compeer's Canadian counsel advised that Compeer supports NBC's application for an interim receiver and (presumably) for an investigative receiver.

[102] However, Compeer did not provide any evidence at the hearing i.e. other than for the purpose of showing (as noted above) that it has commenced certain proceedings against some of the defendants in the US. Meaning no evidence from Compeer about its dealings with the defendants or any of them or anything else from which I might gauge how Compeer might benefit from the proposed receivership here.

[103] Neither did it bring its own application for a receiver or jointly apply with NBC.

[104] I do not find that providing a possible albeit unspecified benefit to a third party possibly involved (albeit with no details), is a sufficiently compelling reason for an investigative receiver or even a material consideration when gauging whether one should be appointed.

[105] Particularly with no evidence on whether whatever benefits might be achieved for Compeer are not achievable otherwise and, if achievable otherwise, evidence allowing an assessment of the comparative advantages and disadvantages of proceeding receiver-wise versus otherwise.

[106] Still less so concerning asserted (but unspecified) benefits for unidentified third parties (“other financial institutions or parties impacted”).

[107] As for the proposed receivership being the sole means by which the defendants (or some of them) can continue operating i.e. via the funding contemplated by the proposed receivership order, that ignores the possibility of the defendants attracting replacement financing during the current hold period (at least concerning the Farmers) and any extended stay period that might be triggered the FDMA or by other proceedings taken by the group (or some members) under the BIA or other restructuring statute.

[108] Concerning “preservation and accessibility of relevant records”, NBC presented no evidence showing any risk of destruction of records.

[109] Concerning the asserted necessity of an investigative receivership to obtaining information from Compeer or other third-party financial institutions, NBC did not show that it can only obtain such information via receivership of the defendants. For instance, it provided no evidence of having requested information from Compeer or of any response from Compeer and, if negative, the reason(s) for it declining or being unable to provide the information.

[110] NBC also alluded to the possibility of obtaining the (or some of the) information “by court order” (see para 84(e)), but did not explain further.

[111] NBC stated (paragraph 79(c)): “Any investigatory, preservatory and administrative actions can be completed by the Interim Receiver more simply and cost effectively than any available means.” But characterized the IR route as simpler and more cost-effective, it did not identify the comparables and how and why the IR route is better, other than a statement (at para 86) that “[NBC] is [not] seeking any sort of freezing order or similar relief (such as a Mareva injunction)” i.e. without any further discussion.

[112] In *Akagi s Synergy Group (2000) Inc*, 2015 ONCA 368, the Ontario Court of Appeal explored the “investigative receiver” concept, surveying the Ontario law to that point. It identified the following common factors in the cases appointing such a receiver:

Some consistent themes emerge from these authorities:

- **The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery:** *Loblaw Brands*, at paras. 10, 14 and 16.
- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric* (Div. Ct.), at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, *supra*, at para. 75.
- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see, *e.g.*, *Loblaw Brands*, at para. 17; *Century Services*.
- Finally, in all cases the investigative receivership must be **carefully tailored to what is required to assist in the recovery of the claimant's judgment** while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends. [para 90] emphasis added]

[113] As already discussed, I do not find sufficient evidence of “a risk to [NBC’s] right to recover” its claims against the defendants or that it otherwise requires “assist[ance] in the recovery” of those claims.

[114] NBC did not offer any detailed submissions on seeking a receiver under any other provincial statute *e.g.* the *Personal Property Security Act* or the *Business Corporations Act*.

V. Conclusion

[115] NBC has not shown that an interim receiver under s. 47 BIA is warranted in the present circumstances or, at least concerning the Farmers, that appointing such a receiver is possible in the face of the current FMDA hold period.

[116] And same for a provincial-statute-anchored receivership aimed at preservation of rights.

[117] It has also not shown that an investigative receivership is possible under s. 47 BIA (at least where no evidence shows how the proposed investigation(s) would aid in preservation efforts) or is warranted under the Judicature Act or any other provincial statute in the current circumstances.

[118] Accordingly, I dismiss NBC’s application for the appointment of an interim receiver under s. 47 BIA or, alternatively, an equivalent receiver under any applicable provincial statute, or alternatively, an investigative receiver under the BIA or any applicable provincial statute.

[119] The defendants are entitled to costs on a scale (*e.g.* Schedule C or otherwise) and quantum to be determined.

[120] The defendants' costs submissions, via maximum 3-page letter (excluding attachments), are due by close of business on Thursday, April 10, 2025, with NBC's due (same rules) by close of business on Thursday, April 17, 2025.

[121] I thank counsel on both sides for their helpful written and oral submissions.

Heard on the 20th day of March, 2025.

Dated at the City of Calgary, Alberta this 24th day of March, 2025.

M.J. Lema
J.C.K.B.A.

Appearances:

Sean Collins, K.C., Pantelis Kyriakakis, Nathan Stewart and Samantha Arbor
McCarthy Tetrault LLP
for the Plaintiff National Bank of Canada

David W. Mann, K.C. and Scott Chimuk
Blue Rock Law LLP
for the Respondents (Sunterra Group)

Tab 4

1 Clerk's Stamp: QUESTIONING OF RAYMOND TZUU-HAUR PAI COCHRANE, ALBERTA BY S. CHIMUK AFFIDAVIT SWORN MARCH 14, 2025 HELD MARCH 17, 2025 VIA REMOTE VIDEO COURT FILE NUMBER 2501-04252 COURT COURT OF KING'S BENCH OF ALBERTA JUDICIAL CENTRE CALGARY PLAINTIFF NATIONAL BANK OF CANADA DEFENDANTS 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	2 1 ENTERPRISES INC., PRECISION 2 LIVESTOCK DIAGNOSTICS LTD., 3 SOLETERRA D'ITALIA LTD., 4 SUNWOLD FARMS, INC., and 5 SUNTERRA FARMS IOWA, INC. 6 7 DOCUMENT QUESTIONING ON AFFIDAVIT 8 9 Taken before C. Forster, Official Court Reporter, 10 pursuant to Rules 5.26, 6.20, and 13.46 of the Court 11 of King's Bench of Alberta. 12 13 FOR THE PLAINTIFF: 14 P. Kyriakakis 15 McCarthy Tetrault LLP 16 4000, 421-7 Avenue SW 17 Calgary, Alberta 18 403-260-3500 19 20 FOR THE DEFENDANTS: 21 S.C. Chimuk 22 Blue Rock Law LLP 23 700, 215-9 Avenue SW 24 Calgary, Alberta 25 825-414-0820 26 27
3 1 OFFICIAL COURT REPORTER: 2 C. Forster, CSR(A) 3 Commissioner for Oaths Appointee No. 0691647 4 ASRA Membership No. 72 5 Dicta Court Reporting Inc. 6 760, 1015-4 Street SW 7 Calgary, Alberta 8 403-531-0590 9 10 (PROCEEDINGS COMMENCED AT 10:05 AM) 11 RAYMOND TZUU-HAUR PAI, Sworn, Questioned by 12 S. Chimuk 13 THE COURT REPORTER: Please state and spell 14 your full name for the record. 15 A Raymond Tzuu-Haur Pai. Spelt R-A-Y-M-O-N-D 16 T-Z-U-U dash H-A-U-R P-A-I. 17 THE COURT REPORTER: Okay. 18 Thank you, Mr. Chimuk. 19 S. CHIMUK: Okay. Perfect. We're 20 good to go? 21 THE COURT REPORTER: Yeah. 22 Q S. CHIMUK: Okay. Good morning, 23 Mr. Pai. My name's Scott Chimuk, and I am 24 counsel for the various Sunterra defendants in 25 the application being brought by National Bank 26 of Canada with respect to the appointment of an 27 interim receiver, okay?	4 1 A Yes. 2 Q I'd give you the file number but it's so urgent 3 we don't have one yet, so ... 4 But you know the matter that I'm referring 5 to; correct? 6 A Yes, sir. 7 Q Okay, thank you. 8 Sir, you have taken an oath today? 9 A Is that a question? 10 Q Yes. 11 A Yes. 12 Q And that means that you are going to tell the 13 truth; correct? 14 A Yes. 15 Q Sir, I understand that you are being produced 16 as corporate representative of the National 17 Bank of Canada; correct? 18 A Yes. 19 Q And your evidence is binding on National Bank 20 of Canada; correct? 21 A Yes. 22 Q A couple of preliminary issues before we get 23 into it. 24 If for whatever reason you do not 25 understand a question that I'm asking you, you 26 let me know, and I will rephrase my question 27 for you, okay?

117 1 And you agree with me that CWB had all of 2 the margin reports monthly; correct? 3 A For the months of May 2024 to December 2024. 4 Q Okay. And you'd agree with me, sir, that CWB 5 saw the cheques -- would have seen the cheques 6 going in and out of its accounts; correct? 7 A Yes. 8 Q So it would have known about the 3,493 cheques; 9 correct? 10 A Yes. 11 Q And it would have known that there were 23 12 cheques per day going between Sunterra parties 13 over a course of about approximately nine 14 months; correct? 15 A Yes. 16 Q 23 cheques per day? 17 A Yes. 18 Q And it would have known that these cheques were 19 in the aggregate amounts of 2.23 billion and 20 1.319 billion respectively; correct? 21 A Yes. For clarity, that is deposited cheques. 22 Q And I'm going to suggest to you that CWB wasn't 23 concerned with respect to any of that until 24 February 14th, when a cheque from Compeer 25 bounced; correct? 26 A No. 27 Q CWB was concerned prior to that cheque bouncing	118 1 from Compeer? 2 A Sir, as you're -- the email that you have just 3 shown, they would -- they would imply that CWB 4 was concerned. 5 Q Okay. So the only evidence of the concern 6 is -- or of any issue is the email that I 7 brought to your attention; correct? That 8 you're aware of? 9 A That I am aware of, yes. 10 Q But in July of 2023, CWB didn't put a hold on 11 any outgoing accounts of the Sunterra Group; 12 correct? 13 A I don't know that, sir. 14 Q In the course of preparing your affidavit and 15 in the course of being the point person for 16 Sunterra, you haven't -- you haven't looked at 17 whether at any point in time since 18 November 2022 to present -- prior to 19 February 2025, whether CWB took any steps with 20 respect to these accounts? 21 A No. 22 Q I'm going to suggest to you that prior to 23 February 2025, notwithstanding that CWB knew 24 about these practices, it did not undertake any 25 risk management processes with respect to these 26 practices by the Sunterra Group; correct? 27 A I don't know that, sir.
119 1 Q You'd agree with me that it knew about these 2 practices by Sunterra Group prior to 3 February 2025; correct? 4 A Yes. Clarity, provided that you have provided 5 your email correspondences. 6 Q Sorry. For clarity, you're saying -- you're 7 saying -- for clarity, you're referring to the 8 email correspondence that I -- that I brought 9 to your attention today? 10 A Yes, sir. 11 Q Now today, after seeing that, you're aware that 12 CWB was aware of these issues in July 2023; 13 correct? 14 A Yes. 15 Q And I'm going to suggest to you that CWB wasn't 16 concerned with respect to taking any risk 17 management processes prior to February 2025 18 because CWB is fully secured with respect to 19 its loans to the debtors; correct? 20 A I don't know that, sir. 21 Q I'm going to suggest to you that CWB is not in, 22 and has never been in a position where it would 23 lose money with respect to the loans because 24 there's sufficient security, and there always 25 has been? 26 A No. 27 Q Are you suggesting that there's insufficient	120 1 security with respect to the loan amounts that 2 CWB has issued today? 3 A As of today and what we know, no. 4 Q In fact, at that February 25th meeting -- the 5 February 24th meeting, 2025, between yourself, 6 CWB, FTI, and Sunterra, you'd agree with me 7 that FTI -- representatives from FTI said at 8 that meeting that CWB was fully covered by its 9 security; correct? 10 A I don't recall that. 11 Q I'm going to suggest to you that at that 12 meeting Chan said, "What we are concerned about 13 is we are concerned about hundreds of millions 14 of dollars of potential liabilities." Do you 15 recall that? 16 A No, sir. 17 Q What I'm going to suggest to you is that 18 Mr. Chan articulated that what he was concerned 19 about wasn't a lack of security for the loans, 20 but that he was concerned about potential 21 litigation with Compeer; correct? 22 A No. 23 Q I'm going to suggest to you that the concern of 24 CWB is not that there's insufficient security 25 but, rather, the concern is that CWB is 26 potentially going to be in litigation with 27 Compeer; correct?

121 1 A Can you repeat that, please? 2 Q Yes. 3 I'm suggesting to you that CWB's concern 4 isn't that there is insufficient security but 5 that CWB's concern to date is of potential 6 litigation with Compeer relating to these 7 issues? 8 A Yes. It is one of our concerns. 9 Q Okay. Sir, I'm going to suggest to you that 10 the -- a receivership application, if 11 successful, is going to put the Sunterra Group 12 into default with respect to its FCC and 13 Compeer loan agreements? 14 P. KYRIAKAKIS: Sorry, Scott, are we 15 talking about the interim receiver here or just 16 a general receivership. 17 S. CHIMUK: I'm talking about the 18 interim receiver here. 19 P. KYRIAKAKIS: Thank you. 20 Q S. CHIMUK: Sir? 21 A Your question being that -- 22 Q Yeah. So my -- 23 A -- a receivership would put FCC and Compeer in 24 default? 25 Q Will put Sunterra Group entities into default 26 with respect to FCC and Compeer? 27 A No.	122 1 S. CHIMUK: Off the record. 2 (DISCUSSION OFF THE RECORD) 3 S. CHIMUK: Back on the record. 4 You know what, let's just -- because I'm 5 playing with documents and stuff like that and 6 my computer's misbehaving, so let's just take 7 a -- let's take a 15-minute break, till quarter 8 to four. I'm nearing the end, just so you 9 know. 10 P. KYRIAKAKIS: Okay. 11 S. CHIMUK: But, yeah, take a 12 15-minute break, come back at quarter to four. 13 P. KYRIAKAKIS: Okay. 14 (ADJOURNMENT) 15 Q S. CHIMUK: Sir, you're still under 16 oath? 17 A Yes. 18 Q That means you're going to tell the truth? 19 A Yes. 20 Q Sir, pursuant to an off-the-record discussion 21 that I had with your counsel, your counsel 22 identified -- I guess there's some questions 23 that were being asked with respect to who's a 24 secured party, who's a guarantor, things of the 25 like. 26 My understanding from your counsel is that 27 the security documentation with respect to
123 1 Sunterra Beef Ltd. is attached as Exhibit "WW" 2 to your affidavit. 3 Do you accept that as your answer? 4 A Yes. 5 Q And further, my understanding is that the 6 security documentation with respect to Sunterra 7 Farms Iowa, Inc. is attached as Exhibit "NN" to 8 your affidavit; correct? 9 A Yes. 10 Q Okay. Thank you. I think that clarifies it. 11 Sorry, bear with me for a second. Sorry, 12 just one second here. Just got to find one 13 document. Sorry about that. 14 I am showing you a -- we had a discussion 15 with respect to FCC prior to the break and as 16 well as Compeer, and you had indicated that you 17 didn't think that the interim receivership 18 would put any of the Sunterra Group parties 19 offside FCC or the Compeer loans. Do you 20 recall? 21 A I do recall, yes. 22 Q Sorry, counsel? 23 P. KYRIAKAKIS: No, I'll let Scott 24 finish, but just so I can hear his question 25 first. 26 Q S. CHIMUK: Yeah. So I just -- I 27 have the third amended and restated credit	124 1 agreement in front of us here, and I guess I'll 2 first ask this question: Did you review this 3 agreement -- or does CWB have a copy of this 4 agreement, or did it obtain it at all and/or as 5 part of the document exchange with respect to 6 the priority agreement? 7 A I did not review it. 8 Q Okay. Well, I'm going to -- I'm going to 9 suggest to you that this document would have 10 been provided as part of -- likely as part of 11 that priority agreement. 12 S. CHIMUK: But in the event, I'd ask 13 that you -- I'll mark this as Exhibit D for 14 Identification, and then I'm going to ask for 15 an undertaking to confirm on the same basis as 16 sort of before, kind of as soon as possible 17 prior to the application. 18 What I want to know is if this Farm Credit 19 Canada agreement was provided to CWB, whether 20 it was reviewed by anybody at CWB, and I 21 guess -- yeah, I think those are my questions. 22 Any objection to that? 23 P. KYRIAKAKIS: Just so I make sure I 24 understand. The undertaking will be to confirm 25 whether or not the third amended and restated 26 credit agreement, the one you have opened, 27 dated June 14th, 2024, was provided to CWB, and

Tab 5

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 6

COURT FILE NO. 2501-06120

COURT **Court of King's Bench of Alberta**

JUDICIAL CENTRE **Calgary**

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

AND IN THE MATTER OF 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.

CLAIMANT **NATIONAL BANK OF CANADA**

RESPONDENTS **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., RAY PRICE, DEBBIE UFFELMAN and CRAIG THOMPSON**

DOCUMENT **CLAIM OF NATIONAL BANK OF CANADA**

PARTY FILING THIS DOCUMENT **NATIONAL BANK OF CANADA**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **McCARTHY TÉTRAULT LLP**
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File No.: 065094-580232

I. Introduction

1. This is the Claim of National Bank of Canada ("**NBC**"), filed herein pursuant to the Consent Order (Scheduling) granted by the Honourable Justice Lema herein on July 24, 2025 (the "**Consent Procedural Order**"), as may be amended, pursuant to which NBC was directed to "file and serve the NBC v. Sunterra Claim upon counsel to the Sunterra Parties with a copy to counsel to Compeer", all capitalized terms in the foregoing bearing the meanings given to those terms in the Consent Procedural Order.

2. This Claim sets forth the claims of NBC against the Respondents for:

(a) contribution and indemnity arising or in any way connected to the "**Compeer v. NBC Claim**" as defined in the Consent Procedural Order; and

(b) damages;

but excludes any claim for the "**NBC Indebtedness**" as defined, and partially quantified, in the Consent Procedural Order.

3. Insofar as NBC's claim for contribution and indemnity is concerned, NBC denies any and all liability to any third party and, in particular, to Compeer Financial, PCA ("**Compeer**"). However, in the event that NBC is found to be liable to Compeer for any judgment, including any award of interest and costs, NBC claims contribution and indemnity from each of the Respondents including because:

(a) The Respondents are legally and equitably obligated to indemnify NBC as the result of the relationship that existed between them and as a result of the conduct of the Respondents;

(b) Separately, the Respondents breached duties and obligations owed by each of them to NBC and its predecessor, Canadian Western Bank ("**CWB**"), as set forth herein; and

(c) Separately, the Respondents breached duties and obligations owed by each of them to Compeer including as set forth in the Compeer v. NBC Claim for which they are wholly and solely liable.

4. Insofar as NBC's claim for damages is concerned, such damages arise from the Respondents' breaches of duties and obligations owed by each of them to NBC and its predecessor, CWB (collectively "**NBC**" unless the context requires).

II. The Parties

5. NBC is a Schedule I bank incorporated under the *Bank Act*, S.C. 1991, c. 46, as amended, with its head office in Montreal, Quebec. Until March 1, 2025, CWB was also a Schedule I bank incorporated under the *Bank Act*. On March 1, 2025, CWB and NBC amalgamated and continued under the name “National Bank of Canada”. Until March 1, 2025, the dealings between NBC and the Respondents that are the subject of this Claim were between the Respondents and NBC’s predecessor, CWB, and thereafter were between the Respondents and NBC. References in this Claim to NBC include, as and where applicable, matters including CWB prior to amalgamation.

6. The Respondents, Sunterra Food Corporation (“**Sunterra Food**”), Trochu Meat Processors Ltd. (“**Trochu Meat**”), Sunterra Quality Food Markets Inc. (“**Sunterra Markets**”), Sunterra Farms Ltd. (“**Sunterra Canada**”), Sunwold Farms Limited (“**Sunwold Canada**”), Sunterra Beef Ltd. (“**Sunterra Beef**”), Sunterra Enterprises Inc. (“**Sunterra Enterprises**”), Sunterra Farm Enterprises Ltd. (“**Sunterra Farm Enterprises**”), and Lariagra Farms Ltd. (“**Lariagra Canada**”) (collectively, the “**Canadian Sunterra Entities**”), are, to the best knowledge of NBC, each a body corporate, incorporated pursuant to the laws of the Province of Alberta which carry on business in the City of Calgary and elsewhere.

7. Sunterra Farms Iowa, Inc. (“**Sunterra Iowa**”) is, to the best knowledge of NBC, a body corporate, incorporated pursuant to the laws of the State of Iowa.

8. Sunwold Farms Inc. (“**Sunwold US**”, Sunterra Iowa and Sunwold US are collectively referred to as, the “**US Impugned Entities**”) and Lariagra Farms South, Inc. (“**Lariagra US**” and collectively with Sunwold US and Sunterra Iowa the “**US Sunterra Entities**”) are, to the best knowledge of NBC, each a body corporate, incorporated pursuant to the laws of the State of South Dakota.

9. The Respondent, Ray Price (“**Price**”) is, to the best knowledge of NBC, an individual who resides primarily in the Province of Alberta.

10. The Respondent, Debbie Uffelman (“**Uffelman**”) is, to the best knowledge of NBC, an individual who resides primarily in the Province of Alberta.

11. The Respondent, Craig Thompson (“**Thompson**”) is, to the best knowledge of NBC, an individual who resides primarily in the Province of Alberta.

III. Relationships Among the Respondents

12. Each of the corporate Respondents are affiliates.

13. Price is a prominent business person in Alberta and has, and exerts, influence as a result of his prominence in the Alberta business community. His association with the corporate Respondents, and his prominence in the Alberta business community, influenced the relationship that NBC had with the corporate Respondents.

14. At all relevant times, to the best knowledge of NBC, Price was the President, a director and one of the ultimate beneficial owners, of each of the Canadian Sunterra Entities.

15. At all relevant times, to the best knowledge of NBC, Price was also an officer, or director or both, and one of the ultimate beneficial owners, of each of the US Sunterra Entities.

16. At all relevant times, to the best knowledge of NBC, Price had knowledge and direct oversight of, and responsibility for, the management of the Canadian Sunterra Entities and the US Sunterra Entities including in respect of the management of each of their finances, credit facilities, deposit accounts and bank accounts.

17. At all relevant times, to the best knowledge of NBC, Uffelman was a director of Lariagra Canada, and also an officer of the Canadian Sunterra Entities holding such titles as Vice President, Corporate Finance, or Chief Financial Officer or both, and had knowledge and direct oversight of, and responsibility for, the management of the Canadian Sunterra Entities' finances, credit facilities, deposit accounts and bank accounts.

18. At all relevant times to the best knowledge of NBC, Uffelman was an officer of the US Sunterra Entities. Further, and in the alternative, if Uffelman was not a *de jure* officer of the US Sunterra Entities, she was nevertheless intimately knowledgeable, and had and exercised oversight and responsibility for, the management of the US Sunterra Entities' finances, credit facilities, deposit account and bank accounts as a *de facto* officer.

19. At all relevant times, Thompson was the Financial Controller of the Canadian Sunterra Entities, a signing officer in respect of the Canadian Sunterra Entities, and to the extent Thompson was not a *de jure* officer of the Canadian Sunterra Entities, he was nevertheless intimately knowledgeable, and had and exercised oversight and responsibility for, the management of the Canadian Sunterra Entities' finances, credit facilities, deposit account and bank accounts as a *de facto* officer.

IV. Relationships Between Respondents and CWB/NBC

20. The relationships between the Respondents and NBC, and its predecessor, CWB, which give rise to the within Claim were long-standing and multi-faceted. One result of the long-standing

and multi-faceted relationship, coupled with the prominence of Price in the Alberta business community, was that NBC came to trust the Respondents in their business dealings and the Respondents' explanations for the way in which they conducted business and operated the various credit facilities granted to the corporate Respondents and bank accounts held by the corporate Respondents with NBC.

1. Relationships Specific to Operation of Bank Accounts

21. Sunterra Canada and Sunwold Canada operated bank accounts with NBC (the “**NBC Accounts**”). So far as NBC is aware, the NBC Accounts were the primary or only bank accounts operated by these corporate Respondents.

22. The operation of the NBC Accounts was governed by, among other things, common law obligations, statutory obligations and representations including those set forth in the *Bills of Exchange Act*, RSC 1985, c. B-4 and certain Account Application Agreements together with a standard form of Business Account Agreement that was then in force and as was updated from time to time.

a) Common Law Obligations

23. The common law obligations of the Respondents to NBC concerning the operation of their respective NBC Accounts included duties:

- (a) not to operate the NBC Accounts in a fraudulent manner, for example, by undertaking cheque kiting activities; and
- (b) to be truthful, without deceit, in responding to inquiries from bank officials as to the financial circumstances of the corporate Respondents and as to the business purposes for drawing cheques on, and depositing cheques into, the NBC Accounts.

b) Statutory Obligations and Representations

24. The statutory obligations and representations of the corporate Respondents included that:

- (a) pursuant to sections 129 and 165 of the *Bills of Exchange Act*, on each occasion that the corporate Respondents drew a cheque on their NBC Account (which, on each occasion, was caused by one or more of the individual Respondents), such corporate Respondent engaged that on due presentment the cheque shall be accepted and paid according to its tenor and that, if it was dishonoured, the drawer would compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour were duly taken; and

(b) pursuant to section 132 and 165 of the *Bills of Exchange Act*, by endorsing a cheque for deposit to its account (which, on most if not all occasions was caused by one or more of the individual Respondents), such corporate Respondent engaged that on due presentment the cheque shall be accepted and paid according to its tenor and that, if it was dishonoured, the endorser would compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceedings on dishonour were duly taken.

c) Business Account Agreements

25. Each of the corporate Respondents' NBC Bank Accounts was governed by a Business Account Agreement made between that corporate Respondent and NBC. Pursuant to the Business Account Agreements, each of the corporate Respondents (defined in the Business Account Agreements as the "**Business**"), understood and agreed that:

(a) NBC would have no obligation to honour and NBC may, in its sole discretion, refuse to honour, any instrument, cheque or transaction which, if honoured, may overdraw the NBC Account or increase the overdraft of the NBC Account;

(b) each corporate Respondent would be responsible for all use of its cheques, instruments and other debits to the NBC Account and that NBC would have no responsibility for forged cheques, instruments or unauthorized transactions unless the corporate Respondent could show that it took reasonable precautions to protect such cheques, instruments and transactions and that it took reasonable care to examine its statements of Account and transaction information;

(c) those persons named in the application for the NBC Account as Authorized Signing Officers or those persons designated in the corporate resolutions, authorizing certificates or other written instructions provided to NBC at any time by the Business were authorized to undertake the following activities, subject to the conditions set out in the Business Account Agreement:

(i) to sign, endorse, make, draw, and/or accept all Instruments (as defined in the Business Account Agreement which includes "cheques") and generally all documents for the purpose of binding or obligating the Business in any way in connection with the Account and transactions with NBC whether or not an overdraft was thereby created and, Instruments and documents so signed shall be binding upon the Business; and

(ii) to negotiate with, deposit or transfer to NBC (but for the credit of the Account only) any and all money, cheques, promissory notes, bills of exchange or other negotiable instruments, and orders for the payment of money and for the said purpose to draw, make, sign, endorse (by rubber stamp or otherwise) any and all of the foregoing, and every such signature or stamping shall be binding on the Business;

(d) the Business was responsible for determining the suitability of individuals appointed as Authorized Signing Officers and that NBC shall not in any way be liable or held responsible for any loss suffered by the Business caused by any act or omission, or wrongful conduct of any Authorized Signing Officer appointed by the Business;

(e) the Business would diligently supervise and monitor the conduct and work of all Authorized Signing Officers and all agents and employees having a role in the preparation of Instruments and the Business's bank statement reconciliation or other banking functions; and

(f) the Business shall provide a copy of this Agreement to its Authorized Signing Officers and shall require that they agree to and abide by its terms.

26. Each of Price, Uffelman and Thompson were Authorized Signing Officers within the meaning of the Business Account Agreement applicable to the respective NBC Accounts held by each of the corporate Respondents and had actual knowledge of the terms of the Business Account Agreements applicable to each of the NBC Accounts held by the corporate Respondents. In the alternative, if Price, Uffelman and Thompson did not have actual knowledge of the terms of the Business Account Agreements, they ought to have known of such terms and their ignorance of such terms is a product of recklessness or willful blindness.

27. On or around June 17, 2020, at the request of the Canadian Sunterra Entities, various holds associated with the Canadian Sunterra Entities' NBC Accounts was increased from \$250,000 to \$1,000,000, on the basis that the head office of the Canadian Sunterra Entities was located out of town and that numerous deposits would be made, at once.

2. Debtor/Creditor Relationships

28. In addition to their relationship with NBC as account holders, Sunwold Canada, Sunterra Canada, Sunterra Markets, Trochu Meat, and Sunterra Food (collectively, the "**Borrowers**") were also borrowers from NBC pursuant to that certain Amended and Restated Commitment Letter

dated November 15, 2022, between NBC as lender and the Borrowers as borrowers (the **“Commitment Letter”**).

29. The Borrowers’ reporting requirements were set out at Schedule “C” to the Commitment Letter, including their obligations to provide monthly, quarterly, and annual reporting. The Borrowers were obligated to, among other things:

- (a) provide combined internally prepared financial statements (balance sheet and profit and loss) on a monthly basis;
 - (b) provide an Officer’s Compliance Certificate certifying that all lending conditions and requirements are being complied with, including the calculation of applicable financial covenants and supporting documents, on a quarterly and annual basis; and,
 - (c) provide audited, consolidated financial statements together with a business plan including projected balance sheets with profit and loss and cash flow statements as well as capital expenditure forecasts for the upcoming fiscal year, on an annual basis
- (collectively, the **“Commitment Letter Reporting Requirements”**).

30. Despite the requirement of the Borrowers to provide audited statements on an annual basis, the Borrowers did not provide annual financial statements following the provision of audited financial statements for the year ended December 31, 2022. Specifically, for the year ended December 31, 2023, the only financial statements provided were prepared to the “compilation engagement” assurance standard, and not audited or the subject of a review engagement.

31. The Commitment Letter Reporting Requirements were in addition to general requirements under the GSAs to, among other things:

- (a) carry on and conduct business in an efficient and proper manner;
 - (b) keep proper books of account and records of all transactions; and
 - (c) observe and conform to all valid requirements of law and of any governmental or municipal authority
- (collectively, the **“Commitment Letter Operational Requirements”**).

32. The Commitment Letter is only the most recent iteration of a long-standing debtor-creditor relationship between NBC and the Borrowers (and other Respondents). Most recently, pursuant to the Commitment Letter, NBC made the following availments to the Borrowers:

- (a) a demand operating loan, in the maximum amount of \$12,000,000;

- (b) a demand non-revolving loan, in the maximum amount outstanding of \$982,272; and,
 - (c) a demand collateral mortgage, in the maximum amount of \$7,000,000
- (collectively, the “**Credit Facilities**”).

33. It has already been determined pursuant to the Consent Procedural Order that:

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.

(the “**Credit Facility Indebtedness**”).

3. Guarantees

34. In addition to their relationship with NBC as bank account holders and borrowers as set out above, the Borrowers, Lariagra, Sunterra Farm Enterprises, Sunterra Enterprises, and Sunterra Beef (collectively, the “**Guarantors**”), are also guarantors of some or all of the Borrowers’ Credit Facility Indebtedness and all other debts, liabilities, obligations and indebtedness due and owing by the Borrowers to NBC.

35. The Credit Facility Indebtedness and all other debts, liabilities, obligations, and indebtedness, due and owing by the Borrowers to NBC are guaranteed pursuant to the following:

- (a) a Multiple Entity Cross Guarantee, dated January 23, 2023, granted by Sunterra Food, Trochu Meat, Sunterra Markets, Sunterra Canada, and Sunwold Canada, to and in favour of NBC;
- (b) Full Liability Guarantee, dated December 6, 2013, granted by Sunterra Beef, to and in favour of NBC;
- (c) Full Liability Guarantee, dated December 31, 2020, granted by Sunterra Enterprises, Sunterra Iowa, and Sunwold US, to and in favour of NBC;
- (d) Full Liability Guarantee, dated December 31, 2020, granted by Sunterra Farm Enterprises, Sunterra Canada, and Sunwold Canada, to and in favour of NBC;

- (e) Full Liability Guarantee, dated January 23, 2023, granted by Lariagra, to and in favour of NBC;
 - (f) Full Liability Guarantee, dated January 23, 2023, granted by Sunterra Beef, to and in favour of NBC;
 - (g) Full Liability Guarantee, dated January 23, 2023, granted by Sunterra Enterprises, to and in favour of NBC; and,
 - (h) Full Liability Guarantee, dated January 23, 2023, granted by Sunterra Farm Enterprises, to and in favour of NBC,
- (collectively, the “**Guarantees**”).

36. Pursuant to the Guarantees, each Guarantor thereunder, jointly and severally, unconditionally guaranteed payment, to NBC, of all present and future debts and liabilities, direct or indirect, absolute or contingent, now or at any time and from time to time due or owing to NBC, by the applicable Borrower(s), whether as principal or surety, and whether incurred by one or more of the Borrower(s) alone or jointly with any other person or persons, or otherwise howsoever, together with all costs, charges, and expenses (including legal fees on a solicitor and client basis), as incurred by NBC.

4. NBC Security

a) General Security Agreements

37. As continuing security for all indebtedness, liabilities, and obligations, owed to NBC, the Canadian Sunterra Entities executed and delivered, among others, the following general security agreements, to and in favour of NBC:

- (a) General Security Agreement, dated September 20, 2010, granted by Sunterra Food;
- (b) General Security Agreement, dated September 20, 2010, granted by Sunterra Markets;
- (c) General Security Agreement, dated September 20, 2010, granted by Trochu Meat;
- (d) General Security Agreement, dated December 6, 2013, granted by Sunterra Beef;
- (e) General Security Agreement, dated January 23, 2023, granted by Sunterra Canada; and,

(f) General Security Agreement, dated January 23, 2023, granted by Sunwold Canada,

(collectively, the “**GSAs**”).

38. Pursuant to the GSAs, as general continuing collateral security for the payment and performance of any and all obligations, indebtedness, and liability (including but not limited to principal, interest, and all costs on a full indemnity basis) present or future, direct or indirect, absolute or contingent, matured or not, extended or renewed, wherever and however incurred, together with any ultimate unpaid balance thereof, whether the same is from time to time reduced and thereafter increased or entirely extinguished and thereafter incurred again, the applicable Canadian Sunterra Entities each:

(a) granted, assigned, conveyed, mortgaged, pledged, and charged, as and by way of a specific mortgage, pledge, and charge, and granted a continuing security interest, in all their present and after-acquired personal property; and,

(b) charged, as and by way of a floating charge, all of the their right, title and interest, in and to all of their presently owned or held and after acquired or held, real, immovable and leasehold property and all interests therein, and all easements, rights-of-way, privileges, benefits, licenses, improvements and rights whether connected therewith or appurtenant thereto or separately owned or held, including all structures and fixtures,

(collectively, the “**GSA Collateral**”).

b) Other Personal Property Security

39. As continuing security for the Indebtedness and other obligations and liabilities owed to NBC, the Canadian Sunterra Entities and US Sunterra Entities executed and delivered, among others, the following security agreements:

(a) Assignment and Postponement of Creditor’s Claims, dated September 20, 2010, granted by Sunterra Beef, to and in favour of NBC;

(b) Assignment and Postponement of Creditor’s Claims, dated December 6, 2013, granted by Sunterra Farm Enterprises, to and in favour of NBC;

(c) Assignment and Postponement of Creditor’s Claims, dated December 31, 2020, granted by Sunterra Enterprises, to and in favour of NBC;

(d) Assignment and Postponement of Creditor’s Claims, dated December 31, 2020, granted by Sunterra Iowa, to and in favour of NBC;

- (e) Assignment and Postponement of Creditor's Claims, dated December 31, 2020, granted by Sunterra Canada, to and in favour of NBC;
 - (f) Assignment and Postponement of Creditor's Claims, dated December 31, 2020, granted by Sunwold Canada, to and in favour of NBC;
 - (g) Assignment and Postponement of Creditor's Claims, dated December 31, 2020, granted by Sunwold US, to and in favour of NBC;
 - (h) Assignment and Postponement of Creditor's Claims, dated January 23, 2023, granted by Lariagra, to and in favour of NBC;
 - (i) Assignment and Postponement of Creditor's Claims, dated January 23, 2023, granted by Sunterra Beef, to and in favour of NBC;
 - (j) Assignment and Postponement of Creditor's Claims, dated January 23, 2023, granted by Sunterra Enterprises, to and in favour of NBC; and,
 - (k) Assignment and Postponement of Creditor's Claims, dated January 23, 2023, granted by Sunterra Farm Enterprises, to and in favour of NBC,
- (collectively, the **"Additional Security"**, and with the GSAs collectively the **"Personal Property Security"**).

c) Real Property Security

40. As continuing security for the Borrowers' obligations to NBC, Trochu Meat executed and delivered, to NBC, a Land Mortgage, dated January 23, 2023 (the **"Trochu Mortgage"**, and together with the Trochu Mortgage and the Personal Property Security, collectively the **"Security"**), in the principal amount of \$13,000,000.

41. Pursuant to the Trochu Mortgage, as additional and continuing collateral security, Trochu Meat, as mortgagor, mortgaged, encumbered, and charged, to and in favour of NBC, as mortgagee, all of its estate and interest in and to the lands and premises municipally described as 233 North Road, Trochu, Alberta and legally described as PLAN 7711418, BLOCK A, EXCEPTING THE ROAD ON SUBDIVISION PLAN 8310022 CONTAINING 0.188 HECTARES (0.465 ACRES) MORE OR LESS, EXCEPTING THEREOUT ALL MINES AND MINERALS (the **"Real Property Collateral"** and, together with the GSA Collateral, the **"Collateral"**).

d) Perfection and Registration

42. NBC perfected its security interests, as and against all of the Collateral, by registering:

- (a) financing statements, in the personal property registry of Alberta (the “**PPR**”), as and against the applicable Canadian Sunterra Entities;
- (b) a land charge, in the PPR, as and against the Borrowers and Sunterra Beef; and,
- (c) the Trochu Mortgage, against the Certificate of Title concerning the Real Property Collateral.

V. Relationships Between Respondents and Compeer

43. The relationships between the Respondents and Compeer are not within the personal knowledge of NBC. However, it is the general understanding of NBC, gained primarily from these proceedings, that:

- (a) Compeer is an entity formed under the laws of the United States that is a member-owned cooperative which provides loans, leases, risk management and other financial services;
- (b) The US Sunterra Entities were customers of Compeer including in respect of revolving lines of credit (“**RLOCs**”) which the US Sunterra Entities were to use to fund their operations and associated deposit accounts, which Compeer refers to as “Farm Cash Management” accounts or “**FCM Accounts**”;
- (c) A feature of the RLOCs was that the US Sunterra Entities could borrow certain amounts from Compeer, on a revolving basis;
- (d) A feature of the FCM Accounts was that the US Sunterra Entities could deposit money and earn interest on the money deposited into the FCM Accounts;
- (e) Compeer treated the RLOCs and FCM Accounts as off-setting one another such that the net aggregate balance of a particular RLOC and a particular FCM Account taken together determined whether Compeer was a creditor of, or debtor to, the US Sunterra Entity that held the associated RLOC and FCM Account (collectively, “**Compeer Accounts**”); and
- (f) Another feature of each of the pairs of combined Compeer Accounts was that cheques could be drawn on the accounts which could be up to the aggregate value of all deposits into its FCM Account and the amount of credit afforded to the US Sunterra Entity under its RLOC.

VI. Livestock Operation Details

44. The operations of Sunterra Canada, Sunwold Canada, Lariagra, and the US Sunterra Entities included the husbandry, raising, management, and selling of pigs (collectively, the “**Livestock**”). Specifically:

(a) Sunterra Canada owned and operated two (2) livestock facilities in Alberta and approximately 11 other facilities, including barns for nurseries and sow isolation;

(b) Sunterra Canada would, at any time during the period from January 2023 to December 2024, own approximately 12,500 market Livestock and approximately 2,300 breeding Livestock;

(c) Sunwold Canada owned and operated 1 Livestock facility in Alberta and 9 other facilities, and would, at any time during the period from January 2023 to December 2024, own approximately 25,500 market Livestock and approximately 3,100 breeding Livestock; and,

(d) Lariagra owned 3 facilities in Alberta and housed approximately 2,400 pigs, (collectively, the “**Livestock Operations**”).

45. The Livestock Operations involved cross-border transactions. Specifically, Sunterra Canada, Lariagra, and Sunwold Canada initially bred and weaned Livestock in Canada, the majority of which was then exported, to the United States of America, for finishing and ultimate sale, by Sunwold US and Lariagra US.

46. On average, as part of the Livestock Operations, approximately 5,000 thousand Livestock were sold, by Sunterra Canada and Sunwold Canada, to Lariagra US and Sunwold US, every week, generally at market pricing. Generally, Livestock was delivered by Sunterra Canada and Sunwold Canada to Sunwold US and/or Lariagra US. Upon receiving delivery of Livestock, from Sunterra Canada or Sunwold Canada, as applicable, Lariagra US or Sunwold US, would become indebted to Sunterra Canada or Sunwold Canada (“**Livestock Receivable**”) for the purchase of the applicable Livestock, to the exporting Canadian entity.

47. The Livestock Receivable was typically held by Sunterra Canada or Sunwold Canada, as applicable, for a period of up to two (2) years before payment was received.

48. Upon receipt of the Livestock, Lariagra US and Sunwold US engaged the services of Sunterra Iowa to operate, raise, and manage the Livestock. In return for providing these services,

Sunterra Iowa received payments, in connection with the operation and management of such Livestock, from Lariagra US and Sunwold US.

49. In connection with the foregoing, some exchange of cheques between the Canadian Sunterra Entities and the US Sunterra Entities was expected. However, the Respondents and the US Sunterra Entities were discovered to be engaging in a scheme that went well beyond the ordinary and expected exchange of cheques.

VII. The Fraudulent Kiting Scheme

50. Cheque kiting takes advantage of conditional liquidity provided by banks, to their customers, in connection with cheque deposits. Generally, when depositing cheques, provisional credit (often referred to as “float”) is provided to the depositing customer, due to the sequencing between: (i) the deposit of the cheque; (ii) the customer having access to those funds; and, (iii) the clearing and settlement process of a cheque, through the Automated Clearing Settlement System (“**ACSS**”) or the United States Bulk Exchange (“**USBE**”), as applicable.

51. NBC, like most banks, “conditionally credits” cheque deposits to recipients’ accounts as float, before final settlement occurs through ACSS or USBE.

52. The Canadian Sunterra Entities, like many commercial banking customers, were not subject to holds on cheque funds, for amounts under \$1,000,000 following the Canadian Sunterra Entities’ request to increase the hold limit on the NBC Accounts in or around June 2020.

53. Any cheques deposited, into the Canadian Sunterra Entities’ NBC Accounts, for an amount under \$1,000,000, were immediately available for use by the depositor, in the amount of their face value, by way of conditional credit or float, before underlying funds were settled through ACSS or USBE (as applicable).

54. It is NBC’s understanding that Compeer likewise “conditionally credited” the US Sunterra Entities’ Compeer Accounts when a cheque was deposited either to pay down an RLOC or to increase the balance of an FCM Account.

55. The Canadian Sunterra Entities, specifically Sunterra Canada and Sunwold Canada, and the US Impugned Entities, fraudulently utilized the conditional credit or float provided by NBC and Compeer to conduct a highly sophisticated cheque kiting scheme (the “**Kiting Scheme**”) by utilizing the NBC Accounts in Canada and the Compeer Accounts in the United States.

VIII. General Mechanics of the Kiting Scheme

56. The Kiting Scheme exploited the availability of conditional credit to the applicable Canadian Sunterra Entities' and US Sunterra Entities' benefit. The US Impugned Entities continuously issued new and additional cheques from the Compeer Accounts and requested that NBC, on behalf of either Sunterra Canada and Sunwold Canada (together, the "**Canadian Impugned Entities**"), issue new and additional cheques from the NBC Accounts, in increasing numbers over time, to create existing and outstanding conditional credit, to be satisfied by new conditional credit (accruing with the issuance of new cheques) on an ongoing basis.

57. The following describes the basic mechanics of one cycle of the Kiting Scheme:

- (a) Step 1: A US Impugned Entity would issue a cheque ("**Cheque #1**"), from one of the US Impugned Entities' Compeer Accounts, for an amount under \$1 million, to be deposited into one of the Canadian Impugned Entities' NBC Accounts;
- (b) Step 2: NBC would "conditionally credit" the applicable NBC Account, for the face value of Cheque #1, upon deposit. As a result, the face value of Cheque #1 would be available for use, by the applicable Canadian Impugned Entity, even though NBC had not yet received final settlement of Cheque #1;
- (c) Step 3: The Canadian Impugned Entity would then, prior to Cheque #1 being returned by Compeer due to there being insufficient funds on deposit to clear Cheque #1, issue one or more new cheques, each under \$1 million (collectively, "**Cheque #2**") to one or both of the US Impugned Entities, from the corresponding NBC Account, by utilizing the conditional credit or float provided by NBC in connection with Cheque #1;
- (d) Step 4: Cheque #2 would be deposited into the Compeer Accounts, Compeer would then "conditionally credit" the applicable US Impugned Entity's Compeer Account, for the face value of Cheque #2. As a result, the face value of Cheque #2 would be available for use by the applicable accountholder, to cover the US Impugned Entities' liquidity needs and the obligations arising in connection with Cheque #1.
- (e) Step 5: The US Sunterra Entity would then proceed to issue one or more new cheques, each under \$1 million (collectively, "**Cheque #3**"), to one or both of the Canadian Impugned Entities, from the corresponding US Impugned Entities' Compeer Account, utilizing the conditional credit provided in connection with Cheque #2; and,

(f) Step 6: NBC would then “conditionally credit” the applicable Canadian Impugned Entity’s NBC Account, for the face value of Cheque #3, upon deposit. As a result, the face value of Cheque #3 would be available for use by the applicable NBC accountholder, to cover the Canadian Impugned Entities’ liquidity needs and the obligations arising in connection with Cheque #2.

58. Sunterra Canada, Sunwold Canada and the US Impugned Entities undertook this elaborate scheme, on an almost daily basis, so as to ensure that there was always sufficient conditional credit available to cover the outstanding Impugned Cheque obligations and to create the illusion that fresh funds were being deposited.

59. Specifically, for the period between January 1, 2023 up to and including February 28, 2025 (the “**Updated Review Period**”):

(a) Sunterra Canada received incoming cheques, mainly from the US Impugned Entities’ Compeer Accounts, in the aggregate amount of approximately \$7.78 billion, and issued outgoing cheques, mainly to the U.S. Impugned Entities’ Compeer Accounts, in the aggregate amount of approximately \$7.73 billion; and,

(b) Sunwold Canada received incoming cheques, mainly from the US Impugned Entities’ Compeer Accounts, in the aggregate amount of approximately \$2.77 billion, and issued outgoing cheques, mainly to the US Impugned Entities’ Compeer Accounts, in the aggregate amount of approximately \$2.76 billion.

60. Each of these cheques issued by the US Sunterra Entities and deposited into the NBC Accounts were under \$1,000,000, being the hold limit of the NBC Accounts and the threshold at which such cheques would undergo additional scrutiny by applicable clearing banks, namely ACSS or USBE. Similarly, all cheques issued by Sunterra Canada and Sunwold Canada to be deposited into the Compeer Accounts were also under \$1,000,000.

61. The vast majority of the cheques at issue were signed by the individual Respondents.

62. All of the cheques at issue were drawn by Sunterra Canada and Sunwold Canada at the instigation of the individual Respondents.

63. At no time did the respective drawer of such cheques have sufficient funds in its NBC Account to cover such cheques except as the result of depositing cheques to its NBC Account for a similar amount drawn on its Compeer Accounts in a perpetual cycle. Correspondingly, the drawer of the cheques drawn on the Compeer Accounts for deposit to the NBC Accounts did not

have sufficient funds in its Compeer Account to cover such cheques except as the result of previously depositing cheques for a similar amount drawn on its NBC Account in a perpetual cycle.

64. At all relevant times, the drawers of such cheques and the individual Respondents that prepared and signed such cheques, or caused such cheques to be prepared and signed, knew that there were insufficient funds in the drawer's account to cover such cheques but for the perpetual cycle of drawing and depositing cheques. The corporate Respondents utilized a unified accounting system that integrated all financial activities of the US Sunterra Entities and the Canadian Sunterra Entities and, as a result, the individual Respondents and others with access to, knowledge of and responsibility for the financial activities of the Canadian Sunterra Entities – including Price, Uffelman, and Thompson – knew that there were insufficient funds to cover the cheques used to perpetrate the Kiting Scheme.

65. Further, and in the alternative, if the drawers of such cheques or the individual Respondents that prepared and signed such cheques, or caused such cheques to be prepared and signed, did not have actual knowledge that there were insufficient funds in the drawer's account to cover such cheques but for the perpetual cycle of drawing and depositing cheques, that lack of knowledge was the result of willful blindness or recklessness.

66. There was no legitimate or lawful commercial purpose for the Kiting Scheme. The volume and frequency of the Impugned Transactions is not consistent with the cash requirements, operations, or enterprise value of the drawer's business.

67. The Kiting Scheme also included the following commonalities indicative of fraud:

- (a) the vast majority of issued cheques were in an amount ranging from \$800,000 to \$999,000 and all were less than the \$1 million threshold (including after conversion of any USD cheques to CAD), over which threshold such cheques would undergo additional scrutiny by applicable clearing banks and would be subject to a further hold, with respect to transactions taking place in the NBC Accounts;
- (b) the transactions were all undertaken by way of physical cheques, rather than by EFT or wire transfer, which is far more convenient and common, especially in cross-border related entity transactions;
- (c) each of the cheques, were deposited individually, as multiple individual deposits, rather than one deposit, at the specific request and direction of the applicable Canadian Sunterra Entity, to circumvent the holds and availability limits placed on the applicable

NBC Accounts and allow immediate access to funds for the full face value of all deposited cheques in contravention of NBC's policies; and

(d) the cheques had no memo line or reference to any existing invoice or ledger.

IX. The Unauthorized Overdrafts and the Respondents' Admissions

68. NBC discovered an issue with the NBC Accounts in February 2025. By February 14, 2025, Sunterra Canada's and Sunwold Canada's NBC Accounts had accumulated unauthorized overdrafts in excess of US\$43 million (the "**Unauthorized Overdrafts**").

69. Immediately upon discovering the Unauthorized Overdrafts, NBC contacted Price.

70. On Friday, February 14, 2025, Price advised NBC, by email (the "**February 14 Email**"), that, among other things, the Unauthorized Overdrafts were caused as a result of Sunterra Canada and Sunwold Canada operating on a cash tax basis, while the US Sunterra Entities operated on an accrual basis. Price further advised that as a result, Sunterra Canada, Sunwold Canada, and the US Sunterra Entities would move cash from the US Sunterra Entities to Sunterra Canada and Sunwold Canada, but in order to keep the US Sunterra Entities with the appropriate cash, they would move money back down to the US Sunterra Entities on an "advance" basis.

71. Furthermore, in the February 14 Email, Price admitted that these intercompany transfers "grew beyond what they were meant to be", as Sunterra Canada, Sunwold Canada, and the US Sunterra Entities continued to make sure that they had the money they needed.

72. Based on the above, NBC immediately requested and attended two separate meetings with the senior most members of the Price family, including Arthur and Glenn Price, as follows:

(a) On Monday, February 17, 2025, a virtual meeting was held among Raymond Pai, Dean Chan, Price, and his brother, Arthur Price. At the time, Arthur Price advised that he was retired from active management of the Sunterra Group but continues as the Chairman of the Board of Directors. The virtual meeting was in the nature of an introductory call and an outline of preliminary information requests and discussions surrounding the path forward. During this preliminary call, Price did not speak; and,

(b) On Monday, February 24, 2025, an in person meeting was held among Arthur Price, Glen Price, Raymond Pai, Dean Chan, and Dustin Olver of FTI Consulting Canada Inc. (who was then acting in the capacity as consultant to NBC's counsel). In the meeting, among other things, Arthur Price advised:

- (i) the Impugned Transactions and Unauthorized Overdrafts were caused by Price;
- (ii) they were unaware of the Impugned Transactions undertaken by Price, and were upset and disappointed with Price for having undertaken the Impugned Transactions;
- (iii) the Impugned Transactions were a mistake;
- (iv) that in order to ensure that the Canadian Impugned Entities' NBC Accounts and the US Impugned Entities' Compeer Accounts had sufficient conditional credit to satisfy their respective obligations, the Impugned Entities maintained an active log of all available conditional credit, under the Impugned Cheques on a rolling three (3) day basis;
- (v) Price would be removed as a signatory on all Sunterra Group banking transactions;
- (vi) the Sunterra Group would fully cooperate with FTI Consulting Canada Inc., including by providing timely responses for requests for information;
- (vii) the Sunterra Group would provide written consent to NBC and Compeer, being the holder of the Compeer Accounts, to facilitate and allow Compeer and NBC to discuss all aspects of the Impugned Transactions; and,
- (viii) the Sunterra Group would provide information to NBC relating to the Impugned Transactions, including, without limitation, by providing up to date account statements for the Compeer Accounts.

73. The Kiting Scheme was stopped by Compeer and NBC. The Compeer Accounts of the US Sunterra Entities became immediately overdrawn and the Respondents were unable to provide any cash to reduce or eliminate such overdrafts.

X. Compeer Commences US Receivership Proceedings

74. On March 18, 2025, Compeer filed a verified complaint (the "**Complaint**") in the United States District Court, District of South Dakota, Southern Division (the "**US District Court**") against the US Sunterra Entities.

75. Compeer's Complaint alleged breach of contract and fraud claims, among others, against the US Sunterra Entities, stemming from the US Sunterra Entities' alleged Kiting Scheme and subsequent defaults with Compeer.

76. On March 28, 2025, the US District Court granted Compeer's motion to appoint a receiver (the "**US Receivership Order**") in the proceedings (the "**US Receivership Proceedings**") and appointed Pipestone Management II, LLC as the receiver (the "**US Receiver**") of the US Sunterra Entities, with duties that included investigating the Kiting Scheme.

XI. Borrowers Commence NOI & CCAA Proceedings

77. On the eve of the granting of the US Receivership Order, on March 24, 2025, each of the Borrowers filed Notices of Intention to File a Proposal, pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "**BIA**") commencing proceedings under the BIA (the "**NOI Proceedings**").

78. On April 15, 2025, the Borrowers, Sunterra Beef, Lariagra, Sunterra Farm Enterprises, and Sunterra Enterprises (collectively, the "**CCAA Entities**"), applied to this Honourable Court for an initial order (the "**Initial Order**") to commence proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (the "**CCAA**").

79. The Initial Order was granted on April 22, 2025, which, among other things, converted and continued the NOI Proceedings into the CCAA Proceedings, under the CCAA

80. On April 28, 2025, an Amended and Restated Initial Order (the "**ARIO**") was granted in the CCAA Proceedings.

XII. Sale of US Sunterra under US Receivership Proceedings

81. On May 14, 2025, the US Receiver filed a motion, supporting memorandum, affidavit, and proposed order, requesting the US District Court to set an expedited hearing to approve a sale to The Pork Group, Inc. ("**TPG**"), of pigs, rolling stock, and an assignment of all the current barn leases, owned or held by various US Sunterra Entities, for a purchase price of approximately \$15,000,000 (the "**US Sunterra Sale**").

82. On May 30, 2025, the US District Court granted the Order approving the US Receiver's Motion to Authorize Private Sale, which, among other things, approved the US Sunterra Sale.

XIII. Compeer Claims Against Sunterra

83. The proceeds from the US Sunterra Sale are insufficient to repay the indebtedness, liabilities, and obligations owed by the US Sunterra Entities to Compeer (the "**Compeer Indebtedness**"), including those resulting from the Kiting Scheme.

84. On June 2, 2025, Compeer filed a Statement of Claim in this Honourable Court, Judicial Centre Edmonton, in Action No. 2503-10998, against Sunterra Canada, Sunwold Canada, Sunterra Enterprises, Price, and Uffelman, seeking, among other relief:

- (a) a declaration that Sunterra Canada, Sunwold Canda, Price, and Uffelman 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, from Sunterra Canada, Sunwold Canada, Price, and Uffelman, arising from their fraudulent and oppressive conduct, namely their perpetuation of the Kiting Scheme (as defined below), 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 amount as may be determined, from Sunterra Enterprises for its breach of guarantees, or owing under such guarantees, granted by Sunterra Enterprises to Compeer;
 - (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 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 by Sunterra Canada, Sunwold Canada, Price, and Uffelman, from the funds obtained as a result of the Kiting Scheme and the disgorgement of same; and,
 - (g) an order, to the extent necessary, declaring that Compeer is entitled to pierce the corporate veil of Sunterra Canada and Sunwold Canada, to enforce their claims and seek damages against Price and/or Uffelman,
- (collectively, the "**Compeer v Sunterra Fraud Claims**").

85. On or about June 23, 2025, Compeer filed an Application for declaratory relief and summary judgment of its claims against the noted Sunterra parties in this Action which is the subject of a further procedural order granted by the Honourable Justice Lema on July 24, 2025 granted at the same time as the Consent Procedural Order referenced herein.

XIV. Compeer Claims Against NBC

86. NBC reasonably expects that if Compeer is unable to fully recover the amount of the Compeer Indebtedness, less the amount by which the Compeer Indebtedness was satisfied from the proceeds of the US Sunterra Sale (the net amount being the "**Compeer Shortfall**" which is

estimated to be the range of USD\$15 million), Compeer will seek to recover the Compeer Shortfall from NBC.

87. NBC has sought confirmation of Compeer's intention to commence an action against NBC arising from, or related to, the Compeer Shortfall. By email date July 23, 2025, counsel for Compeer advised, among other things:

We can further advise that while Compeer agrees with National and Sunterra that it may have a claim against National, it is simply not in a position to advance one at this time. It has been focusing its efforts on the issues as they relate to the Sunterra Entities and their directors and officers which are clearly relevant to these proceedings and has had inadequate time and information to consider or advance a claim in respect of National and it reserves its right to do so outside of the CCAA Proceedings in the ordinary course.

88. By Application filed on August 25, 2025, NBC has sought an order requiring Compeer to file an election, on or before September 30, 2025, in which Compeer: (i) indicates whether it intends to advance a claim against NBC in respect of any facts, circumstances or matters that give rise to the Compeer v. NBC Claim, as defined in the Consent Procedural Order; and, (ii) if so, requiring Compeer to (a) outline the bases of such claim; and (b) provide a range of the quantum of such claim.

XV. NBC Claims Against Respondents

1. Fraud, Deceit and Fraudulent Misrepresentation

89. Cheque kiting is an unauthorized and fraudulent activity. By its nature, cheque kiting has the effect of overstating the amount of money that is available in a depositor's bank account by taking advantage of conditional credit provided by the bank and the delay between depositing a cheque and the time it is cleared.

90. By engaging in the Kiting Scheme, each of Sunterra Canada, Sunwold Canada and the US Sunterra Entities engaged in fraud. On each occasion or cycle in which Sunterra Canada and Sunwold Canada drew a cheque on their NBC Account for deposit to the Compeer Accounts of the US Sunterra Entities, and deposited a cheque drawn on the Compeer Accounts of the US Sunterra Entities into its NBC Account, knowing (or being willfully blind or being reckless to the fact) that Sunterra Canada and Sunwold Canada did not have sufficient funds to cover such cheque but for the perpetration of a corresponding fraud regarding the US Sunterra Entities' operation of their Compeer Accounts (each a "**Cycle**"), Sunterra Canada, Sunwold Canada the US Sunterra Entities committed a fraudulent act. Such fraudulent acts caused damage to NBC.

91. By means of the Kiting Scheme, and in each Cycle, Sunterra Canada, Sunwold Canada, the US Sunterra Entities, Price, Uffelman, and Thompson:

- (a) knowingly misrepresented the ability of Sunterra Canada, Sunwold Canada and the US Sunterra Entities, to honour their obligations, or in the alternative, were reckless or willfully blind;
- (b) deposited cheques, which they knew or ought to have known that the drawing entity did not have the necessary liquidity or cash to honour; and,
- (c) utilized the conditional credit provided by NBC and Compeer, to create Unauthorized Overdrafts, and, on an ongoing and ever-increasing basis, overstated the balance in the respective NBC Accounts and Compeer Accounts, for their use and benefit and to the corresponding deprivation of NBC.

92. At all relevant times, the drawers of such cheques and the individual Respondents that prepared and signed such cheques, or caused such cheques to be prepared and signed, knew that there were insufficient funds in the drawer's account to cover such cheques but for the perpetual cycle of drawing and depositing cheques.

93. Further, and in the alternative, if the drawers of such cheques or the individual Respondents that prepared and signed such cheques, or caused such cheques to be prepared and signed, did not have actual knowledge that there were insufficient funds in the drawer's account to cover such cheques but for the perpetual cycle of drawing and depositing cheques, that lack of knowledge was the result of willful blindness or recklessness.

94. Sunterra Canada, Sunwold Canada, the US Sunterra Entities, Price, Uffelman, and Thompson continued and attempted to cover and conceal their numerous fraudulent transactions by:

- (a) providing false and knowingly misleading information when providing information in purported satisfaction of the Commitment Letter Reporting Requirements;
- (b) breaching the Commitment Letter Operational Requirements;
- (c) failing to report:
 - (i) the inability of Sunterra Canada, Sunwold Canada and the US Sunterra Entities to honour the face value of the cheques being drawn and deposited; or
 - (ii) the Kiting Scheme and liquidity issues of these entities;

contrary to their obligations under the Commitment Letter and the GSAs;

(d) providing (or causing to be provided) financial information and records to NBC, which failed to disclose the Kiting Scheme and were false or contained misrepresentations as to the status and transactions taking place; and

(e) misrepresenting the quantum of the inter-company receivables as between Sunterra Canada, Sunwold Canda and the US Sunterra Entities;

all in order to actively maintain and conceal the Kiting Scheme, while knowing they were being deceitful about the truth of such matters, or being willfully blind, or being reckless, as to the truth of such matters.

95. As a result of the perpetration of the Kiting Scheme, the Sunterra Parties are liable to NBC in fraud, deceit, and fraudulent misrepresentation.

96. The conduct of the Sunterra Parties, includes representations and omissions made to NBC that constitute fraud, dishonest dealings, knowingly false representations, including by the non-disclosure of facts. All such conduct was undertaken with knowledge of its falsehood, with intention that NBC act upon same; which NBC did.

97. NBC relied upon false representations and fraudulent misrepresentation to its detriment, and permitted: (i) the Borrowers continued access to the Credit Facilities; and, (ii) access to the NBC Accounts, cheque writing privileges, overdraft availability, and the conditional credit that resulted from the Canadian Sunterra Entities' and the US Sunterra Entities' use of cheques in perpetuating the Kiting Scheme.

98. The result of NBC's detrimental reliance on such fraudulent and deceitful conduct is that NBC suffered losses and damages caused by Sunterra Canada, Sunwold Canada, the US Sunterra Entities, Price, Uffelman, and Thompson.

2. Breach of Implicit Representations under *Bills of Exchange Act*

99. In each Cycle, Sunterra Canada and Sunwold Canada also breached the implicit representations in set forth in the *Bills of Exchange Act* mentioned above:

(a) pursuant to sections 129 and 165 of the *Bills of Exchange Act*, on each occasion that Sunterra Canada and Sunwold Canada drew a cheque on their NBC Account (which, on each occasion, was caused by one or more of the individual Respondents), such corporate Respondent engaged that on due presentment the cheque shall be accepted and paid according to its tenor, and that if it was dishonoured it would compensate the

holder or any endorser who is compelled to pay it, if the requisite proceeding on dishonour were duly taken; and

(b) pursuant to section 132 and 165 of the *Bills of Exchange Act*, by endorsing a cheque for deposit to its account (which, on most if not all occasions was caused by one or more of the individual Respondents), such corporate Respondent engaged that on due presentment the cheque shall be accepted and paid according to its tenor, and that if it was dishonoured it would compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceeding on dishonour were duly taken.

100. As a result of the foregoing breaches of the representations implied by the *Bills of Exchange Act*, Sunterra Canada and Sunwold Canada caused damage to NBC for which NBC claims herein.

101. Further, and in the alternative, Sunterra Canada and Sunwold Canada are bound to honour their obligations arising from such implicit representations to compensate the holders of such cheques, including NBC.

3. Breach of Business Account Agreements

102. In each Cycle, Sunterra Canada and Sunwold Canada also breached the terms of their Business Account Agreement. In particular:

(a) Sunterra Canada and Sunwold Canada each agreed that it would be responsible for all use of its cheques, instruments and other debits to the NBC Account and that NBC would have no responsibility for forged cheques, instruments or unauthorized transactions unless the corporate Respondent could show that it took reasonable precautions to protect such cheques, instruments and transactions and that it took reasonable care to examine its statements of Account and transaction information, which Sunterra Canada and Sunwold Canada cannot demonstrate;

(b) Sunterra Canada and Sunwold Canada each agreed that they were responsible for determining the suitability of individuals appointed as Authorized Signing Officers which they were not, given their participating in the Kiting Scheme, and that NBC shall not in any way be liable or held responsible for any loss suffered by the Business caused by any act or omission, or wrongful conduct of any Authorized Signing Officer appointed by the Business, which they have failed to do; and

(c) Sunterra Canada and Sunwold Canada each agreed that they would diligently supervise and monitor the conduct and work of all Authorized Signing Officers and all agents and employees having a role in the preparation of Instruments and the Business's bank statement reconciliation or other banking functions, which they failed to do.

103. As a result of the foregoing breaches of the Business Account Agreements, Sunterra Canada and Sunwold Canada caused damage to NBC for which NBC claims herein.

4. Breach of Commitment Letter Operational Requirements

104. In each Cycle, Sunterra Canada and Sunwold Canada also breached the terms of the Commitment Letter Operational Requirements. In particular, they did not:

- (a) carry on and conduct business in an efficient and proper manner;
- (b) keep proper books of account and records of all transactions

105. As a result of the foregoing breaches of the Commitment Letter Operational Requirements, Sunterra Canada and Sunwold Canada caused damage to NBC for which NBC claims herein..

5. Oppression

106. The perpetration of the Kiting Scheme by Sunterra Canada, Sunwold Canada, the US Sunterra Entities, Price, Uffelman, and Thompson amounted to oppressive conduct that unfairly disregarded or prejudiced the interests of NBC. As a result, NBC is entitled to compensation and relief under section 242 as a “complainant” within the meaning of the Alberta *Business Corporations Act*, as amended (the “**ABCA**”).

6. Inducing Fraud, Statutory Misrepresentations, and Breach of Contract

107. In each Cycle, each of Price, Uffelman, and Thompson induced Sunterra Canada, Sunwold Canada and the US Sunterra Entities:

- (a) to commit the fraudulent acts mentioned above;
- (b) to misrepresent the matters under the *Bills of Exchange Act* mentioned above;
- (c) to breach the Business Account Agreements;
- (d) to make misrepresentations in respect of the Commitment Letter Reporting Requirements; and
- (e) to breach the Commitment Letter Operational Requirements.

108. In the case of the Business Account Agreements:

- (a) Price, Uffelman, and Thompson were Authorized Signing Officers within the meaning of the Business Account Agreement applicable to the respective NBC Accounts held by Sunterra Canada and Sunwold Canada, and had actual knowledge of the terms of the Business Account Agreements applicable to each of the NBC Accounts held by the corporate Respondents;
- (b) In the alternative, if Price, Uffelman, and Thompson did not have actual knowledge of the terms of the Business Account Agreements, they ought to have known of such terms and their ignorance of such terms is a product of recklessness or willful blindness;
- (c) In each Cycle, Price, Uffelman, and Thompson intended to cause Sunterra Canada and Sunwold Canada to breach the Business Account Agreements;
- (d) In each Cycle, Sunterra Canada and Sunwold Canada committed an act of fraud, breached their representations under the Bills of Exchange Act and breached the Business Account Agreements as Price, Uffelman, and Thompson induced them to do; and
- (e) The foregoing caused loss and damage to NBC, and may cause further loss and damage to NBC.

7. Knowing Assistance, Breach of Fiduciary Duty, Breach of Statutory Duty

109. Price, Uffelman, and Thompson each knowingly assisted Sunterra Canada and Sunwold Canada to commit the thousands of fraudulent acts described above.

110. The knowing assistance given by each of Price, Uffelman, and Thompson was in breach of their respective statutory and fiduciary duties to Sunterra Canada, Sunwold Canada and the US Sunterra Entities.

111. The foregoing caused loss and damage to NBC, and may cause further loss and damage to NBC.

8. Wrongful Means Conspiracy

112. The Kiting Scheme was, in effect and substance, an unlawful means conspiracy purported by Sunterra Canada, Sunwold Canada, the US Sunterra Entities, Price, Uffelman, and Thompson acting jointly and in concert.

113. The Sunterra Parties agreed to engage in unlawful conduct that they knew (and in fact intended) or should have known would likely cause injury to NBC. Their unlawful conduct, namely the Kiting Scheme, is actionable. It amounts to fraud, deceit, and fraudulent misrepresentation, directed towards NBC.

114. The Sunterra Parties acted in concert with a common design in pursuing the Kiting Scheme with the intention of inducing NBC to provide conditional credit and advance funds, based on false and misleading representations, while knowing that there was not sufficient cash to honour the face value of the cheques drawn in furtherance of the unlawful conspiracy.

115. By engaging in their conspiracy, the Sunterra Parties caused NBC to suffer losses for which they are jointly and severally liable.

9. Indemnification

116. Sunterra Canada, Sunwold Canada, Price, Uffelman, and Thompson are bound to indemnify, or in the alternative, to contribute to any loss or damage claimed by third parties against NBC, including by Compeer arising from, or related to the Compeer Shortfall or such other amounts as Compeer may claim against NBC arising from, or relating to the Kiting Scheme.

117. While NBC does not admit any liability, whatsoever, Compeer has asserted or threatened, or may in the future assert or threaten, certain claims against NBC that are related to, arise from, or are connected to the Kiting Scheme, including without limitation arising from, or related to, the Compeer v. NBC Claims.

118. NBC may incur or suffer losses or damages as a result of the Compeer v. NBC Claims.

119. The Sunterra Parties, jointly and severally, are liable to make full indemnification, or in the alternative, contribution, to NBC, in respect of any losses or damages NBC may suffer in relation to the Compeer v. NBC Claims as forth below.

a) Contractual Basis

120. Sunterra Canada and Sunwold Canada each agreed in their respective Business Account Agreement that it would be responsible for all use of its cheques, instruments and other debits to the NBC Account and that NBC would have no responsibility for forged cheques, instruments or unauthorized transactions unless the corporate Respondent could show that it took reasonable precautions to protect such cheques, instruments and transactions and that it took reasonable care to examine its statements of Account and transaction information, which Sunterra Canada and Sunwold Canada cannot demonstrate.

121. Sunterra Canada and Sunwold Canada also each agreed in the respective Business Account Agreements that NBC shall not in any way be liable or held responsible for any loss suffered by the Business caused by any act or omission, or wrongful conduct of any Authorized Signing Officer appointed by the Business.

122. As such, it is an express term of the Business Account Agreements that Sunterra Canada and Sunwold Canada would save NBC harmless such that it would have no responsibility for unauthorized transactions, either to them or to any third party, such as those undertaken in connection with the Kiting Scheme.

123. Further, and in the alternative, it is an implied term of the Business Account Agreements that Sunterra Canada and Sunwold Canada would hold NBC harmless from, and indemnify NBC for, any and all losses suffered by NBC as a result of the Sunterra Parties' fraud or any fraudulent instructions given by the Sunterra Parties to NBC.

b) At Common Law and Equity

124. Further, and in the alternative, the Respondents are liable to Compeer in respect of the Compeer v. NBC Claims and have a direct interest in, and will benefit from, any payments made by NBC to Compeer in relation to any Compeer v. NBC Claims. The Sunterra Parties have a legal obligation, to NBC, to indemnify NBC for (or in the alternative, contribute in respect of) any and all losses or damages suffered by NBC in relation to the Compeer v. NBC Claims.

125. Further and in the alternative, if the Sunterra Parties are not directly liable to Compeer in respect of the Compeer v. NBC Claims:

(a) there is a community of interest between NBC and the Sunterra Parties in relation to the Compeer v. NBC Claims, including insofar as the Sunterra Parties will benefit from any payments made by NBC in relation to the Compeer v. NBC Claims, and the Sunterra Parties have an equitable obligation, to NBC, to indemnify NBC for (or in the alternative, contribute in respect of) any and all losses or damages suffered by NBC in relation to the Compeer v. NBC Claims;

(b) any and all liability of NBC in respect of the Compeer v. NBC Claims (which liability is not admitted, and expressly denied) arises from the same occurrences or transactions as NBC's claims against the Sunterra Parties, and furthermore, the Sunterra Parties should be bound by any decision in relation to the Compeer v. NBC Claims;

(c) all losses or damages suffered by Compeer which relate to, arise from, or are connected to the Compeer v. NBC Claims are the direct result of the Sunterra Parties' fraud in carrying out the Kiting Scheme. The Sunterra Parties are solely responsible and liable for any losses or damages suffered as a result thereof, and NBC has a legal or equitable right to reimbursement, from the Sunterra Parties, for any losses or damages suffered by NBC or which relate to the Compeer v. NBC Claims;

(d) the Compeer v. NBC Claims arise from the Kiting Scheme. Any and all steps or acts taken by NBC in connection with the Kiting Scheme were taken on the direction of the Sunterra Parties, or as a direct result of the instructions given by the Sunterra Parties, who knew such acts, directions, or instructions, were based upon fraud, deceit, and fraudulent misrepresentations made by the Sunterra Parties to NBC and to Compeer. The Sunterra Parties agreed, expressly or impliedly, to indemnify NBC for acting on such directions or instructions, and have a legal or equitable obligation to indemnify NBC in relation to the Compeer v. NBC Claims;

(e) NBC is entitled to the benefit of an implied indemnity in relation to any damage caused to any third party by the Sunterra Parties' negligence or misconduct, including, without limitation, in respect of the Compeer v. NBC Claims, including as a result of: (i) the relationship between NBC and the Sunterra Parties; (ii) the express or implied terms of the various agreements between NBC and the Sunterra Parties; (iii) the principles of equity; (iv) due to the various fraud, deceit, and fraudulent misrepresentations of the Sunterra Parties, the known particulars of which are described herein; and, (v) the operation of statutes, including, but not limited to, the *Tort-Feasors Act* (Alberta) and the *Contributory Negligence Act* (Alberta); and,

c) Under Statute

126. Further and in the alternative, in the event that any Compeer v. NBC Claims are asserted successfully against NBC (the validity of such claims not being admitted and being expressly denied by NBC), the Sunterra Parties are, or will be, joint tortfeasors with NBC and will be liable to indemnify NBC under and pursuant to the *Tort-Feasors Act* (Alberta) and/or the *Contributory Negligence Act* (Alberta), and NBC expressly pleads and relies upon the *Tort-Feasors Act* (Alberta) and the *Contributory Negligence Act* (Alberta). Without limiting the generality of the foregoing, in the event that Compeer suffered any loss or damage by the fault of NBC (which is not admitted, and expressly denied), in relation to the Compeer v. NBC Claims, such loss or damage was caused entirely by the fault of the Sunterra Parties;

10. Guarantees

127. As set forth above, the Borrowers, Lariagra, Sunterra Farm Enterprises, Sunterra Enterprises, and Sunterra Beef, are also guarantors of some or all of the Borrowers.

128. Pursuant to the Guarantees, each Guarantor thereunder, jointly and severally, unconditionally guaranteed payment, to NBC, of all present and future debts and liabilities, direct or indirect, absolute or contingent, now or at any time and from time to time due or owing to NBC, by the applicable Borrower(s), whether as principal or surety, and whether incurred by one or more of the Borrower(s) alone or jointly with any other person or persons, or otherwise howsoever, together with all costs, charges, and expenses (including legal fees on a solicitor and client basis), as incurred by NBC.

129. As such, the Guarantees also apply to the liability of the Borrowers, or any of them, in respect of the matters claimed herein.

11. Security

130. In accordance with the terms and conditions of the Commitment Letter and Guarantees, all Canadian Sunterra Entities are jointly and severally liable for all losses, obligations, indebtedness, and liabilities, including, among others, damages, owed to NBC. Furthermore, in accordance with the terms and conditions of the Security Agreements, all such obligations and liabilities are properly secured and perfected, to and in favour of NBC, against the Collateral.

XVI. Damages

131. Due to the Kiting Scheme, NBC has suffered, incurred, and/or is reasonably expected to incur, out-of-pocket expenses, fees, disbursements and special damages in its detection, investigation, quantification, and litigation of the Kiting Scheme and losses suffered in its attempt to recover such losses at the hands of the Sunterra Parties, in an amount to be proven.

XVII. Punitive Damages and Exemplary Damages

132. As a result of the fraudulent and high-handed conduct of the Sunterra Parties, NBC pleads that it is entitled to recover punitive and exemplary damages, as a result of the Kiting Scheme.

XVIII. Tracing the Proceeds of the Kiting Scheme and the Impugned Transactions, Accounting and Disgorgement

133. As a result of the wrongful and fraudulent conduct of the Sunterra Parties, NBC is entitled to trace all amounts received or disbursed by the Impugned Entities during the Review Period or as part of or as a result of the Kiting Scheme and to recover the same.

134. Such tracing must include all amounts paid to directors and officers of the Impugned Entities, including, among others, dividends, redemptions or purchases for cancellation of any of the shares of the capital stock of the Impugned Entities, termination pay, severance pay, incentive benefits, or other benefits to a director, officer, or any person who manages or supervises the management of business and affairs of the Impugned Entities. NBC specifically pleads and relies upon section 101 of the BIA and sections 43 and 118 of the ABCA.

135. NBC is also entitled to an accounting of the monies belonging NBC that have come into the possession of the Sunterra Parties and the US Sunterra Entities and to an accounting of any benefit received by the Sunterra Parties and the US Sunterra Entities as a result of the Kiting Scheme described above.

136. The Sunterra Parties, together and each individually, are liable to make restitution to NBC and to disgorge any benefits they have received, as a result of or in connection with the Kiting Scheme.

XIX. Remedy Sought

137. As a result of the foregoing, National Bank of Canada seeks the following relief:

- (a) a declaration that the Kiting Scheme was fraudulent;
- (b) a declaration that Sunterra Canada, Sunwold Canada and the US Sunterra Entities have committed fraud;
- (c) judgment, or an award of damages, jointly and severally, as against Sunterra Canada, Sunwold Canada, Price, Uffelman, and Thompson in such amount as may be proven, including but not limited to
 - (i) special damages and out-of-pocket expenses incurred by NBC arising out of the detection, investigation, quantification, and recovery of the fraud, losses, and consequential losses suffered by NBC in an amount to be established;
 - (ii) legal fees, costs, and expenses incurred by NBC in connection with the Kiting Scheme, this Claim, or the NBC Claim Process, on a solicitor and their own client, full indemnity basis, and judgment, on a joint and several basis, for such amount; and
 - (iii) any and all amounts as may be awarded against NBC in favour of Compeer arising out of, or relating to, the Compeer v NBC Claim;

- (d) a declaration that Sunterra Canada, Sunwold Canada, Price, Uffelman, and Thompson are jointly and severally bound to indemnify and save NBC harmless in respect of the Compeer v. NBC Claim and from any and all amounts claimed by, or awarded to, Compeer against NBC arising from, or related to the Compeer v. NBC Claim, the Compeer Shortfall, the Kiting Scheme or such other amounts as Compeer may claim against NBC;
- (e) further or in the alternative to the relief described in the previous sub-paragraph, a declaration that the Respondents are liable to make contribution, to NBC, in an amount or percentage to be determined by the Court, in respect of any and all losses, damages, or liabilities suffered or incurred by NBC as a result of, arising from, or relating to, the Kiting Scheme or any other Compeer v. NBC Claims;
- (f) a declaration that the conduct of Sunterra Canada and Sunwold Canada, and that of Price, Uffelman, and Thompson as officers and directors of those corporate Respondents, effected a result, or was carried on or conducted, or was exercised in a manner that was oppressive or unfairly prejudicial or that unfairly disregarded the interests of NBC as a creditor and that NBC is entitled to:
 - (i) an order compensating NBC as an aggrieved party;
 - (ii) an order granting permission to NBC to commence an action in the name of and on behalf of those corporate Respondents and Price, Uffelman, and Thompson and such other directors and officers of those corporate Respondents for breach of their statutory, fiduciary and other duties to those corporate Respondents.
- (g) a declaration that all Respondents are liable for all damages and amounts due and owing to NBC by any of the Respondents, whether awarded as damages or as indemnity and contribution:
 - (i) due to their joint liability; and
 - (ii) in relation to the Borrowers and Guarantors under and in accordance with the terms of the Commitment Letter and Guarantees;
- (h) a declaration that all indebtedness, damages, and obligations due and owing to NBC, by any of all of the Canada Sunterra Entities, are properly secured by the applicable Security Agreements;

- (i) a declaration that NBC is entitled to a constructive trust and/or restitution as a result of the Respondents' unjust enrichment, which the quantum of such restitution being no less than the amount of misappropriated funds resulting from the Kiting Scheme;
- (j) a declaration that NBC is entitled trace all amounts received or disbursed by the Respondents as part of or as a result of the Kiting Scheme and to recover the same;
- (k) a declaration that NBC is entitled to trace all amounts paid to directors and officers of the corporate Respondents, including, dividends, redemptions or purchases for cancellation of any of the shares of the capital stock of the corporate Respondents, termination pay, severance pay, incentive benefits, or other benefits to a director, officer, or any person who manages or supervises the management of business and affairs of the corporate Respondents;
- (l) a declaration that NBC is entitled to an accounting of the monies belonging to NBC that have come into the possession of the Respondents and to an account of any benefit received by the Respondents as a result of the Kiting Scheme including interest in any accounts and of all money had or received by the Respondents or any person on their behalf, and an order declaring that NBC is permitted to trace monies fraudulently obtained from the Respondents into and through any financial institution accounts or deposit facilities in the names of the Respondents, respectively, and into any assets purchased by the Sunterra Parties with those monies;
- (m) a declaration that the Respondents, together and each individually, are liable to make restitution to NBC and to disgorge any benefits they have received from the Kiting Scheme;
- (n) a declaration that NBC is entitled to recover punitive and exemplary damages, in the amount of \$1,000,000, from the Respondents, jointly and severally;
- (o) an order, to the extent necessary, declaring that NBC is entitled to pierce the corporate veil of the Canadian Sunterra Entities to enforce their claims and seek damages against Price, Uffelman, and Thompson, and any other directors and officers of the Canadian Sunterra Entities and the US Sunterra Entities;
- (p) pre-judgment and post-judgment interest on all amounts awarded to NBC, at such rate or rates as may be ordered, compounded annually or monthly, pursuant to the *Judgment Interest Act*, R.S.A., c. J-1, as amended; and

- (q) such further and other relief as this Honourable Court may deem just.

Tab 7

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

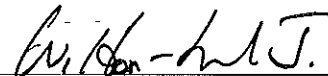
[103] The Milbournes also seek to have the Subordination Claim raised in the Milbourne Objection determined within the CCAA proceeding.

[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 8

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
Stelco Inc., and the Other Applicants Listed Under Schedule
"A"

Application Under the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as amended

[Indexed as: Stelco Inc. (Re)]

78 O.R. (3d) 241
[2005] O.J. No. 4883
Dockets: C44436 and M33171

Court of Appeal for Ontario,
Goudge, Sharpe and Blair JJ.A.
November 17, 2005

Debtor and creditor -- Companies' Creditors Arrangement Act
-- Creditors -- Classification -- Classification of creditors
should be determined by their legal rights in relation to
debtor company as opposed to their rights as creditors in
relation to each other.

The appellant represented unsecured creditors who held
convertible unsecured subordinated debentures issued by the
debtor company pursuant to a Supplemental Trust Indenture.
Their claims were subordinated to Senior Debt Holders. The
Supplemental Trust Indenture provided that if the Subordinated
Debenture Holders received any payment from the company, or any
distribution from the assets of the company, before the Senior
Debt was fully paid, they were obliged to remit any such
payment or distribution to the Senior Debt Holders until the
latter had been paid in full, but that no such payment or
distribution by the company shall be deemed to constitute

payment on the Subordinated Debenture Holders' debt. The parties referred to these provisions as the "Turnover Payment" provisions. In the company's Proposed Plan, the Subordinated Debenture Holders and the Senior Debt Holders were included in the same class (along with Trade Creditors) for the purposes of voting on the Proposed Plan. The appellant sought an order from the supervising judge classifying the Subordinated Debenture Holders as a separate class for voting purposes, arguing that their interests were different than those of the Senior Debt Holders and that creditors who do not have common interests should not be classified in the same group for voting purposes. The motion was dismissed. The appellant appealed.

Held, the appeal should be dismissed.

The classification of creditors is a fact-driven exercise, dependent upon the circumstances of each particular case. It is determined by the creditors' legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. The supervising judge did not err in finding that there was no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis--vis the company. Each was entitled to be paid the moneys owing under their respective debt contracts. The only difference was that the former creditors were subordinated in interest to the latter and had agreed to pay over to the latter any portion of their recovery received until the Senior Debt had been paid in full. As between the two groups of creditors, this merely reflected the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. The supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights. Finally, the supervising judge's finding that there was no realistic conflict of interest between the creditors was supported on the record. [page242] Each had the same general interest in relation to the company, namely to be paid under their contracts, and to maximize the amount recoverable from the company through the Plan negotiation process. The Senior Debt Holders' efforts would not be moderated in some respect because they would be content to make their recovery on the

backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders would require the support of the Trade Creditors, whose interest was not affected by the subordination agreement. Thus, the Senior Debt Holders would be required to support the maximization approach.

Canadian Airlines Corp. (Re), [2000] A.J. No. 1693, 19 C.B.R. (4th) 12 (Q.B.), apld

NsC Diesel Power Inc. (Re), [1990] N.S.J. No. 484, 97 N.S.R. (2d) 295, 258 A.P.R. 295, 79 C.B.R. (N.S.) 1 (T.D.), not folld

Other cases referred to

Campeau Corp. (Re), [1991] O.J. No. 2338, 86 D.L.R. (4th) 570, 10 C.B.R. (3d) 100 (Gen. Div.); Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180, 41 O.A.C. 282, 1 C.B.R. (3d) 101 (C.A.) (sub nom. Nova Metal Products v. Comiskey); Fairview Industries Ltd. (Re), [1991] N.S.J. No. 456, 109 N.S.R. (2d) 32, 11 C.B.R. (3d) 71, 30 A.C.W.S. (3d) 376 (T.D.); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1988] A.J. No. 1226, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139, 72 C.B.R. (N.S.) 20 (Q.B.); Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, [1989] B.C.J. No. 63, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363, 73 C.B.R. (N.S.) 195 (C.A.); Northland Properties Ltd. (Re), [1988] B.C.J. No. 1937, 32 B.C.L.R. (2d) 309 (C.A.), affg [1988] B.C.J. No. 1530, 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (S.C.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 610, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, 261 A.R. 12, 19 C.B.R. (4th) 33, 97 A.C.W.S. (3d) 844 (C.A.); Savage v. Amoco Acquisition Co., [1988] A.J. No. 330, 59 Alta. L.R. (2d) 260, 40 B.L.R. 188, 68 C.B.R. (N.S.) 154 (C.A.) (sub. nom. Amoco Acquisition Co. v. Savage); Sklar-

Peppler Furniture Corp. v. Bank of Nova Scotia, [1991] O.J. No. 2288, 86 D.L.R. (4th) 621, 8 C.B.R. (3d) 312 (Gen. Div.); Sovereign Life Assurance Co. v. Dodd (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573, 8 T.L.R. 684, 36 Sol. Jo. 644, 41 W.R. 4, 62 L.J.Q.B. 19, 67 L.T. 396 (C.A.); Stelco Inc. (Re) (2005), 75 O.R. (3d) 5, [2005] O.J. No. 117, 1196 O.A.C. 142, 253 D.L.R. (4th) 109, 9 C.B.R. (5th) 135, 2 B.L.R.(4th) 238 (C.A.); Wellington Building Corp. Ltd. (Re), [1934] O.R. 653, [1934] 4 D.L.R. 626, 16 C.B.R. 48 (H.C.J.); Woodward's Ltd. (Re), [1993] B.C.J. No. 852, 84 B.C.L.R. (2d) 206, 20 C.B.R. (3d) 74 (S.C.)

Statutes referred to

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

Joint Stock Companies Arrangement Act 1870 (U.K.), 33 and 34 Vict., c. 104

Authorities referred to

Edwards, S.E., "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587

Robertson, Q.C., R.N., "Legal Problems on Reorganization of Major Financial and Commercial Debtors" (Canadian Bar Association -- Ontario Continuing Legal Education, April 5, 1983) [page243]

APPEAL from an order of Farley J., [2005] O.J. No. 4814, 143 A.C.W.S. (3d) 623 (S.C.J.) dismissing a motion for an order classifying the appellants as a separate class of creditors for voting purposes.

Paul Macdonald, Andrew Kent and Brett Harrison, for Informal Independent Converts' Committee.

Michael E. Barrack and Geoff R. Hall, for Stelco Inc.

Robert Staley and Alan Gardner, for Senior Debenture Holders.

Fred Myers, for Her Majesty the Queen in Right of Ontario,
and the Superintendent of Financial Services.

Ken Rosenberg, for United Steelworkers of America.

A. Kauffman, for Tricap Management Ltd.

Kyla Mahar, for Monitor.

Murray Gold, for Salaried Retirees.

Heath Whitley, for CIBC.

Steven Bosnick, for U.S.W.A. Loc. 5328 and 8782.

The judgment of the court was delivered by

BLAIR J.A.:--

Background

[1] This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the Companies' Creditors Arrangement Act ("CCAA") [See Note 1 at the end of the document]. Stelco has been in the midst of this fractious process for approximately 21 months. Justice Farley has been the supervising judge throughout.

[2] Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee (the "Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday

afternoon (the courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005. [page244]

[3] This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument -- and in order to clarify matters so that the vote could proceed the following day -- we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

[4] The endorsement read as follows:

In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.

Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

[5] These are those expanded reasons.

Facts

[6] Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

[7] The Converts' Committee represents unsecured creditors who hold \$90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With

interest, the claims of the Subordinated Debenture Holders now amount to approximately \$110 million. Those claims are subordinated to approximately \$328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately \$228 million. In the Proposed Plan, these three groups of unsecured creditors -- the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders and the Trade Creditors -- have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

[8] The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.). They also argue that the supervising [page245] judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

[9] In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

[10] In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

[11] The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

[12] The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled -- the elimination of their subordinated position by virtue of the Turnover Payment provisions.

[13] Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paras. 13 and 14 of his reasons: [page246]

I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt [See Note 2 at the end of the document] plus the trade debt vis--vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid

any unnecessary fragmentation -- and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis--vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

[14] We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

[15] The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point is of significance to the action;
- (c) whether the appeal is prima facie meritorious or frivolous; and [page247]
- (d) whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A.), at para. 24; *Country Style Food Services Inc. (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15; *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 610, 19 C.B.R. (4th) 33 (C.A.), at para. 7.

[16] Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1693, 19 C.B.R. (4th) 12 (Q.B), this court has not dealt with the issue since its decision in *Elan Corp. v. Comiskey*, supra, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Elan*.

[17] A brief further comment respecting the leave process may be in order.

[18] The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada -- including this one -- have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the

authorities cited above remain good law.

[19] Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings -- particularly in major ones such as this one involving Stelco -- has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded. [page248]

[20] As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No error in law or principle

[21] Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (C.A.) which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited. At pp. 249-50 All E.R., Lord Esher said:

The Act provides that the persons to be summoned to the

meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act [See Note 3 at the end of the document] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251 All E.R., Bowen L.J. stated:

The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

[22] These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process -- a flexibility which is its genius -- there can be no fixed rules that must apply in all cases.

[23] In *Canadian Airlines Corp. (Re)*, supra, Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said: [page249]

In summary, the cases establish the following principles

applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation;
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if at all possible;
4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches which would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

[24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, [1991] O.J. No. 2288, 86 D.L.R. (4th) 621 (Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1988] A.J. No. 1226, 72 C.B.R. (N.S.) 20 (Q.B.); *Fairview Industries Ltd. (Re)*, [1991] N.S.J. No. 456, 11 C.B.R. (3d) 71 (T.D.); *Woodward's Ltd. (Re)*, [1993] B.C.J. No. 852, 84 B.C.L.R. (2d) 206 (S.C.); *Northland Properties Ltd. (Re)*, [1988] B.C.J. No. 1530, 73 C.B.R. (N.S.) 166 (S.C.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] B.C.J. No. 63, 73 C.B.R. (N.S.) 195 (C.A.); *Nsc Diesel Power Inc. (Re)*, [1990] N.S.J. No. 484, 79 C.B.R. (N.S.) 1 (T.D.); *Savage v. Amoco Acquisition Co.*, [1988] A.J. No. 330, 68 C.B.R. (N.S.) 154 (C.A.) (sub nom. *Amoco Acquisition Co. v.*

Savage); *Wellington Building Corp. (Re)*, [1934] O.R. 653, 16 C.B.R. 48 (H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent Canadian Airlines decision: *Canadian Airlines Corp. (Re)*, *supra*, at para. 27.

[25] In the passage from his reasons cited above (paras. 13 and 14) the supervising judge in this case applied those principles. In our view, he was correct in law in doing so.

[26] We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Elan Corp. v. Comiskey*. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the [page250] two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 299 O.R.), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

[27] Elan Corp. v. Comiskey did not deal with the issue of whether creditors with divergent interests as amongst themselves -- as opposed to divergent legal interests vis--vis the debtor company -- could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test -- a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra; Fairview Industries Ltd. (Re), supra; Woodward's Ltd. (Re), supra. In our view, there is nothing in the decision in Elan Corp. that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

[28] In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include Elan Corp. v. Comiskey [See Note 4 at the end of the document] and [page251] Wellington Building Corp. Ltd. (Re), supra [See Note 5 at the end of the document]. Examples of the latter include Sklar-Peppler, supra [See Note 6 at the end of the document] and Campeau Corp. (Re), [1991] O.J. No. 2338, 10 C.B.R. (3d) 100 (Gen. Div.) [See Note 7 at the end of the document].

[29] Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality

of interest they may have vis--vis Stelco.

[30] We agree with the line of authorities summarized in Canadian Airlines (Re) and applied by the supervising judge in this case which stipulate 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. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary -- see, for example Nsc Diesel Power Inc. (Re), supra -- we prefer the Alberta approach.

[31] There are good reasons for such an approach.

[32] First, as the supervising judge noted [at para. 7], the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.), at para. 24 [page252] (after referring to the full style of the legislation):

[The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the

Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at p. 602.

[35] Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association -- Ontario Continuing Legal Education, April 5, 1983 at 19-21; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., *supra*, at para. 27; Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, *supra*; Sklar-Peppler, *supra*; Woodward's Ltd. (Re), *supra*.

[36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted [at para. 31] in Canadian Airlines (Re), "the Court should be careful to resist classification approaches that would potentially jeopardize viable plans". [page253]

Discretion and fact finding

[37] Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

[38] We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis--vis Stelco. Each is entitled to be paid the moneys owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

[39] Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

[40] We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis--vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

[41] Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

Appeal dismissed. [page254]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

Note 3: The Joint Stock Companies Arrangement Act 1870 (U.K.), 33 & 34 Vict., c. 104.

Note 4: A second secured creditor with superior voting power was separated from a first secured creditor for the voting purposes, in order [to] prevent the former from utilizing its superior voting strength to adversely affect the latter's prior security position.

Note 5: The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

Note 6: Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power" [at p. 627 D.L.R.].

Note 7: Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

Tab 9

Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches) *Respondents*

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Ecojustice Canada Society,
Canadian Association of Petroleum Producers,
Greenpeace Canada,
Action Surface Rights Association,
Canadian Association of Insolvency and
Restructuring Professionals and
Canadian Bankers' Association** *Interveners*

**INDEXED AS: ORPHAN WELL ASSOCIATION v.
GRANT THORNTON LTD.**

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

Present: Wagner C.J. and Abella, Moldaver,
Karakatsanis, Gascon, Côté and Brown JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA**

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

Orphan Well Association et Alberta Energy Regulator *Appellants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

**Procureure générale de l'Ontario,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
procureur général de l'Alberta,
Ecojustice Canada Society,
Association canadienne des producteurs
pétroliers, Greenpeace Canada,
Action Surface Rights Association,
Association canadienne des professionnels de
l'insolvabilité et de la réorganisation et
Association des banquiers canadiens** *Intervenants*

**RÉPERTORIÉ : ORPHAN WELL ASSOCIATION c.
GRANT THORNTON LTD.**

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Gascon, Côté et Brown.

**EN APPEL DE LA COUR D'APPEL DE
L'ALBERTA**

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

[26] A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (*OGCA*, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (*OGCA*, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator, or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (*OGCA*, ss. 108 and 110). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (*EPEA*, ss. 227 to 230, 240 and 245).

[27] The second power at issue in this appeal is the Regulator's power to impose conditions on a licensee's transfer of its licence(s). As when it initially grants a licence, the Regulator has broad powers to consent to the transfer of a licence subject to any conditions, restrictions and stipulations or to reject the transfer (*OGCA*, s. 24(2)). Under Directive 006 and its 2016 replacement, the Regulator can reject a transfer even where both parties would have the required LMR after the transfer or where a security deposit is available to be posted in compliance with LMR requirements. In particular, the Regulator may determine that it is not in the public interest to

[26] Le titulaire de permis qui contrevient ou ne se conforme pas à une ordonnance de l'organisme de réglementation, ou qui a une dette impayée envers ce dernier relativement aux frais d'abandon ou de remise en état, est assujéti à un certain nombre de mesures d'exécution potentielles. L'organisme de réglementation peut suspendre les activités, refuser d'étudier des demandes de permis ou de transfert de permis (*OGCA*, al. 106(3)(a), (b) et (c)), ou exiger le paiement des dépôts de garantie, de façon générale ou comme condition à l'octroi d'autres permis, approbations ou transferts (*OGCA*, al. 106(3)(d) et (e)). Lorsqu'un titulaire de permis contrevient à la Loi, aux règlements ou aux règles, à toute ordonnance ou directive de l'organisme de réglementation ou à toute condition d'un permis, l'organisme de réglementation peut intenter une poursuite contre le titulaire de permis pour infraction réglementaire, et ce dernier est passible d'une amende en guise de pénalité, bien qu'il puisse invoquer la défense de diligence raisonnable (*OGCA*, art. 108 et 110). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 51 à 54). L'*EPEA* contient elle aussi des dispositions similaires relatives à la création de dettes et afférentes aux ordonnances de protection de l'environnement, en plus de prévoir la poursuite d'infractions réglementaires en cas d'inobservation, avec la possibilité d'invoquer une défense de diligence raisonnable. Toutefois, comme il a été mentionné, la responsabilité du syndic en ce qui concerne les ordonnances de protection de l'environnement se limite aux éléments de l'actif, sauf s'il est responsable de négligence flagrante ou d'inconduite délibérée (*EPEA*, art. 227 à 230, 240 et 245).

[27] Le second pouvoir en cause dans le présent pourvoi est celui que possède l'organisme de réglementation d'imposer des conditions au transfert, par un titulaire, d'un ou de plusieurs de ses permis. Tout comme au moment où il octroie un permis au départ, l'organisme de réglementation jouit de vastes pouvoirs pour consentir au transfert d'un permis sous réserve de conditions, restrictions et stipulations, ou pour rejeter le transfert (*OGCA*, par. 24(2)). Suivant la Directive 006 et le texte qui l'a remplacée en 2016, l'organisme peut rejeter un transfert, même si les deux parties auraient la CGR requise après le transfert, ou même quand un dépôt de garantie

approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

[28] Where a proposed transaction would cause the transferor's LMR to deteriorate below 1.0 (or simply to deteriorate, in the case of an insolvent transferor), the Regulator insists that one of the following conditions be met before it will approve the transaction: (i) that the transferor perform abandonment, reclamation, or both, thus reducing its deemed liabilities, or (ii) that the transferor post a security deposit, thus increasing its deemed assets. Alternatively, the transaction may be structured to avoid any deterioration of the transferor's LMR by "bundling" the licences for spent wells with the licences for producing wells. A transaction in which the licenses for spent wells are retained while the licences for producing wells are transferred will almost always cause a considerable deterioration in a company's LMR.

[29] During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being off-loaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24). The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of

peut être versé conformément aux exigences relatives à la CGR. Plus particulièrement, l'organisme de réglementation peut décider qu'il n'est pas dans l'intérêt public d'approuver le transfert de permis compte tenu des antécédents de conformité de l'une des parties, ou des deux, ou de leurs administrateurs, dirigeants ou détenteurs de titres, ou encore du risque que présenterait le transfert à l'égard du fonds pour les puits orphelins.

[28] Lorsqu'une transaction proposée entraînerait une détérioration de la CGR du cédant en deçà de 1,0 (ou simplement une détérioration dans le cas d'un cédant insolvable), l'organisme de réglementation insiste sur le respect d'une des conditions suivantes avant d'approuver la transaction : (i) que le cédant effectue les processus d'abandon et/ou de remise en état, réduisant ainsi ses passifs réputés; (ii) que le cédant verse un dépôt de garantie, augmentant ainsi ses biens réputés. La transaction pourrait également être structurée de manière à éviter toute détérioration de la CGR du cédant par le « regroupement » des permis relatifs aux puits épuisés et de ceux liés aux puits productifs. Une transaction au cours de laquelle on conserve les permis des puits épuisés tandis que les permis des puits productifs sont transférés entraînerait presque toujours une détérioration considérable de la CGR d'une société.

[29] Au cours du présent pourvoi, il a été beaucoup question d'autres régimes de réglementation que l'Alberta aurait *pu* adopter pour éviter que les coûts environnementaux associés à l'industrie pétrolière et gazière ne soient passés au public. Ce que l'Alberta *a* choisi, c'est un régime de permis qui fait de ces coûts une partie inhérente de la valeur des biens visés par les permis. Ce régime a l'avantage de s'accorder avec le principe du pollueur-payeur, un précepte bien reconnu du droit canadien de l'environnement. Ce principe attribue aux pollueurs la charge de réparer les dommages environnementaux dont ils sont responsables, ce qui incite les sociétés à se soucier de l'environnement dans le cadre de leurs activités économiques (*Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24). Le Programme d'évaluation de la responsabilité des titulaires de permis exige essentiellement que les titulaires de permis

the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

[30] Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the “development, conservation and management of non-renewable natural resources . . . in the province” (*Constitution Act, 1867*, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.

[31] However, the insolvency of an oil and gas company licensed to operate in Alberta also engages the *BIA*. The *BIA* is federal legislation that governs the administration of a bankrupt’s estate and the orderly and equitable distribution of property among its creditors. It is validly enacted pursuant to Parliament’s constitutional authority over bankruptcy and insolvency (*Constitution Act, 1867*, s. 91(21)). Just as Alberta’s regulatory regime reflects its considered choice about how to address the important policy questions raised by the environmental risks of oil and gas extraction, the *BIA* reflects Parliament’s considered choice about how to balance important policy objectives when a bankrupt’s assets are, by definition, insufficient to meet all of its various obligations. To the extent that there is an operational conflict between the Alberta regulatory regime and the

appliquent la valeur dérivée des biens pétroliers et gaziers pendant les parties productives du cycle de vie des biens au coût inévitable de l’abandon de ces biens et de la remise en état de leurs sites à la fin de ce cycle de vie.

[30] En fin de compte, il ne revient pas à notre Cour de décider de la meilleure approche réglementaire pour l’industrie pétrolière et gazière. Ce qui n’est pas contesté, c’est qu’en adoptant son régime de réglementation actuel, l’Alberta a agi dans les limites de sa compétence constitutionnelle en matière de propriété et de droits civils dans la province ainsi que dans le domaine de l’« exploitation, [de la] conservation et [de la] gestion des ressources naturelles non renouvelables [. . .] de la province » (*Loi constitutionnelle de 1867*, par. 92(13) et al. 92A(1)c)). L’Alberta a mis au point un appareil réglementaire complexe pour régler d’importantes questions de politique concernant le moment où, par qui et de quelle manière les coûts environnementaux inévitables associés à l’extraction du pétrole et du gaz doivent être payés. Sa solution est un régime d’octroi de permis qui fait baisser la valeur des principaux éléments d’actif de l’industrie pour refléter les coûts environnementaux, lequel est soutenu par une redevance sur l’industrie sous forme de fonds pour les puits orphelins. L’Alberta voulait que cet appareil continue à fonctionner lorsqu’une société pétrolière et gazière fait l’objet d’une procédure d’insolvabilité.

[31] Par contre, l’insolvabilité d’une société pétrolière et gazière autorisée à exercer ses activités en Alberta met aussi en jeu la *LFI*, une loi fédérale qui régit l’administration de l’actif d’un failli ainsi que la répartition ordonnée et équitable des biens entre ses créanciers. Elle a été valablement promulguée dans l’exercice de la compétence constitutionnelle du Parlement en matière de banqueroute et de faillite (*Loi constitutionnelle de 1867*, par. 91(21)). Tout comme le régime de réglementation de l’Alberta témoigne de son choix réfléchi quant à la façon d’aborder les questions de politique importantes soulevées par les risques environnementaux liés à l’extraction du pétrole et du gaz, la *LFI* témoigne du choix réfléchi du Parlement concernant la manière d’équilibrer des objectifs de politique importants lorsque les biens d’un failli sont, de par leur nature, insuffisants

BIA, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

B. *The Relevant Provisions of the BIA*

[32] Here, I simply wish to note the sections of the *BIA* at issue in this appeal. These sections will determine whether the doctrine of paramountcy applies. I will discuss the purposes of the *BIA* and the various issues raised by s. 14.06 in greater detail below.

[33] The central concept of the *BIA* is that of a “claim provable in bankruptcy”. Several provisions of the *BIA* form the basis for delineating the scope of provable claims. The first is the definition provided in s. 2:

claim provable in bankruptcy, provable claim or claim provable includes any claim or liability provable in proceedings under this Act by a creditor . . .

[34] “Creditor” is defined in s. 2 as “a person having a claim provable as a claim under this Act”.

[35] The definition of “claim provable” is completed by s. 121(1):

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

[36] A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A “contingent claim is ‘a claim which may or may not ever ripen into a debt, according as some future event does or does not happen’” (*Peters v. Remington*, 2004 ABCA

pour satisfaire à toutes ses obligations diverses. Et, pour autant qu’il y ait un conflit d’application entre le régime de réglementation de l’Alberta et la *LFI*, ou que le régime de réglementation de l’Alberta entrave la réalisation de l’objet de la *LFI*, la doctrine de la prépondérance commande que la *LFI* l’emporte.

B. *Les dispositions applicables de la Loi sur la faillite et l’insolvabilité*

[32] À ce stade-ci, je tiens simplement à souligner les articles de la *LFI* qui sont en cause dans le présent pourvoi. Ce sont ces articles qui détermineront si la doctrine de la prépondérance s’applique. J’analyserai plus en détail ci-après les objets de la *LFI* ainsi que les différentes questions soulevées par l’art. 14.06.

[33] Le concept central de la *LFI* est celui d’une « réclamation prouvable en matière de faillite ». Plusieurs dispositions de la *LFI* servent de fondement pour circonscrire la portée des réclamations prouvables. La première est la définition que l’on trouve à l’art. 2 :

réclamation prouvable en matière de faillite ou réclamation prouvable Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l’autorité de la présente loi par un créancier.

[34] Le terme « créancier » est défini à l’art. 2 comme une « [p]ersonne titulaire d’une réclamation prouvable à ce titre sous le régime de la présente loi ».

[35] La définition de « réclamation prouvable » se termine au par. 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.

[36] Une réclamation peut être prouvable dans une procédure de faillite même s’il s’agit d’une réclamation éventuelle. Une [TRADUCTION] « réclamation éventuelle est “une réclamation qui peut ou non se transformer en une créance, selon qu’un événement

5, 49 C.B.R. (4th) 273, at para. 23, quoting *Garner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

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

...

135 (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[37] In *Newfoundland and Labrador v. Abitibi-Bowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 (“*Abitibi*”), at para. 26, this Court interpreted the foregoing provisions of the *BIA* and articulated a three-part test for determining when an environmental obligation imposed by a regulator will be a provable claim for the purposes of the *BIA* and the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”):

First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]

[38] I will address the *Abitibi* test in greater detail below.

[39] Once bankruptcy has been declared, creditors of the bankrupt must participate in one collective bankruptcy proceeding if they wish to enforce their provable claims. Section 69.3(1) of the *BIA* thus provides for an automatic stay of enforcement of provable claims outside the bankruptcy proceeding, effective as of the first day of bankruptcy.

futur se produit ou non” » (*Peters c. Remington*, 2004 ABCA 5, 49 B.C.R. (4th) 273, par. 23, citant *Garner v. Newton* (1916), 29 D.L.R. 276, (B.R. Man.), p. 281. Les paragraphes 121(2) et 135(1.1) donnent des indications sur le moment où une réclamation éventuelle deviendra une réclamation prouvable :

121 (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.

...

135 (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.

[37] Dans l’arrêt *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 (« *Abitibi* »), par. 26, notre Cour a interprété les dispositions précédentes de la *LFI* et a formulé un critère tripartite afin de décider quand une obligation environnementale imposée par un organisme de réglementation sera une réclamation prouvable pour l’application de la *LFI* et de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* ») :

Premièrement, on doit être en présence d’une dette, d’un engagement ou d’une obligation envers un *créancier*. Deuxièmement, la dette, l’engagement ou l’obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d’attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l’original.]

[38] J’aborderai le critère de l’arrêt *Abitibi* plus en détail ci-dessous.

[39] Une fois la faillite déclarée, les créanciers du failli doivent participer à l’unique procédure collective de faillite s’ils souhaitent faire valoir leurs réclamations prouvables. Le paragraphe 69.3(1) de la *LFI* prévoit donc une suspension automatique de l’exécution des réclamations prouvables en dehors de la procédure de faillite, à compter du premier jour de la faillite.

[40] The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at paras. 32-35).

[41] Essential to this appeal is s. 14.06 of the *BIA*, which deals with various environmental matters in the bankruptcy context. I will now reproduce s. 14.06(2) and s. 14.06(4), the two portions of the s. 14.06 scheme that are directly implicated in this appeal. The balance of s. 14.06 can be found in the appendix at the conclusion of these reasons.

[42] Section 14.06(2) reads as follows:

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

[40] La *LFI* établit un régime de priorité complet pour l'acquittement des réclamations prouvables présentées contre le failli dans la procédure collective. L'article 141 énonce la règle générale, à savoir que tous les créanciers ont un rang égal et une part proportionnelle des biens du failli. Toutefois, la règle énoncée à l'art. 141 s'applique « [s]ous réserve des autres dispositions de [la *LFI*] ». Le paragraphe 136(1) énumère les réclamations des « créanciers privilégiés » et fixe l'ordre de priorité dans lequel ils doivent recevoir leur paiement. Cet ordre établi par le par. 136(1) l'est « [s]ous réserve des droits des créanciers garantis ». Selon le par. 69.3(2), la suspension des procédures n'empêche pas les créanciers garantis de réaliser leur garantie. La *LFI* instaure donc un régime de priorité pour le versement des réclamations prouvables en matière de faillite, les créanciers garantis étant payés en premier, les créanciers privilégiés en deuxième et les créanciers non garantis en dernier (voir *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 32-35).

[41] L'article 14.06 de la *LFI*, qui traite de diverses questions environnementales dans le contexte de la faillite, est essentiel pour statuer sur le présent pourvoi. Je vais maintenant reproduire les par. 14.06(2) et 14.06(4), les deux parties du régime prévu à l'art. 14.06 qui sont directement en cause dans le présent pourvoi. Le reste de l'art. 14.06 se trouve en annexe à la fin des présents motifs.

[42] Voici le texte du par. 14.06(2) :

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

[43] Section 14.06(4) reads as follows:

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

[44] As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the *BIA*. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who “abandons, disposes of or otherwise releases any interest in any real property”.

[43] Voici le texte du par. 14.06(4) :

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l’environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l’ordonnance :

a) si, dans les dix jours suivant l’ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l’ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l’alinéa b) :

(i) il s’y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l’ordonnance, tout droit sur l’immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s’en dessaisit;

b) pendant la durée de la suspension de l’ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l’ordonnance visée à l’alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l’ordonnance est alors en vigueur :

(i) soit par le tribunal ou l’autorité qui a compétence relativement à l’ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d’évaluer les conséquences économiques du respect de l’ordonnance;

c) si, avant que l’ordonnance ne soit rendue, il avait abandonné tout droit sur l’immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s’en était dessaisi.

[44] Comme je l’expliquerai, un point de discord important entre les parties tient aux interprétations fort différentes qu’elles donnent au par. 14.06(4) de la *LFI*. Je remarque que le sous-al. 14.06(4)a)(ii), sur lequel s’appuie GTL, parle du syndic qui « abandonne [...] tout intérêt sur le bien réel en cause, en dispose

The word “disclaim” is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

[45] I turn now to a brief discussion of the events of the Redwater bankruptcy.

C. The Events of the Redwater Bankruptcy

[46] Redwater was a publicly traded oil and gas company. It was first granted licences by the Regulator in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater’s present and after-acquired property. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with its assets. In mid-2014, Redwater began to experience financial difficulties. Upon application by ATB, GTL was appointed receiver for Redwater on May 12, 2015. At that time, Redwater owed ATB approximately \$5.1 million.

[47] Upon being advised of the receivership, the Regulator sent GTL a letter dated May 14, 2015, setting out its position. The Regulator noted that the *OGCA* and the *Pipeline Act* included both receivers and trustees in the definition of “licensee”. The Regulator stated that it was not a creditor of Redwater and that it was not asserting a “provable claim in the receivership”. Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The Regulator stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater’s licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations. It requested confirmation that GTL had taken possession of Redwater’s licensed properties and that it was taking steps to comply with all of Redwater’s regulatory obligations.

ou s’en dessaisit ». Dans les présents motifs, le mot « renoncer » sert à raccourcir ces termes, comme cela a été le cas tout au long du litige qui nous occupe.

[45] Je vais maintenant procéder à une brève analyse des faits entourant la faillite de Redwater.

C. Les faits entourant la faillite de Redwater

[46] Redwater était une société pétrolière et gazière cotée en bourse. L’organisme de réglementation lui a octroyé ses premiers permis en 2009. Le 31 janvier et le 19 août 2013, ATB a avancé des fonds à Redwater et, en contrepartie, s’est vu accorder une sûreté sur les biens actuels et futurs de Redwater. ATB a prêté des fonds à Redwater en pleine connaissance des obligations de fin de vie associées à ses biens. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Sur demande d’ATB, GTL a été nommé séquestre de Redwater le 12 mai 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB.

[47] Après avoir été informé de la mise sous séquestre, l’organisme de réglementation a envoyé à GTL une lettre datée du 14 mai 2015 exposant sa position. L’organisme de réglementation a fait remarquer que l’*OGCA* et la *Pipeline Act* incluaient à la fois les séquestres et les syndics dans la définition d’un « titulaire de permis ». L’organisme de réglementation a déclaré qu’il n’était pas un créancier de Redwater et qu’il ne faisait pas valoir une [TRADUCTION] « réclamation prouvable dans le cadre de la mise sous séquestre ». Ainsi, malgré la mise sous séquestre, Redwater demeurait tenue de se conformer à toutes les exigences réglementaires, y compris les obligations d’abandon, pour tous les biens visés par des permis. L’organisme de réglementation a déclaré que GTL était légalement tenu de remplir ces obligations avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L’organisme de réglementation a averti qu’il n’approuverait pas le transfert de l’un ou l’autre permis de Redwater à moins d’être convaincu que le cessionnaire et le cédant seraient en mesure de s’acquitter de toutes les obligations réglementaires. Il a demandé la confirmation que GTL avait pris possession des biens de Redwater visés par des permis et qu’il prenait des mesures pour se conformer à toutes les obligations réglementaires de Redwater.

[48] At the time it ran into financial difficulties, Redwater was licensed by the Regulator for 84 wells, 7 facilities and 36 pipelines, all in central Alberta. The vast majority of its assets were these oil and gas assets. At the time GTL was appointed receiver, 19 of the wells and facilities were producing and the remaining 72 were inactive or spent. There were working interest participants in several of the wells and facilities. Redwater's LMR did not drop below 1.0 until after it went into receivership, so it never paid any security deposits to the Regulator.

[49] By September 2015, Redwater's LMR had dropped to 0.93. The net value of its deemed assets and its deemed liabilities was negative \$553,000. The 19 producing wells and facilities for which Redwater was the licensee would have had an LMR of 2.85 and a deemed net value of \$4.152 million. The remaining 72 wells and facilities for which Redwater was the licensee would have had an LMR of 0.30 and a deemed net value of negative \$4.705 million. Given that Redwater was in receivership, the Regulator's position was that it would approve the transfer of Redwater's licences only if the transfer did not cause a deterioration in its LMR.

[50] In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated

[48] À l'époque où elle a connu des difficultés financières, Redwater avait des permis délivrés par l'organisme de réglementation concernant 84 puits, 7 installations et 36 pipelines, tous situés dans le centre de l'Alberta. La grande majorité de ses éléments d'actif étaient ces biens pétroliers et gaziers. Au moment de la nomination de GTL comme séquestre, 19 des puits ou installations étaient productifs, tandis que les 72 autres étaient inactifs ou taris. Il y avait des participants en participation directe dans plusieurs puits et installations. La CGR de Redwater n'est tombée en dessous de 1,0 qu'après la mise sous séquestre de celle-ci et, en conséquence, Redwater n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

[49] En septembre 2015, la CGR de Redwater avait chuté à 0,93. La valeur nette de ses biens réputés moins ses passifs réputés était égale à un montant négatif de 553 000 \$. Les 19 puits et installations productifs pour lesquels Redwater était titulaire de permis avaient une CRG de 2,85 et une valeur nette réputée de 4,152 millions de dollars. Les 72 autres puits ou installations pour lesquels Redwater était titulaire de permis auraient eu une CGR de 0,30 et une valeur nette réputée négative de 4,705 millions de dollars. Puisque Redwater était sous séquestre, l'organisme de réglementation a mentionné qu'il n'approuverait le transfert des permis de Redwater que si cela n'occasionnait pas une détérioration de sa CGR.

[50] Dans son Deuxième rapport à la Cour du Banc de la Reine de l'Alberta daté du 3 octobre 2015, GTL a expliqué pourquoi il avait conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation. D'après GTL, le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Il considérerait comme improbable la vente des puits inexploités, même s'ils étaient regroupés avec les puits productifs. Si une telle vente était possible, le prix d'achat serait réduit au regard des obligations de fin de vie, annulant ainsi le bénéfice pour l'actif. Sur la base de cette évaluation, par lettre datée du 3 juillet 2015, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater (y compris un puits

Tab 10

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 11

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: MARCH 31, 2010

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"

Debtors

And

ERNST & YOUNG INC.

Monitor

And

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND
AND LABRADOR**

Petitioner

And

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA**

Intervening parties

**JUDGMENT ON AMENDED MOTION FOR A DECLARATION REGARDING ORDERS
ISSUED PURSUANT TO THE ENVIRONMENTAL PROTECTION ACT (#445)**

4) The Factual Context and the Content of the EPA Orders

[184] That is not all. When considering the true intent and nature of the EPA Orders, consideration of the broader context in which they have been issued and what their content reveals are also relevant.

[185] In this regard, the evidence shows that the EPA Orders were, on the balance of probabilities, most likely expected not to be complied with in nature by Abitibi, such that their enforcement would only be achieved through monetary condemnations. Accordingly, from the outset, the Province must have known that they were to be, in reality, nothing else than a strategic bargaining tool for its negotiations with Abitibi.

[186] This being the case, they can hardly be qualified as true regulatory orders. This rather supports the finding that they were, to the contrary, financial and monetary in nature, and intended to have this impact. Many factual elements justify this conclusion.

[187] First, in the months preceding the EPA Orders, the *Abitibi Act* was announced and passed, less than two weeks after Abitibi made public the intended closure of its Grand Falls mill operation.

[188] This led to Abitibi filing a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA for the losses arising from this confiscation effected by the Province. As indicated earlier, according to Abitibi, the losses resulting from this enactment are well in excess of \$300 million.

[189] Not only was the Province fully aware of this, but it was known as well that if it were to ever file a claim in the restructuring process, Abitibi would raise the value of its cross-claims or set-off claims for this expropriation against the Province. While the *Abitibi Act* denies Abitibi the right to use the Province's courts to that end, the Province cannot, however, prevent Abitibi to raise this counter-claim argument in front of the CCAA Court.

[190] As a result, it is a reasonable inference to draw that the Province had a definite interest in trying to avoid any claims process in the CCAA, so as to shield itself from the counter claim it knew Abitibi would surely oppose in compensation for the alleged wrongful expropriation of the *Abitibi Act*.

[191] Interestingly, in this case, the third party consultants (CRA) who issued the reports that formed the basis of the EPA Orders were retained not by the Minister in the exercise of her statutory duties, but by the Toronto litigation Counsel to the Province in the NAFTA proceedings. This is apparent from the face of each of the CRA Reports filed by the Province, which are addressed not to the Minister but to these lawyers.

[192] Second, the EPA Orders issued on November 12, 2009, over six (6) months after Abitibi filed for Court protection under the CCAA, ordered Abitibi to perform the following positive acts:

- i) the submission for approval by January 15, 2010, of detailed Remediation Action Plans for all sites identified by CRA as having exceeded the allegedly applicable limits;
- ii) the completion of the approved site remediation actions by January 15, 2011 or by another date as may be agreed upon with EVNC; and
- iii) the closure of all landfills and lagoons/impoundments associated with each site by January 15, 2011.

[193] However, based on the evidence of Mrs. Minville, to submit detailed Remediation Action Plans as requested would have rather required close to a full year to be carried out adequately.

[194] Similarly, the closure of all landfills and lagoons or impoundments associated with each site being logically the last task to perform when a remedial action plan is implemented, requiring Abitibi to close these units no later than January 15, 2011 was unrealistic.

[195] In addition, given the magnitude and scope of the work ordered by the Province to be carried out simultaneously at the five locations targeted by the EPA Orders, based on Abitibi's past experiences with such projects in NL, it is highly doubtful that there existed sufficient resources (engineering firms, specialty providers such as drillers and laboratories and authorized specialty contractors) to carry out the work within the prescribed one-year time frame.

[196] All this suggests that the Province never truly intended for the EPA Orders to be abided by or complied with in nature given the unrealistic time frame imposed.

[197] Third, at the time the EPA Orders were issued, the Province knew or should have known that, in any event, it would be impossible for Abitibi to comply with them. There were a number of reasons for this.

[198] To begin with, since the approval of the ACI DIP Facility on May 6, 2009, Abitibi's operations have been funded through debtor-in-possession facilities under the supervision of the Monitor and Abitibi's creditors, including its secured lenders. Abitibi's access to funds was therefore limited to funding for its ongoing business operations and Abitibi enjoyed little discretion as to how these funds are allocated.

[199] Furthermore, even if Abitibi was in possession of the funds necessary to comply with the EPA Orders, it would not be possible for it to comply with the EPA Orders in the sequencing and timeframe imposed by these orders while seeking to manage the complex task of raising financing and organizing its emergence from CCAA proceedings.

[200] Finally, the EPA Orders targeted sites that were expropriated (Grand Falls-Windsor, Buchans and the Logging camps) or surrendered to the Province long ago, such that Abitibi could doubtfully access properties that were now in the possession of third parties to complete the remediation efforts sought.

[201] The fact that Abitibi acknowledged in the past having on-going environmental obligations, like, for instance, for the Buchans site³², does not carry much weight when the sites at issue are not in its ownership, possession or control anymore.

[202] In all fairness, a regulator can hardly pretend to realistically order that a "person responsible" carry out actions upon properties that it no longer owns. This order would be unenforceable for obvious reasons. In such situations, non-compliance can only be compensated through monetary damages.

[203] One example will suffice. In view of the *Abitibi Act*, the Province is now the owner of the Grand-Falls paper mill. As such, the expenses of safely demolishing the mill and removing it normally belong to the Province as its new owner. In spite of this, the EPA Orders purport to require Abitibi to prepare a plan for the demolition of the Grand Falls mill that is now owned by and in possession of the Province.

[204] This order is as unenforceable as it is unjustifiable.

[205] When an order is most likely expected to be complied with through compensation in money rather than enforcement in nature, the regulator cannot avoid the qualification of the order as being a claim simply by refusing to wear the hat of a creditor for strategic purposes and financial or economic advantages, instead of valid public policy reasons.

[206] Actually, on February 8, 2010, the Minister noted in her decisions rejecting Abitibi's appeals of the EPA Orders that, in respect of each site, Abitibi had failed to comply with the EPA Orders within the set deadlines.

[207] Over all, it appears obvious that the Province knew that Abitibi could not, would not and will not be in a position to comply with its so-called injunctive or purely regulatory orders.

[208] Fourth and last, the Province is the transferee of most of the lands in respect of which the EPA Orders were issued. Yet, it has pointedly declined to make an order against itself despite the fact that it would be the beneficiary (in terms of improved land value) of any remediation work performed. The Province, as owner and occupier of the lands, is clearly a "person responsible" under s. 99 of the *EPA*.

[209] In a similar fashion, the Province, in its role as regulator, never asked other persons responsible under its *EPA*, like the towns involved, USAF, ASARCO or

³² Exhibits NL-8 to NL-11.

Linerboard, to deal with the environmental obligations allegedly outstanding on the Abitibi Sites.

[210] In other words, the evidence suggests that the target was not the enforcement of statutory duties or obligations. The target was Abitibi.

[211] In light of these considerations, it is reasonable to infer that the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question.

5) The Province's Behavior prior and after the EPA Orders

[212] There is more. Be it before or after the EPA Orders, the Province acted as a creditor with respect to the claims that they include.

[213] For instance, only days prior to issuing the allegedly non-monetary EPA Orders, the Province was before the Court in the Data Room Motion, arguing that it was a creditor of Abitibi precisely because of, amongst others, various environmental claims it allegedly possessed, including claims relating to Buchans, a site targeted by the orders.

[214] In the judgment on the Data Room Motion, the Court noted in fact that "the Province claimed that because of Abitibi's economic activities, it has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined" and that "the Province alleged that it has incurred significant costs in that regard".

[215] Put another way, in its Data Room Motion, the Province alleged that it had already incurred significant costs and liabilities as a result of a) Abitibi's alleged failure to meet its obligations and b) its hiring of CRA environmental consultants.

[216] In a contradictory manner however, in the EPA Motion, the Province now alleges that the very same monetary claims that it sought to advance as a basis to seek access to the electronic data rooms of Abitibi are no longer monetary claims, and thus remain unaffected by the stay of proceedings and the Claims Procedure Order.

[217] While the arguments of the Province for access were denied for the reasons set forth in the judgment on the Data Room Motion, the fact that such potential claims are financial and monetary in nature remains plain and obvious.

[218] For the Province to now contend otherwise is not very convincing and seems opportunistic at best. Admittedly, if the hat of the creditor (be it actual or potential) was proper then, it certainly would fit as well now.

[219] In a similar vein, the evidence showed that the Province actually began the process of seeking third party tenders for some of the remedial work that it was

allegedly expecting Abitibi to perform pursuant to the EPA Orders, the whole merely days after issuing the orders and weeks before the compliance deadline had expired.

[220] Mrs. Ballard confirmed this. Requests for proposals concerning the remediation work at the Buchans site were released as soon as in December 2009³³.

[221] Mrs. Ballard explained as well that the Province did some emergency work to repair the integrity of a dam near Buchans, and even dealt with some health issues arising from potential lead exposures in that town. Both issues were covered in the CRA Reports that were the source of the EPA Orders.

[222] The Province thus appears to have so far taken some steps to liquidate, at least partially, the extent of its claims against Abitibi arising from the EPA Orders. This is consistent with the true financial nature of these orders and the status of creditor of the Province. The interview of December 2009 of its Premier is along the same lines³⁴.

[223] On the whole, not only have some alleged damages been liquidated and related costs incurred, but it also seems that the Province has already a very good idea of the total costs involved. Certainly precise enough for the Premier to say that in all likelihood, no net payment to Abitibi will ensue.

[224] This is quite far from a behavior that would be consistent with a pure regulatory order. It is rather conduct analogous to those cases where courts have concluded that it amounted to provable claims of regulatory bodies in bankruptcy processes³⁵.

[225] As matter of fact, these claims can easily be characterized as contingent. They are far from being too remote or even too speculative. To the contrary, they bear strong elements of probability and the Province has definite means of valuing them. It has in fact started the process, to such an extent that the Premier was able to affirm that there were no expectations of any net payment to Abitibi as early as in December 2009³⁶.

[226] Therefore, as things stand presently, the EPA Orders are more than likely to result in a debt and liability of Abitibi towards the Province in the short term at worst.

[227] In such a case, s. 12 of the CCAA authorizes the Court to determine the "amount" of the claim that may be compromised. It corresponds to the amount that "proof of which might be made". The CCAA does not provide solely for the compromise of filed or actual claims but has from its inception been correctly interpreted as permitting contingent claims to be included. Here, there is definitely a claim that "might"

³³ Exhibit NL-15.

³⁴ Exhibit NL-16.

³⁵ See, for instance, *Re Shirley*, (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.) and *Re General Chemical Canada Ltd.*, 2007 CarswellOnt 5497 (Ont. C.A.) ("*General Chemical*"), leave to appeal to the Supreme Court refused.

³⁶ Exhibit NL-16.

be filed. That objective fact, not the subjective choice of the creditor to hold the claim in its pocket for tactical reasons, is the test under the CCAA.

[228] There may be difficulty in proving the amount or the right. Abitibi certainly contests every element of them. However, these objections would not put such a claim on a footing any different from other complex contingent claims that a claim officer or a court is called upon to consider in the course of CCAA proceedings.

[229] The fact that a claim may not be ascertained and may in fact be contested in its entirety during the CCAA process does not prevent it from being compromised. In many situations, courts have been called upon to determine the value of contingent or disputed claims for the purpose of having such claims included in compromises. The provable values of such claims are determined based on an assessment of the likelihood of the contingency occurring, followed by a quantification of the claim³⁷.

[230] The same process may be adopted whether the claim is a complex litigation claim, a claim under human rights legislation, a claim under a guarantee not yet demanded or a claim for environmental remediation under the *EPA* in respect of formerly owned properties³⁸.

[231] If, under the CCAA, a debtor can compromise contested debts arising from pay equity and labor standards statutes, class actions and personal injuries claims, or even pension plans disputes, it can certainly compromise environmental claims that are financial in nature and whose likely enforcement is through a monetary condemnation as opposed to an execution in nature upon the debtor.

[232] There is no reason to make an exception in this case. In *Anvil Mining Range Corp.*³⁹, Farley J. sanctioned a liquidation plan of arrangement under the CCAA in respect of mines against which certain government creditors held secured claims. One of these was a \$60 million claim by the Department of Indian Affairs and Northern Development that included future environmental remediation costs. In a judgment upheld by the Ontario Court of Appeal, Farley J. noted that the claim had been acknowledged as "contingent since it relates to reclamation costs in the future".

[233] Contingent claims are nothing more than incomplete claims, the enforceability of which depends on some contingency or future event that has not yet occurred (and may never occur). In the case of a guarantee, it might be the non-payment by the principal debtor. In the case of an environmental claim of the sort advanced by the Province, it would be the decision of the latter to carry out the remediation and pass along the cost as the *EPA* provides.

³⁷ See, *Air Canada, Re*, 2004 CanLII 6674 (Ont. S.C.), at para. 6; *Air Canada, Re*, 2006 CanLII 42583 (Ont. S.C.), at paras 24 and 25.

³⁸ See, with respect to guarantee claims, *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 162 (Ont. S.C.), at paras 12ff.

³⁹ *Anvil Range Mining Corp., Re*, 2001 CarswellOnt 1325, at para. 15 (Ont. S.C.); aff'd. in *Anvil Range Mining Corp., Re*, 2002 CarswellOnt 2254 (Ont. C.A.)

[234] The fact that all the elements of the claim do not presently exist does not deprive a contingent claim of its essential element of being a claim that can be quantified and the amount of which can be compromised.

[235] The holder of a guarantee that has not been called cannot seek to avoid the compromise of his or her claim by saying "you cannot compromise the guarantee I hold as I have not demanded on it yet". Likewise, neither can the Province allege that the claims for the costs of remediation of the properties which it has seized without compensation cannot be compromised simply because it chose not to actually ask for money in a situation where it is reasonable to conclude that this is the only way to go.

[236] Under such circumstances, a conditional creditor cannot have the luxury of electing whether or not its claim is subject to compromise under the CCAA. That would defeat its basic objectives and key purposes.

6) The *EPA* and the Applicable Case Law

[237] In the present case, the EPA Orders were issued pursuant to s. 99 of the *EPA*, which provides that the Minister may make an order "requiring a person, at that person's own expense" to do any of the listed category of actions.

[238] The jurisdiction to make such order is specifically couched in terms of the ability to cause a person to incur an expense. From that standpoint, such an order is, by its very nature, financial or monetary.

[239] Furthermore, s. 102(2) of the *EPA* permits the Minister to take action to carry out the terms of the order if the person to whom it is directed fails to do so. It provides that the expenses incurred by the Minister in doing so "are recoverable by the minister from the person to whom the order was directed as a debt owed to the Crown".

[240] Contrary to the situation that prevailed in some decisions invoked by the Province⁴⁰, the *EPA* thus contains a "debt-creating provision" in the event that a person targeted by an environmental remediation order fails to comply with it.

[241] As the *EPA* provides that the regulatory agency may perform the task itself and assert a claim against the debtor in respect of the costs of the performance of the obligations, the mechanism of a monetary judgment is then clearly contemplated as a means of enforcing environmental compliance. This is explicitly the case in subsection 102(4) of the *EPA*.

[242] Even if steps had not been taken by the Province to perform the work itself (and here, some have definitely been), this would signify nothing more than the difference between an accrued claim and a contingent one. Indeed, on the facts of this case, a money claim is the only mechanism for enforcement realistically open to the Province.

⁴⁰ See, for instance, *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

In such a context, it is difficult to sustain, as the Province argues, a demarcation between enforcement of the law and pursuit of a monetary judgment.

[243] There is little doubt that if the Province were to take the steps that clearly lie within its power to take under the *EPA* (i.e. performing the allegedly necessary remediation and making a claim for the costs so incurred), the resulting costs would be monetary claims provable in bankruptcy.

[244] The only difference at the moment is that the Province maintains that the last step in the process of quantifying its claims under the *EPA* Orders can be kept in its pocket and managed at its discretion for the purpose of gaming the *CCAA* and the priority of creditor claims hereunder.

[245] With respect, this is hardly a defensible position.

[246] To this day, although it is aware of the fact that Abitibi cannot comply with the *EPA* Orders, the Province maintains that it has chosen to compel Abitibi to fulfill the terms of the *EPA* Orders rather than resort to an exercise of its powers under s. 102 of the *EPA*.

[247] The Province adopts this approach because it needs to argue, for strategic purposes, that it is not a "creditor" of Abitibi, a few weeks after arguing the opposite position in the Data Room Motion.

[248] For the Province, the definitions of claims and provable claims found in the *CCAA* and in the *BIA* are dependent on the existence of a debt or liability owed by the bankrupt or insolvent person to the person with the claim. This was, it argues, the conclusion reached in *Jameson House Properties Ltd. (Re)*⁴¹, where the British Columbia Court of Appeal said that a claim for *CCAA* purposes must consist of "a debt or liability ... that must be owed by the [debtor] to the person seeking to prove the claim..."

[249] The Province's argument rests primarily on the distinction made in the *Panamericana*⁴² case between a situation "where the government insists that the person fulfill his or her statutory duties or obligations from his own resources" and one where the government avails itself from the debt-creating provision in its environmental legislation to perform the remedial work. Only in the latter situation would the government create a "debt owed to the Crown" and could not be anything else than a creditor.

[250] In *Panamericana*, the Court held that an environmental order imposed by the Alberta Energy Resources Conservation Board on a receiver of a bankrupt company was not a "claim provable". If the liability of the receiver for the abandonment of oil

⁴¹ (2009) 11 W.W.R. 425, at para. 47 (B.C.C.A.).

⁴² *Panamericana de Biennes Y Servicios (Receiver of) v. Northern Badger Oil & Gas Ltd.*, (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"), leave to appeal to the Supreme Court refused.

wells was present, that liability was not owed, however, to a "creditor". It was rather owed to the public at large:

The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money, nor is that the object of the whole process. Rather it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. (p. 290)

(Our emphasis)

[251] Likewise, in the two cases indexed as *Strathcona (Country) v. Fantasy Construction Ltd. (Trustee of)*⁴³, the Alberta Court of Queen's Bench ruled that an insolvent debtor must comply with its regulatory obligations to the public before paying the creditors. Relying on *Panamericana*, it stated that an obligation of the bankrupt to comply with public safety or environmental standards based on statutory authority must be honoured by the Trustee using estate assets notwithstanding resulting prejudice to creditors of the bankrupt.

[252] The court held, however, that where the regulatory authority has chosen to make itself a creditor by monetizing the regulatory obligation, the authority's status changes from that of an "enforcer" outside the scheme of bankruptcy distribution to a "creditor" within it:

Clearly, it is essential to this reasoning that the public agency charged with enforcing the general law of Alberta not have taken steps to make itself a creditor. If it has exercised a statutory authority or authority obtained from some other source, such as a Court Order, to do whatever ought to have been done by the party with the obligation and to recover the costs of doing so, it has become a creditor. From then on, the object of the whole process has changed. The public agency is no longer seeking to require the party with the general law obligation to comply. It is seeking to recover money. If the party with the obligation is in bankruptcy, collection of the money, its debt, by the public authority must be subject to the scheme of distribution created by the *BIA*⁴⁴.

(Our emphasis)

⁴³ (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*").

⁴⁴ (2005) 261 D.L.R. (4th) 221 (Alta Q.B.), at para. 46.

[253] In a similar fashion, pleads the Province, the Ontario Court of Appeal decided in *Bulora*, thirty years ago, that a court-appointed receiver-manager was required to expend money under its control – money that would otherwise be paid to secured creditors – in order to comply with regulatory obligations⁴⁵.

[254] The Court considers that the *Panamericana*, *Strathcona* and *Bulora* decisions are distinguishable from the present situation based on the relevant facts.

[255] Pivotal in these decisions was the fact that the regulators involved were not acting as creditors, nor seeking the recovery of a debt. They were rather public agencies seeking to enforce the general law of the province involved. None was deriving a direct pecuniary benefit through the compliance of the orders issued. That no steps had been taken (i) to enforce the law at issue, (ii) to make the regulator involved a creditor or (iii) to seek the recovery of money were also key to the findings adopted by the courts.

[256] On top of that, in each of *Panamericana*, *Strathcona* and *Bulora* (and in *Lamford* too), the debtors were still the owner of the assets covered by the orders to be complied with.

[257] The present situation is unique. It bears no similarity with the facts in any of these decisions. In none of them did the regulator stand to directly benefit financially from the orders issued. Here, to borrow from the wording used in these cases, the Province has even taken steps to make itself a creditor. Indeed, it can reasonably be inferred from the fact pattern at issue that it is, in truth, seeking to recover a benefit for itself, if not simply money.

[258] Given the lack of any presence of Abitibi in the Province and the obvious adequacy of money as a remedy to its alleged claims, the only effective means by which the EPA Orders can, on the balance of probabilities, be effectively enforced is by invoking s. 102(3) and (4) of the *EPA* now or later.

[259] Put otherwise, looking at the true substance over the apparent form, it is not the public "enforcer" taking steps to enforce the general law. It is, to the contrary, the enforcing authority clothed as a creditor.

[260] From that perspective, the situation at hand bears a lot of similarities to *Re Shirley*⁴⁶. In that case, the regulating authority was found to have a provable claim for costs expended and to be expended following a clean-up order ignored by the debtor but upon which the Ontario Minister of Environment had had to begin work partially.

⁴⁵ *Canada Trust Co. v. Bulora Corp.* (1980) 34 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Bulora*"), affirming (1980) 34 C.B.R. (N.S.) 145 (Ont. S.C.); see also, along the same lines, *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

⁴⁶ (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.).

[261] If, like there, the Province can, and no doubt will, "create" a debt next month based on the same jurisdictional cloth as now exists, that future obligation based on presently existing facts is as subject to compromise as the debt "created" today.

[262] In other words, as this review of the case law indicates, only limited cases in limited circumstances⁴⁷ have so far ruled that non-monetary statutory obligations are not claims provable in a bankruptcy process or in a CCAA restructuring. The cases actually contain strong caveats⁴⁸ to this kind of rulings where the duty is based on a statute that includes a "debt-creating" provision and where the regulator has taken steps to engage in the process by which such debt is created.

[263] Both conditions required for this exception to apply are present here, in a context where it is, furthermore, highly likely that the Province will have no other alternative but to pursue the monetary claim process of its *EPA* under the circumstances.

[264] Besides, the core of the *Panamericana* argument is that the receiver, having elected to operate the business, could not shirk its duty to follow a regulatory requirement arising from that very operation under general law. This narrow view, which is the ratio of the case, was relatively uncontroversial (although subsequent amendments to the *BIA* and to the *CCAA* have effectively overruled it by placing limits on a receiver's obligations).

[265] By contrast, Abitibi has not carried on business in NL since the time of filing and the *EPA* Orders were issued primarily in respect of properties formerly owned by Abitibi and in regard to activities in most cases years in the past.

[266] As a result, viewed as a case that found liability of a court-appointed receiver, *Panamericana* is of little relevance following the amendments to the *BIA* and *CCAA* that limited this liability explicitly. However, in its analysis, the Alberta Court of Appeal went beyond a consideration of the receiver's responsibility as an operator of the business to consider what claims may or may not be provable in bankruptcy. Such analysis was, arguably, an *obiter*; most *CCAA* courts have not followed it in subsequent decisions.

[267] In that regard, the Court notes that the *Panamericana* decision did not consider that the *BIA* (like the *CCAA*) explicitly contemplates the proof of contingent and unliquidated claims which, combined with the "debt creating" provisions of a statute like

⁴⁷ See, *Panamericana de Biennes Y Servicios (Receiver of) v. Northern Badger Oil & Gas Ltd.*, (1991) 81 D.L.R. (4th) 280 (Alta C.A.) ("*Panamericana*"), leave to appeal to the Supreme Court refused; *Strathcona (Country) v. Fantasy Construction Ltd. (Trustee of)*, (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); *Canada Trust Co. v. Bulora Corp.* (1980) 34 C.B.R. (N.S.) 152 (Ont. C.A.) ("*Bulora*"), affirming (1980) 34 C.B. R. (N.S.) 145 (Ont. S.C.); and *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

⁴⁸ See, *Re Shirley*, (1995) 36 C.B.R. (3d) 101 (Ont. Ct. J.); *Strathcona (Country) v. Fantasy Construction Ltd. (Trustee of)*, (2005) 261 D.L.R. (4th) 221 (Alta Q.B.) and (2005) 256 D.L.R. (4th) 536 (Alta Q.B.) ("*Strathcona*"); and *Re Lamford Forest Products Ltd.*, (1991) 10 C.B.R. (3d) 137 (B.C.S.C.) ("*Lamford*").

Tab 12

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 13

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 14

CITATION: SkyLink Aviation Inc. (Re), 2013 ONSC 2519
COURT FILE NO.: CV-13-1003300CL
DATE: 20130430

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

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 AND
ARRANGEMENT OF SKYLINK AVIATION INC., Applicant**

BEFORE: MORAWETZ J.

COUNSEL: Robert J. Chadwick and Logan Willis, for SkyLink Aviation Inc.

Harvey Chaiton, for Arbib, Babrar and Sunbeam Helicopters

Emily Stock, for Certain Former and Current Directors for Insured Claims

S. R. Orzy and Sean Zweig, for the Noteholders

Shayne Kukulowicz, for Certain Directors and Officers

M. P. Gottlieb and A. Winton, for the Monitor, Duff & Phelps

HEARD : APRIL 23, 2013

DECIDED: APRIL 23, 2013

REASONS: APRIL 30, 2013

ENDORSEMENT

[1] SkyLink Aviation Inc. (“SkyLink Aviation”, the “Company” or the “Applicant”), seeks an Order (the “Sanction Order”), among other things:

- (a) sanctioning SkyLink Aviation’s Plan of Compromise and Arrangement dated April 18, 2013 (as it may be amended in accordance with its terms, the “Plan”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”);

- (b) declaring that the New Shareholders Agreement is effective and binding on all holders of New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan; and
- (c) extending the Stay Period, as defined in the Initial Order of this Court granted March 8, 2013 (the “Initial Order”).

[2] No party opposed the requested relief.

[3] Counsel to the Company submits that the Plan has strong support from the creditors and achieves the Company’s goal of a going-concern recapitalization transaction (the “Recapitalization”) that minimizes any impact on operations and maximizes value for the Company’s stakeholders.

[4] Counsel further submits that the Plan is fair and reasonable and offers a greater benefit to the Company’s stakeholders than other restructuring or sale alternatives. The Plan has been approved by the Affected Creditors with 95.3% in number representing 93.6% in value of the Affected Unsecured Creditors Class and 97.1% in number representing 99.99% in value of the Secured Noteholders Class voting in favour of the Plan (inclusive of Voting Claims and Disputed Voting Claims).

[5] The request for court approval is supported by the Initial Consenting Noteholders, the First Lien Lenders and the Monitor.

THE FACTS

[6] SkyLink Aviation, together with the SkyLink Subsidiaries (as defined in the Affidavit of Jan Ottens sworn April 21, 2013) (collectively, “SkyLink”), is a leading provider of global aviation transportation and logistics services, primarily fixed-wing and rotary-wing air transport and related activities (the “SkyLink Business”).

[7] SkyLink is responsible for providing non-combat life-supporting functions to both its own personnel and those of its suppliers and clients in high-risk conflict zones.

[8] SkyLink Aviation experienced financial challenges that necessitated a recapitalization of the Company under the CCAA. On March 8, 2013, the Company sought protection from its creditors under the CCAA and obtained the Initial Order which appointed Duff & Phelps Canada Restructuring Inc. as the monitor of the Applicant in this CCAA Proceeding (the “Monitor”).

[9] The primary purpose of the CCAA Proceeding is to expeditiously implement the Recapitalization. The Recapitalization involves: (i) the refinancing of the Company’s first lien debt; (ii) the cancellation of the Secured Notes in exchange for the issuance by the Company of consideration that includes new common shares and new debt; and (iii) the compromise of certain unsecured liabilities, including the portion of the Noteholders’ claim that is treated as unsecured under the Plan.

[10] On March 8, 2013, I granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Company and its directors and officers.

SkyLink Aviation, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order.

[11] Pursuant to the Claims Procedure Order, the Secured Noteholders Allowed Claim, was determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, to be approximately \$123.4 million.

[12] The Secured Noteholders Allowed Claim was allowed for both voting and distribution purposes against the Applicant as follows:

- (a) \$28.5 million, as agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, was allowed as secured Claims against the Applicant (collectively the “Secured Noteholders Allowed Secured Claim”); and
- (b) \$94.9 million, the balance of the Secured Noteholders Allowed Claim, was allowed as an unsecured Claim against the Applicant (collectively the “Secured Noteholders Allowed Unsecured Claim”).

[13] The value of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range set out in the valuation dated March 7, 2013 (the “Valuation”) prepared by Duff & Phelps Canada Limited.

[14] The Claims Procedure resulted in \$133.7 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of \$94.9 million and other unsecured Claims of \$38.8 million, being filed against the Company.

[15] In addition, ten claims were filed against the Directors and Officers totalling approximately \$21 million. Approximately \$13 million of these claims were also filed against the Company.

[16] Following the commencement of these proceedings, SkyLink Aviation entered into discussions with certain creditors in an effort to consensually resolve the Affected Unsecured Claims and Director/Officer Claims asserted by them. These negotiations, and the settlement agreements ultimately reached with these creditors, resulted in amendments to the original version of the Plan filed on March 8, 2013 (the “Original Plan”).

PURPOSE AND EFFECT OF THE PLAN

[17] In developing the Plan, counsel submits that the Company sought to, among other things: (i) ensure a going-concern result for the SkyLink Business; (ii) minimize any impact on operations; (iii) maximize value for the Company’s stakeholders; and (iv) achieve a fair and reasonable balance among its Affected Creditors.

[18] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant.

[19] Unaffected Creditors will not be affected by the Plan (subject to recovery in respect of Insured Claims being limited to the proceeds of applicable Insurance Policies) and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

[20] Equity Claims and Equity Interests will be extinguished under the Plan and any Equity Claimants will not receive any consideration or distributions under the Plan.

[21] The Plan provides for the release of a number of parties (the “Released Parties”), including SkyLink Aviation, the Released Directors/Officers, the Released Shareholders, the SkyLink Subsidiaries and the directors and officers of the SkyLink Subsidiaries in respect of Claims relating to SkyLink Aviation, Director/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA proceedings or other related matters. These releases were negotiated as part of the overall framework of compromises in the Plan, and such releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization.

[22] The Plan does not release: (i) the right to enforce SkyLink Aviation’s obligations under the Plan; (ii) any Released Party from fraud or wilful misconduct; (iii) SkyLink Aviation from any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA; or (iv) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. Further, as noted above, the Plan does not release Director/Officer Wages Claims or Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the applicable Insurance Policies.

MEETINGS OF CREDITORS

[23] At the Meetings, the resolution to approve the Plan was passed by the required majorities in both classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Affected Unsecured Creditors Class:

95.3% in number and 93.6% in value (inclusive of Voting Claims and Disputed Voting Claims);

97.4% in number and 99.9% in value (Voting Claims only); and

(b) Secured Noteholders Class:

97.1% in number and 99.99% in value.

[24] Counsel to the Company submits that the results of the vote taken in the Affected Unsecured Creditors Class would not change materially based on the inclusion or exclusion of the Disputed Voting Claims as the required majorities for approval of the Plan under the CCAA

would be achieved regardless of whether the Disputed Voting Claims are included in the voting results.

[25] Counsel for the Company submits that the Plan provides that the shareholders agreement among the existing shareholders of SkyLink Aviation will be terminated on the Plan Implementation Date. A new shareholders agreement (the “New Shareholders’ Agreement”), which is to apply in respect of the holders of the New Common Shares as of the Plan Implementation Date, has been negotiated between and among: (i) the Initial Consenting Noteholders (and each of their independent counsel), who will collectively hold more than 90% of the New Common Shares; and (ii) counsel to the Note Indenture Trustee, who acted as a representative for the interests of the post-Recapitalization minority shareholders.

REQUIREMENTS FOR APPROVAL

[26] The general requirements for court approval of a CCAA plan are well established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v Royal Trust Co., 17 C.B.R. (3d) 1 (Ont. Sup. Ct. J. (Gen Div)).

Canadian Airlines Corp., Re, 2000 ABQB 442, at para 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60.

[27] Since the commencement of the CCAA Proceeding, I am satisfied that SkyLink Aviation has complied with the procedural requirements of the CCAA, the Initial Order and all other Orders granted by the Court during the CCAA Proceeding.

[28] With respect to the second part of the test I am satisfied that throughout the course of the CCAA Proceeding, SkyLink Aviation has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Honourable Court.

[29] Counsel to SkyLink submits that the Plan is fair and reasonable for a number of reasons including:

- (a) the Plan represents a compromise among the Applicant and the Affected Creditors resulting from dialogue and negotiations among the Company and its creditors, with the support of the Monitor and its counsel;

- (b) the classification of the Company's creditors into two Voting Classes, the Secured Noteholders Class and the Affected Unsecured Creditors Class, was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;
- (c) the amount of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range provided for in the Valuation and is supported by the Monitor;
- (d) the Affected Creditors voted to approve the Plan at the Meetings;
- (e) the Plan is economically feasible;
- (f) the Plan provides for the continued operation of the world-wide business of SkyLink with no disruption to customers and provides for an expedient recapitalization of the Company's balance sheet, thereby preserving the going-concern value of the SkyLink Business;

I accept these submissions and conclude that the Plan is fair and reasonable.

[30] In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the CCAA:

The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.

ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp. (2008), 43 CBR (5th) 269, (Ont. Sup. Ct. J. [Commercial List]); affirmed 2008 ONCA 587 leave to appeal refused (2008), 257 OAC 400 (SCC).

[31] Counsel to the Company submits that the third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicant based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The Plan does not release any Released Party for fraud or wilful misconduct.

[32] Counsel to the Company submits the releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization and that there is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

[33] I am satisfied that the releases of the Released Directors/Officers and the Released Shareholders contained in the Plan are appropriate in the circumstances for a number of reasons including:

- (a) the releases of the Released Directors/Officers and the Released Shareholders were negotiated as part of the overall framework of compromises in the Plan;
- (b) the Released Directors/Officers consist of parties who, in the absence of the Plan releases, would have Claims for indemnification against SkyLink Aviation;
- (c) the inclusion of certain parties among the Released Directors/Officers and the Released Shareholders was an essential component of the settlement of several Claims and Director/Officer Claims;
- (d) full disclosure of the releases was made to creditors in the Initial Affidavit, the Plan, the Information Statement, the Monitor's Second Report and the Ottens' Affidavit;
- (e) the Monitor considers the scope of the releases contained in the Plan to be reasonable in the circumstances.

[34] I am satisfied that the Plan represents a compromise that balances the rights and interests of the Company's stakeholders and the releases provided for in the Plan are integral to the framework of compromises in the Plan.

SEALING THE CONFIDENTIAL APPENDIX

[35] The Applicant also requests that an order to seal the confidential appendix to the Monitor's Third Report (the "Confidential Appendix"), which outlines the Monitor's analysis and conclusions with respect to the amount of the Secured Noteholders Allowed Secured Claim.

[36] The Confidential Appendix contains sensitive commercial information, the disclosure of which could be harmful to stakeholders. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 2 SCR 522 (WL Can) at para. 53 has been met and the Confidential Appendix should be sealed.

EXTENSION OF STAY PERIOD

[37] The Applicant also requests an extension of the Stay Period until May 31, 2013.

[38] I am satisfied that the Company has acted and, is acting, in good faith and with due diligence such that the extension request is justified and is granted.

MORAWETZ J.

Date: April 30, 2013

Tab 15

CITATION: Cline Mining Corporation (Re), 2015 ONSC 622
COURT FILE NO.: CV-14-10781-00CL
DATE: 2015-01-30

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 AND
ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL
COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick* and *Logan Willis*, for the Applicants Cline Mining
Corporation et al.

Michael DeLellis and *David Rosenblatt*, for the FTI Consulting Canada Inc.,
Monitor of the Applicants

Jay Swartz, for the Secured Noteholders

HEARD: January 27, 2015

ENDORSEMENT

[1] Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

- a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and
- b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

[2] Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise

and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

[3] Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

[4] The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

[5] The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

[6] The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corporation (Re)*, 2014 ONSC 6998 and need not be repeated.

[7] The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. \$3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of \$210,000 (with \$90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of \$100,000 payable in eight years from the Plan implementation date.

[8] As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

[9] The Applicants served the Amended Plan on the Service List on January 20, 2015.

[10] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

[11] Equity claimants will not receive any consideration or distributions under the Plan.

[12] The Plan provides for the release of certain parties (the "Released Parties"), including:

- (i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

- (ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the “Released Claims”).

[13] The Plan does not release:

- (i) the right to enforce the Applicants’ obligations under the Plan;
- (ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or
- (iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[14] The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants’ applicable Insurance Policies.

[15] The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

[16] The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

[17] None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

[18] Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court’s approval is to bind the company and its creditors.

[19] The general requirements for court approval of the CCAA Plan are well established:

- a. there must be strict compliance with all statutory requirements;
- b. all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done, which is not authorized by the CCAA; and

- c. the plan must be fair and reasonable.

(see *Re SkyLink Aviation Inc.*, 2013 ONSC 2519)

[20] Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

[21] In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

- a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;
- b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;
- c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;
- d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;
- e. all Affected Creditors that voted on the Plan voted for its approval;
- f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;
- g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;
- h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and
- i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

[22] The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

(“*ATB Financial*”); *SkyLink, supra*; and *Re Sino-Forest Corporation*, 2012 ONSC 7050, leave to appeal denied, 2013 ONCA 456).

[23] The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

[24] I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

[25] Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

[26] The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

[27] The Monitor supports the Applicants’ request for the sanction of the Plan, including the releases contained therein.

[28] I am satisfied that in these circumstances, it is appropriate to grant the releases.

[29] The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

[30] The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

- (i) circumstances exist that make the order appropriate; and
- (ii) the applicant has acted, and is acting in good faith and with due diligence.

[31] The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

[32] Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

[33] For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

R.S.J. Morawetz

Date: January 30, 2015

Tab 16

Court of Queen's Bench of Alberta

Citation: Mailer v Mailer, 2021 ABQB 423

Date: 20210531
Docket: 4803 187801
Registry: Edmonton

Between:

Jennifer Lynn Mailer

Applicant/Defendant

- and -

Lee Jeffery Mailer

Respondent/Plaintiff

**Reasons for Judgment
of the
Honourable Mr. Justice M. J. Lema**

A. Introduction

[1] Did a binding-arbitration-award challenger require leave to appeal the award and, if so, did he seek leave in time?

[2] Parties in family-law litigation agreed to arbitrate selected issues and made a binding-arbitration agreement. On appeal rights, the parties agreed that “the decision of the Arbitrator shall be subject to an appeal only on question of law in accordance with s. 44(2) of the *[Arbitration] Act*.”

[3] The arbitration-award supporter contends that, by including that provision, the parties limited appeals to questions of law and also imposed a leave requirement. She then argues that leave was not sought within the statutory time period, that the period cannot be extended, and that the Court should accordingly declare the arbitration award beyond challenge.

[4] The award challenger accepts that leave to appeal was required, acknowledges that leave was not sought in time, and asks that time to seek leave be extended.

[5] I find that ss 44(2) applies (and thus imposes a leave requirement), that the challenger did not apply for leave within the statutory time period, that that period has now expired, and that it cannot be extended.

[6] Accordingly, I dismiss the arbitration challenge for lack of (now unattainable) leave to appeal.

[7] I also note that, in any case, likely none of the perceived errors qualify as “questions of law.”

B. Analysis

Arbitration Act (key provisions)

[8] It is common ground that the *Arbitration Act* applies here (recital “D” and s. 3.1 of the arbitration agreement).

[9] The key provisions of the *Act* here are ss 44 (appeal rights) and 46 (time limit to appeal):

44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may, with the permission of the court, appeal an award to the court on a question of law.

(2.1) The court shall grant the permission referred to in subsection (2) only if it is satisfied that

- a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
- b) the determination of the question of law at issue will significantly affect the rights of the parties.

(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

(4) The court may require the arbitral tribunal to explain any matter.

(5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.

(6) Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

46(1) The following must be commenced within 30 days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based:

- a) an appeal under section 44(1);
- b) an application for permission to appeal under section 44(2);
- c) an application to set aside an award under section 45.

(2) An application to set aside an award on the grounds that an arbitrator has committed a corrupt or fraudulent act or that the award was obtained by fraud must be commenced

- a) within the period referred to in subsection (1), or
- b) within 30 days after the applicant discovers or ought to have discovered the fraud or corrupt act,

whichever is later. [emphasis added]

[10] Per ss 44(1) and (2), the *Act* differentiates between scenarios where the parties expressly provide in their arbitration agreement for an appeal and define its scope (questions of law, fact, or mixed law and fact, or some combination), on the one hand, and where their agreement does not provide a right to appeal on a question of law, on the other.

[11] The parties are free to include or not include an appeal right in their agreement and, if they include one, to define its scope as indicated.

[12] If they do not include any appeal right at all or if they include one not providing for a question-of-law appeal, then ss 44(2) fills the gap for that kind of appeal. It says that, where the agreement does not provide for such an appeal, “a party may, **with the permission of the court**, appeal an award to the court on question of law.”

[13] In other words, as far as question-of-law appeals go, the parties either provide such a right for themselves in their agreement (permitted under ss 44(1)) or the *Act* supplies such a right for them (under ss 44(2)).

[14] The difference is that, where the parties agree on the possibility of such an appeal, no court leave is required. Per ss 44(1), the only question is: did the arbitration agreement provide such a right? (The statutory precondition is simply “If the arbitration agreement so provides”.) If so, “a party may appeal an award to the court on a question of law” That is, it can appeal straight off, without having to first seek leave to appeal.

[15] If the parties do not provide that right for themselves, ss 44(2) does so but imposes a “permission of the court” hurdle. (Subsection 44(2.1) outlines the tests to clear that hurdle: “importance to the parties” and “significant [impact on] their rights.”)

[16] That is the statutory backdrop against which I examine the arbitration agreement here.

Arbitration agreement here

[17] The key provisions of the agreement are:

11.1 The decision of the Arbitrator on the issues submitted shall be final and binding on the parties **The parties agree that the decision of the Arbitrator shall be subject to an appeal only on question of law in accordance with s. 44(2) of the Act.** ...

11.3 **If one party seeks leave to appeal** or to set aside the Award, the Arbitration Award shall be forthwith entered as a judgment of the Court. ...

11.5 The parties further expressly acknowledge that the **ultimate determination of the issues will include questions of mixed fact and law and involve the discretion** of the Arbitrator. [emphasis added]

[18] Per section 1 of the agreement, the issues submitted to arbitration were (a) division of matrimonial property; (b) the parties' respective Guidelines Incomes; (c) child and spousal support (including entitlement, quantum, and duration); and (d) costs.

Did the arbitration agreement authorize question-of-law appeals?

[19] The issue here distills to this: **did the parties provide for a question-of-law appeal right, or not?**

[20] As noted, the parties "agree[d] that the decision of the Arbitrator **shall be subject to an appeal only on question of law in accordance with s. 44(2)**"

[21] The first eleven bolded words of s 11.1 ("shall be ... questions of law") are clear. If only those words had been used, the parties would plainly have built in a question-of-law appeal right and would have fit squarely within ss. 44(1), with no leave to appeal needed.

[22] But do the words "in accordance with s. 44(2)" change the meaning of the opening phrase?

[23] The answer is yes, for these reasons:

- an appeal right "in accordance with ss. 44(2)" necessarily means an **appeal subject to a leave requirement**. Otherwise the parties would have said "in accordance with ss. 44(1)";
- the parties could have engaged ss. 44(2) simply by remaining silent on question-of-law appeals. In that indirect fashion, they would have satisfied its opening condition ("If the arbitration agreement **does not provide that the parties may appeal an award to the court on a question of law**"). But they decided to explicitly invoke ss. 44(2);
- ss 44(1) and (2) are binary: the parties either provide, or do not provide, a question-of-law appeal right. We start by asking whether the parties, by agreement, created an unconditional question-of-law appeal right. If they did, a party perceiving a question-of-law error can launch an appeal via that clear pathway. If they did not create an unconditional right to appeal such questions,

by definition, they fall into ss. 44(2), where question-of-law appeals are **possible but only with leave**;

- what else can the parties have intended by their express reference to ss. 44(2) and the limitation of an appeal “in accordance with” that provision? Instead of a clear pathway to an appeal, they obviously preferred to impose a leave hurdle; and
- this view is clinched by the follow-up wording of s. 11.3 of the agreement: “If one party **seeks leave to appeal** or to set aside the award” The bolded wording only makes sense if s. 11.1 imposes a leave hurdle. Nothing else in the agreement would or could give rise to a “leave to appeal” requirement.

[24] The award challenger himself does not argue that leave was not required, instead that time to seek leave can, and should be, extended.

[25] This raises the next issues: what is the statutory deadline for applying for leave to appeal, did the applicant meet that deadline, and, if not, can it be extended?

[26] I start with the statutory deadline.

Statutory time period to seek leave

[27] I reproduce the key portion of ss. 46(1) (full provision above):

The following must be **commenced within 30 days after the** appellant or **applicant [for leave] receives the award ...** on which the appeal or application is based:

- a) an appeal under section 44(1); [or]
- b) an **application for permission to appeal under section 44(2).**

[28] The award here was released on March 1, 2021. The challenger filed a “family application” (Form FL-18 under Rule 12.44(1)(a) – “Application within Course of Proceeding”) on March 31, 2021.

[29] The award supporter does **not dispute that the filing here was made “within 30 days” after the award was issued. But she asserts that, instead of filing the necessary application for leave, the challenger filed a notice of appeal i.e. skipped the leave step.**

[30] The challenger accepts that leave to appeal was required here and acknowledges filing an appeal, not an application for leave to appeal. Per his counsel’s letter submitted on these issues, “the application to appeal was **filed pursuant to s. 44(1) [the straight-to-appeal provision]** rather than s. 44(2) [the leave-to-appeal provision]” (emphasis added). As well, he acknowledged (per the same letter) filing a “**Notice of Appeal**” and that “the application simply **missed the step to request leave to appeal.**”

[31] The consequence is that, with **no application for leave to appeal** filed before the 30-day deadline expired (on March 31, 2021), it is too late, **per that deadline**, to seek such leave.

[32] The challenger's focus (necessarily) turned to whether that deadline can be extended and, if so, whether an extension is warranted here, which I examine next.

Whether 30-day period to apply for leave to appeal extendable

[33] The challenger cited the test for extending an appeal period from ***Cairns v Cairns***, [1931] 4 DLR 819 at 826-827 (Alta SC(AD)), reiterated as recently as two weeks ago in ***Wang v Alberta***, 2021 ABCA 175 (May 12, 2021), where Veldhuis JA (in chambers) stated:

Under Rule 14.8(2) of the ***Alberta Rules of Court***, Alta Reg 124/2010, a Notice of Appeal must be filed and served within one month of the date of the decision. The Substantive Orders were granted in November 2019, December 2019, February 2020 and September 2020. The Notice of Appeal for all of them was filed on January 4, 2021. As a result, under Rule 14.37 of the ***Alberta Rules of Court***, I must consider whether I should extend time to appeal the Substantive Orders.

The **test for an extension of time was established in *Cairns v Cairns***, 1931 CanLII 471 (ABCA), [1931] 4 DLR 819 at 826-827, [1931] 3 WWR 335. The applicants must establish:

- a) that there was a bona fide intention to appeal while the right to appeal existed;
- b) that there was an explanation for the delay including some special circumstance that would excuse or justify the delay;
- c) that the other party was not so prejudiced by the delay that allowing an appeal would create injustice;
- d) that the applicant has not benefited from the judgment being appealed from; and
- e) that the appeal would have a reasonable chance of success if allowed to proceed. [paras 13-14] [emphasis added]

[34] The challenger offered submissions on each of these factors as they apply, or may apply, here.

[35] The award supporter disputes that the statutory (*Arbitration Act*) deadline can be extended, whether on a ***Cairns v Cairns*** analysis or otherwise. She pointed first to ***Funk v Funk***, 2018 ABCA 210, where McDonald JA (in chambers) held:

... even if the applicant could appeal the December 1, 2017 Judgment, there is still the Arbitral Award, which the applicant appealed after the expiry of the appeal period. He is seeking an extension of time to appeal, but is unlikely to be successful in obtaining one. **The *Arbitration Act*, RSA 2000, c A-43, does not provide for extending time.** Even claiming fraud as a basis to set aside an award requires the application be commenced within 30 days after the fraud was discovered: *Arbitration Act* section 46(2). **The *Rules of Court* do not permit a court to extend statutory appeal periods:** *B.W. v G.R.*, 1989 ABCA 205. [para 43] [emphasis added]

[36] And to *Allen v Renouf*, 2019 ABCA 250, where the Court of Appeal ruled:

... the chambers judge correctly decided that nothing in the *Arbitration Act*, the *Alberta Rules of Court*, or on any other juridical basis, conferred on him the jurisdiction to extend the statutory time limit [in s. 46]: *Funk v Funk*, 2018 ABCA 210 at para 43; *BW v GR*, 1989 ABCA 205 at para 11, 68 Alta LR (2d) 377.

[37] The Court of Appeal echoed this conclusion more recently in *Pearson v Pearson*, 2020 ABCA 260

... Mr. Pearson’s only grounds for such a [stay] remedy would have been his desire to appeal the arbitration award, which was out of time prior to the Application. Section 46(1)(a) of the [*Arbitration*] Act **requires that an appeal be commenced within 30 days, a time limit the court has no jurisdiction to extend**: *Allen v Renouf*, 2019 ABCA 250. [para 44] [emphasis added]

[38] See also the concurring decisions on the non-extendability of the s. 46 deadlines in *Ellsworth v. Ness Homes Ltd.*, 1999 ABQB 287 (Girgulis J.) at para 32 and *Masterpiece Cabinetry & Finishing Ltd v Risi*, 2001 ABQB 118 (Coutu J.) at paras 16-20.

[39] Finally, see also the cases gathered by Wakeling JA (in chambers) on this point generally in *Legacy Inc v Red Deer (City)*, 2018 ABCA 393:

... this Court cannot extend a statutorily imposed deadline. [footnote 39]

[footnote 39] *Tymchak v. Subdivision and Development Appeal Board*, 2012 ABCA 22, ¶ 41; 519 A.R. 295, 305 (chambers) (a court **cannot extend a statutory limitation period for filing and serving a permission-to-appeal application**); *County of Northern Sunrise v. De Meyer*, 2009 ABCA 205, ¶ 7; 454 A.R. 88, 92 (“Where legislation provides for a specific time period (such as 30 days) for launching an appeal to this court, and where that legislation does not expressly or impliedly incorporate by reference the *Rules of Court* ... and their curative provisions regarding extending time to appeal, this Court **lacks jurisdiction to extend that time period if the limitation is clearly a ‘statutory prescription’**”); *Mallett v. Yorkshire Trust Co.*, 1986 ABCA 97 (CanLII), 71 A.R. 23, 24 (C.A. 1986) (“unless there is an explicit statutory authority to relieve against a statutory prescription, this court has **no power** to do so”); *Lakevold v. Dome Petroleum*, 1979 ABCA 261 (CanLII), 181 A.R. 254, 256 (C.A. 1979) (a court may **not extend a statutory time limit** unless the statute confers on the court the authority to extend the time); *Duvs v. Duvs*, 1973 ALTASCAD 9 (CanLII), [1973] 3 W.W.R. 394, 397-98 (“[a rule allowing a court to abridge or extend a time limit] **does not apply where the time for appealing is fixed by statute** which confers no power on the court to extend the time”); *Re MacDonald*, 1928 CanLII 123 (SK CA), [1929] 2 D.L.R. 265, 266

(Sask. C.A. 1928) (“As the right of appeal is given by statute and there is no statutory or other authority for extending the time fixed by the statute, there is no right of appeal if the appeal is not brought within that time, and this Court has **no power to extend that time** as we have been asked to do”) & ***B.C. Permanent Loan Co. v. Canadian Northern Railway***, 1922 CanLII 282 (SK CA), 66 D.L.R. 75, 76 (Sask. C.A. 1922) (“The right of appeal being given by statute must be exercised strictly in accordance with the terms of that statute. There is no provision in the Railway Act for extending the time for appeal consequently **on the termination of the time fixed by the statute, if no notice of appeal has been given, the right of appeal is gone**, and there is no appeal to which the practice and the proceedings of the Court can apply”). [para 61, with footnote 39] [emphasis added]

[40] The *Arbitration Act* does not provide for extensions of the s. 46 deadlines, whether directly or indirectly e.g. by incorporating the extension powers in the *Rules of Court*.

[41] Accordingly, the *Cairns v Cairns* test does not apply.

[42] The Court has no power to extend the 30-day deadline for seeking leave to appeal.

C. Likely no “questions of law” in any case

[43] The expiry of the deadline to seek leave to appeal likely ends up having no practical consequence. The reason is that, as discussed above, only an appeal on “questions of law” was permitted here. In my view, likely none of the proposed appeal issues fall into that category.

[44] On the utility of examining how an appeal would likely have fared if leave had been sought and obtained, I draw guidance from *Warren v Gilbert Estate*, 2008 ONCA 694 (excerpt from headnote):

... Had the estate appeared at trial, it would have had to take a position contrary to the one taken by G while she was alive. During her lifetime, G failed to take any steps to sever the joint tenancy, even after the matrimonial litigation started, because she wanted D to become the sole owner of the property by right of survivorship. **It was most unlikely that the estate would have taken the position at the original trial that it now sought to assert, and it was unlikely that the estate would have succeeded had it done so.** [see also paras 21 and 22] [emphasis added]

[45] As noted earlier, the arbitration addressed these issues:

- division of matrimonial property;
- the parties’ respective Guideline incomes;
- child and spousal support (including entitlement, quantum, and duration); and
- costs.

[46] The arbitrator examined all of these issues and delivered her decisions on each of them.

[47] I reproduce the challenger's list of perceived errors:

- [error] in the application of law in determining the [award supporter's] entitlement to spousal support;
- [error] in the application of law in determining duration of spousal support;
- [error] in law in the application of Cunningham factors in determining guideline income; and
- [error] in law in relying upon hearsay evidence of value of [a certain timeshare interest] provided by the [award supporter].

[48] The challenger framed, or tried to frame, each of these issues as, or as involving, a question of law.

[49] However, I note the following:

- on **entitlement to spousal support**, the arbitrator proceeded on the basis that the **challenger did not dispute entitlement**: para 23 (fourth bullet) and para 70 of the decision;
- that squares with her summary of his **“amount of spousal support” submissions** (both prospective and retroactive): para 17 (first bullet);
- I see no realistic possibility that the arbitrator misunderstood the challenger's position (“not contested”) on entitlement;
- even if she did, such would not raise a “question of law”, instead a purely factual issue (was entitlement conceded or not?);
- in any case, based on a nearly 24-year marriage and the general arc of the parties' working and domestic lives as summarized by the arbitrator (in part) at paras 74-78, I see virtually no chance of the challenger succeeding on a “no entitlement” argument;
- as for **duration of spousal support**, the arbitrator's decision (para 81) represented the exercise of her discretion to depart from the (non-binding) *Spousal Support Advisory Guidelines*, for reasons she articulated. Her reasons do not reflect any error in the identification of any relevant legal principle. At most, this exercise involved the application of properly identified (whether explicit or implicit) legal principles to the facts on the ground i.e. a “mixed fact and law” exercise i.e. not a “question of law.” On this aspect, see *Arnason v Arnason*, 2011 ABQB 393 (Nation J.) at paras 44-45. (For an example of a spousal support issue raising an actual question of law, see the decision of Strekaf J. (as she then was) in *Dawson v Dawson*, 2016 ABQB 167 i.e. whether the arbitration award, in part concerning spousal support, was unenforceable because no acknowledgements and certificates of independent advice pursuant to section 38 of the *Matrimonial Property Act* were executed in respect of the Award);
- in any case, the arbitrator's award of indefinite spousal support is subject to review once a named child is no longer a child of the marriage. That child is currently finishing Grade 12 and intends to study at NAIT. Presumably that means continued “child of the marriage” status for him for the next three or so years, following which spousal support is reviewable;

- as for **guideline income**, the focus was on the challenger's income (with the parties agreeing on the award supporter's Guideline income (para 35)) and the asserted errors limited to "application of *Cunningham* factor." That refers to ***Cunningham v Seveny***, 2017 ABCA 4 and its discussion of Guideline-income-adjustments for persons earning income through one or more corporations (e.g. the personal share of corporation-covered expenses, etc);
- nothing in the arbitrator's decision reflects the selection of the wrong legal principle(s) or off-target description of those principles. In the challenger's own words, this is about the **application** of those principles i.e. a mixed-fact-and-law issue, not a "question of law";
- in any case, the arbitrator's Guideline-Income analysis (paras 35-57) appears to be thorough and even-handed, with every adjustment or declined adjustment anchored in relevant facts; and
- finally, as for the perceived **evidence error** (relying in part on hearsay evidence to value a certain time-share interest – a letter from a certain travel-related entity):
 - per the arbitration agreement, the parties gave the arbitrator jurisdiction to hear and determine "all process issues ... including ... evidentiary issues that may arise";
 - the agreement also stated that "the Arbitrator ... shall not be bound by the strict rules of evidence in force in courts of this Province, and may, in her discretion, receive any evidence submitted to her by the Parties that [she] believes to be relevant in the matters in controversy or that will enable [her] to arrive at a fair and proper decision";
 - that squares with s. 21(1) of the *Arbitration Act*: "the [arbitrator] is not bound by the rules of evidence ... and has the power to determine the admissibility, relevance and weight of any evidence";
 - if the challenger had any competing documentary evidence of value, he did not produce it, leaving the arbitrator free to "make an award on the evidence before [her]", per ss 27(3) of the *Act*;
 - nothing in the decision reflects that the challenger was unable to provide valuation evidence i.e. if he had decided it would assist. Apparently, he decided not to provide any (independent) valuation evidence i.e. beyond his opinion that the award supporter's proposed value was too high;
 - the arbitrator recognized that the valuation evidence was "less than ideal", but she had to work with the available evidence, and she was entitled (as outlined above) to rule on what evidence could be received and how much weight to attach to it; and
 - in any case, valuation of an asset is a question of fact: ***Arnason v Arnason***, 2011 ABQB 393 (Nation J.) at para 28.

[50] In the above analysis, I rely on and invoke the helpful "what is a question of law?" analysis of Nation J. in ***Metcalf v Metcalfe***, 2006 ABQB 798, particularly paras 22-24:

There has been considerable judicial analysis of exactly what comprises a question of law, as opposed to a question of mixed law and fact. Because of its relevance to judicial review and appellate advocacy, these are helpful areas when looking at these principles generally. The applicable principles have been

reviewed in some detail by Fruman, J.A. in *Alberta (Workers' Compensation Board) v. Appeals Commission* 2005 ABCA 276 at paras. 21, 22, 29 and 30. **Generally stated, an incorrect statement of the legal standard, or test, or an application of incorrect factors in applying the law to the facts is clearly an error of law. The law must not only be stated correctly, but that correct interpretation of the law applied to the facts, when engaging in applying the law to the facts. Where there is a discretion involved in applying the law to the facts, the application of the discretion is not a question of law, but a question of mixed law and fact. However, if a wrong legal principle is used in the application of the law to the facts, or in the exercise of the discretion, there is an error of law.**

This determination is not only important in terms of what questions can be reviewed, but also the standard of review. An error of law is to be reviewed at the level of correctness. An exercise of discretion, or the application of a legal principle to the facts, is to be reviewed at the level of reasonableness.

Family law illustrates well the issues that can arise. **One can state the law to be applied, for example, the matters to consider to decide spousal support. These correct legal considerations, set by the law, have to then be applied to the facts. That application of the law to the facts involves a question of mixed law and fact. Where there is broad discretion, as there is in applying the law of spousal support, the review of the exercise of the discretion is a question of mixed law and fact. The way the discretion has been exercised can only be reviewed as a question of law if it can be shown that there was an error in the legal rules (or law) that was applied, when exercising that discretion.** [emphasis added]

[51] On *Cunningham*-type adjustments to income, see in particular Nation J.'s comments at para 29:

The Applicant complained of adjustments that the Arbitrator had made to arrive at the Applicant's real income for child support purposes. The argument advanced is set out in detail at pp. 9 to 13 of the Appellant's brief filed in support of the appeal. It relates to changes in income for automotive expenses, courses and conferences, depreciation and amortization, promotion and entertainment. **The law allows these adjustments to be made, it is an exercise of discretion applicable to every self-employed person, or person who utilizes write offs for tax purposes, when their taxable income may not correctly reflect their income for support purposes. This is an issue of mixed law and fact, and as no error was demonstrated in the legal principles applied, it is not reviewable on appeal.** [emphasis added]

[52] In *Clark v Unterschultz*, 2020 ABQB 338, Ross J. addressed the same issues:

The Arbitration Agreement provided that the following issues were submitted to arbitration:

A. **Matrimonial Property division, including issues of valuation**, exemptions, dissipation or disposition of assets, manner

of property division, including directions on payment and enforcement;

B. **Entitlement and quantum of spousal support, including fixing and enforcement of arrears and variation on a retroactive basis;**

C. **A determination of guideline incomes for support purposes;**

D. Costs.

All of these issues involve mixed questions of fact and law, as opposed to discrete questions of law. I conclude that the identified questions of law mentioned earlier – i.e. failure to allow expert evidence, corporate separateness, and inadequacy of reasons – were not expressly referred to the Arbitrator, and the appeal is not barred by s 44(3) of the *Arbitration Act*. [paras 46 and 47] [emphasis added]

[53] In *Craig v Craig*, 2004 ABCA 364, Paperny JA (in chambers) classified spousal-support quantum fixing as a “mixed fact and law” exercise:

... to do justice in such cases, it is important to consider the possible merits of the appeals themselves. **The first [appeal] is from an interim order for spousal support. The chambers judge ordered the sum of \$1500.00 per month, payable to the respondent retroactive to November 1, 2001,** and directed that the issues of matrimonial property and spousal support be set down for trial at the earliest possible date after March 30, 2002. The appellant’s primary grounds of appeal are that he was refused an adjournment and that the chambers judge arrived at an incorrect amount by virtue of considering evidence that was not properly before him. As to the first, the granting of an adjournment is discretionary and a review of the record does not reveal any error warranting appellate intervention. **The second ground, the amount, is a question of mixed fact and law and subject to a high deferential standard: see *Hickey v. Hickey*, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518.** ... [para 9] [emphasis added]

[54] In *Patton-Casse v Casse*, 2012 ONCA 709, the Ontario Court of Appeal confirmed that an appeal of an arbitrator’s decisions on child support and spousal support, concerning alleged “errors in the arbitrator’s application of the law to the facts”, was an appeal of “mixed fact and law” (paras 9 and 13).

[55] In that case, the perceived errors involved incorrectly tagging the father for “blameworthy conduct”, misunderstanding the tax implications of awarding retroactive spousal support, failing to consider the connection (or lack of connection) between the payor’s new employment and the recipient spouse’s efforts during the marriage, and misinterpreting the parties’ “joint statement of issues for trial” as it concerned overpayment adjustments (paras 14-30).

[56] All these issues were classified as questions of mixed fact and law.

[57] As I see it (in light of these “taxonomy of errors” cases), likely none of the issues identified by the challenger here raise “questions of law.”

D. Conclusion

[58] Per ss. 44(2) of the *Arbitration Act*, leave to appeal was needed before this appeal could be launched.

[59] Leave was not sought before the unchangeable statutory deadline expired.

[60] With leave required and not obtained, and now not obtainable, the appeal challenge must be dismissed.

[61] In any case, the proposed grounds likely did not raise questions of law, so the appeal was likely bound to fail for that reason alone.

[62] The award supporter is entitled to costs of the May 18th chambers application.

[63] I thank the parties for their helpful written and oral submissions.

Heard on the 18th day of May, 2021. Written submissions received on May 21st, 25th and 28th, 2021.

Dated at the City of Edmonton, Alberta this 31st day of May, 2021.

M. J. Lema
J.C.Q.B.A.

Appearances:

Katherine E. Palmer
Strathcona Law Group LLP
for the Applicant/Defendant

Laura H. Bruyer
Bruyer Mackay Family Law
for the Respondent/Plaintiff

Tab 17

Court of Queen's Bench of Alberta

Citation: Kozina v Redlick, 2019 ABQB 749

Date: 20190925
Docket: 1503 14832
Registry: Edmonton

Between:

Kazimierz Kozina

Plaintiff

- and -

**Jack Redlick, Craig Offin, Jason Kemp,
Phil Leeman, Regan James, David Kabyn,
Steven Chwok, Danielle Campbell,
and Michael Boyd and Rod Knecht,
Chiefs of the Edmonton Police Service**

Defendants

Reasons for Decision of

L.A. Smart, Master, Court of Queen's Bench of Alberta

Introduction & Background

[1] On February 11, 2010, the Respondent/Plaintiff, Kazimierz Kozina, was arrested by the Defendant Edmonton Police Service (EPS) Officers Jack Redlick, Craig Offin, Jason Kemp, and Phil Leeman during a “buy-and-bust” operation. During the course of the arrest, Mr. Kozina suffered a broken orbital bone and spinal injuries.

[2] Mr. Kozina alleges that the Defendants covered up the incident and there was a failure to disclose the brutality allegations from a police witness to the arrest.

[3] The Defendants Boyd and Knecht (the Applicants) have applied to strike all or part the Statement of Claim, or alternatively summary dismissal. The basis for this application includes several arguments, including a limitations defence, abuse of process, bad faith, and unavailable remedies.

[4] Mr. Kozina initiated a complaint against the arresting officers. The then Chief of Police Michael Boyd, dismissed this initial complaint on November 23, 2010. Later, in **Kozina v Kemp**, 2014 CanLII 10796 (ABLERB) at para 20, the Alberta Law Enforcement Review Board (LERB) found that the Chief of Police “did not effectively advise the appellant of the disposition and the appellant’s right of appeal in 2010.”

[5] On October 25, 2011, Mr. Kozina pleaded guilty to two charges in relation to the arrest: trafficking in a controlled substance and obstruction of a peace officer.

[6] On September 27, 2013, a CBC program was aired which documented former EPS Officer Derek Huff witnessing brutality and alleged corruption during the arrest of Mr. Kozina. According to **Kozina v Kemp** at para 1, Mr. Kozina first became aware of these allegations because of the CBC program. At no point from the arrest on February 11, 2010, until September 27, 2013, was any of Mr. Huff’s reporting or any subsequent documentation into the conduct of the arrest (outside of the formal investigative documentation and decisions) disclosed to Mr. Kozina.

[7] Specifically, Mr. Kozina’s Statement of Claim alleges that Mr. Huff continually reported his concerns to numerous EPS employees (including EPS supervisors, Human Resources, and the Deputy Chief of Police) about the conduct of the arrest of Mr. Kozina, as well as how the arrest was characterized by the arresting officers in written reports. The Statement of Claim extensively details allegations that Mr. Huff was mistreated by his colleagues and that EPS did not investigate his allegations.

[8] According to **Kozina v Edmonton (Police Service)**, 2014 ABLERB 46 at para 2:

... in light of concerns brought forward in 2012 by [Mr. Huff] about the level of force used during the appellant’s arrest, the matter had been referred to the Alberta Serious Incident Response Team (“ASIRT”), for investigation of possible criminal charges.

[9] In May of 2014, the ASIRT investigation concluded and no criminal charges were laid.

[10] Soon after the CBC program aired, Mr. Kozina contacted legal counsel who requested a copy of the Chief of Police’s 2010 decision disposing of Mr. Kozina’s complaint. The Board in

Kozina v Kemp found that service of this disposition was effected on October 18, 2013 when Mr. Kozina's legal counsel obtained a copy.

[11] Mr. Kozina then appealed the Chief of Police's 2010 dismissal to the LERB. On September 5, 2014, the LERB directed the Chief of Police (at that time, Rod Knecht) to again investigate Mr. Kozina's complaints. Further investigation led the Chief to direct a disciplinary hearing into the complaint.

[12] On June 3, 2015, Mr. Kozina appealed his guilty convictions. The Court of Appeal set aside his guilty pleas and quashed the conviction on July 14, 2015.

[13] On September 25, 2015, Mr. Kozina filed the Statement of Claim in this matter. The Statement of Claim was amended on February 24, 2017. Paragraph 26 of the Amended Statement of Claim alleges: "The Plaintiff's claim is for damages arising out of the cover-up and failure to disclose."

[14] On July 18, 2016, the disciplinary charges against the arresting officers were dismissed by Presiding Officer Binder (the Binder Decision). Mr. Kozina appealed the decision to the LERB which upheld the dismissal. Mr. Kozina has initiated a judicial review of this LERB decision, however, that application has not yet been heard.

The Applicants' Position

[15] The Applicants argue that Mr. Kozina's claim is statute barred by the *Limitations Act*, RSA 2000, c L-12, s 3 because the Statement of Claim was not filed within two years from the date the Plaintiff knew or ought to have known of the injury against him. More specifically, they claim the limitation period began to run on February 11, 2010, the date Mr. Kozina was arrested, since that was the only incident where Mr. Kozina could have suffered injury.

[16] Alternatively, some or all of the allegations in the Amended Statement of Claim do not disclose a reasonable or any claim against the Defendants or the claims are frivolous, improper, vexatious, and/or an abuse of process.

[17] Specifically, the Amended Statement of Claim is an abusive attempt to advance litigation on behalf of a non-party by alleging mistreatment of Mr. Huff. If there is any cover-up, the proper recourse is through the statutory police discipline process set out in the *Police Act*, RSA 2000, c P-17. Regardless, the allegations have already been assessed in the Binder Decision so this action is an attempt to relitigate the proceedings currently under judicial review.

[18] In the further alternative, the Defendants suggest I can reach a fair and just determination as there is no genuine issue for trial. As such, they argue that some or all of the allegations in the Amended Statement of Claim be dismissed pursuant to r 7.3(1) of the *Alberta Rules of Court*, Alta Reg 124/2010.

[19] Neither EPS officers, nor the Chiefs as named in this action, can be liable for damages for *Charter* breaches since the *Charter* does not bind private individuals. Further, Mr. Kozina has not alleged facts that the Defendants have disclosure obligations to provide the Crown with information relating to the complaints made by Mr. Huff. Therefore, the Defendants cannot be found liable for civil damages.

[20] Finally, the Applicants argue that the Amended Statement of Claim can only be construed as pleading either malicious prosecution or misfeasance in a public office, and that neither tort is properly plead nor supported by the evidence.

[21] None of the Defendants initiated prosecution against Mr. Kozina, and they cannot form a belief about reasonable and probable grounds in any event. Alternatively, even if reasonable and probable grounds existed in relation to the conviction for obstructing a peace officer, no damages were suffered since the sentence imposed for that charge was shorter and concurrent to the sentence for trafficking to which he pleaded guilty.

[22] The bald allegations of a cover-up have not been substantiated by evidence and the allegations of Mr. Huff have been declared unsubstantiated and not credible through the EPS disciplinary hearing process and should not be relitigated here. Further, the Plaintiff has not suffered any compensable damages for the same reason as above for malicious prosecution.

Mr. Kozina's Position

[23] Mr. Kozina argues that the limitation period started running when the cover-up was allegedly first discovered on September 27, 2013 when the CBC program first came to Mr. Kozina's attention. Since the Statement of Claim in this action was filed on September 25, 2015, the claim is not statute barred by the *Limitations Act*.

[24] Mr. Kozina disagrees with the characterizing of this action as an attempt to "relitigate matters determined." The disciplinary hearing and the current civil action are different kinds of proceedings with different remedies. Based on Mr. Kozina's reading of ***Penner v Niagara (Regional Police Services Board)***, 2013 SCC 19, relying on the outcome of the Binder decision to preclude this action would be "fundamentally unfair." In any event, "it is obvious that a just and fair determination of the claim cannot be made on the basis of the documentary evidence before this court" (Respondent's Brief at para 6).

[25] Mr. Kozina further argues that because the EPS is a creature of statute (namely, enacted through the *Police Act*), this means that the police are "the state" and Mr. Kozina can seek *Charter* remedies against the Defendants.

[26] Despite this contention, Mr. Kozina notes that their claim is not restricted to *Charter* relief and that they seek common law remedies as well. Specifically,

... the police have a duty to disclose to the prosecuting Crown all material pertaining to the investigation of an accused, which would obviously include information relating to the very investigation that resulted in Kozina being charged (Respondent's Brief at para 28).

[27] Mr. Kozina asserts that this duty was breached, and he is therefore entitled to damages.

[28] Mr. Kozina admits that the claim should not be characterized as malicious prosecution or negligence. Instead, "the tort is probably more properly described as misfeasance in public office" (Respondent's Brief at para 15). He further argues that the elements of the tort are made out on the alleged facts: the officers engaged in deliberate and unlawful conduct in their capacity as public officers, they were aware that the conduct was likely to harm Mr. Kozina, and the conduct actually caused compensable injury to him.

Issues

[29] To determine whether or not all or part of the Amended Statement of Claim should be struck, or if summary dismissal should be granted, the following issues must be considered:

- (a) Does the *Limitations Act* bar Mr. Kozina from recovery in this action?
- (b) Is the Amended Statement of Claim properly pleaded, or is the remedy sought unavailable?
- (c) Is the Amended Statement of Claim an abuse of process?
- (d) Does the Amended Statement of Claim advance a claim in bad faith?
- (e) Should the Amended Statement of Claim be otherwise summarily dismissed?

Striking Out Pleadings

[30] Rule 3.68 provides that all or part of a claim may be struck out if there is either no reasonable claim, or the claim is frivolous, irrelevant, improper, or an abuse of process.

[31] The test of "reasonableness" is "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed" (***Ernst v Alberta (Energy Resources Conservation Board)***, 2014 ABCA 285). William A. Stevenson & Jean E. Côté, *Alberta Civil Procedure Handbook*, vol 1 (Edmonton: Juriliber, 2018) explain at 3-123 that "frivolity, irrelevance, and impropriety" are "not really ... independent ground[s] of attack, because it is probably impossible to have any relevant pleading disclosing a cause of action ... which would fit within" those conditions.

Law of Summary Dismissal

[32] Under r 7.3 of the *Rules*, a court may "dismiss one or more claims in the action" if "there is no merit to a claim or part of it." The Alberta Court of Appeal recently refined the law regarding summary dismissal (***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47):

The proper approach to summary dispositions, based on the *Hryniak v Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a “just result”, or there is a genuine issue requiring a trial.

The Limitations Act

[33] Section 3(1) of the *Limitations Act* provides that if a claimant does not file a Statement of Claim within two years after the date the claimant first knew, or ought to have known, that the injury occurred and that it was attributable to the conduct of the defendant, then the defendant is entitled to immunity from liability.

[34] The Applicants argue that if Mr. Kozina suffered any harm at all, that harm occurred when he was arrested on February 11, 2010, meaning the limitation period expired on February 11, 2012. If this is correct, then Mr. Kozina would be statute barred from recovery and the Applicants would be successful on this application for summary dismissal.

[35] However, based on the evidence before me that Mr. Kozina was unaware of any potential cover-up and failure to disclose until he watched the CBC program on September 27, 2013, a claim based on such a cover-up or failure to disclose could potentially start the limitation clock at that time. The Statement of Claim would then be within the limitation period. The cover-up or failure to disclose must nonetheless be an “injury” to Mr. Kozina which the Defendants deny. “Injury” is defined in the *Limitations Act* at s 1(e) as meaning:

- (i) personal injury,
- (ii) property damage,
- (iii) economic loss,
- (iv) non-performance of an obligation, or
- (v) in the absence of any of the above, the breach of a duty.

[36] The most relevant types of injury alleged by Mr. Kozina on the facts of this case would appear to arise from the “non-performance of an obligation” or “the breach of a duty.”

[37] In ***R v Gubbins***, 2018 SCC 44 at para 23:

In addition to information contained in the investigative file, the police should disclose to the prosecuting Crown any additional information that is “obviously relevant” to the accused’s case. The phrase “obviously relevant” should not be taken as indicating a new standard or degree of relevance: ***Jackson***, at para. 125, per Watt J.A. Rather, this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under ***Stinchcombe*** because it relates to the accused’s ability to meet the Crown’s case, raise a defence, or otherwise consider the conduct of the defence. ***R v McNeil***, 2009 SCC 3, requires the police to hand such information to the Crown.

[38] The Defendants argue that “Mr. Huff’s allegations are not findings of serious misconduct nor are they ‘fruits of the investigation’ by EPS into conduct of the Plaintiff.” This may be true, but that does not mean that the allegations were not “obviously relevant” as described in ***Gubbins***.

[39] However, “not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused’s case” (***McNeil***, supra para 37 at para 59). Examples of irrelevance may include the officer playing “a peripheral role in the investigation, or the misconduct in question may have no realistic bearing on the credibility or reliability of the officer’s evidence” (***McNeil***).

[40] The multiple allegations made by Mr. Huff up to the date of Mr. Kozina’s conviction were arguably relevant to Mr. Kozina’s case. Had this information been disclosed to the Crown, and then to Mr. Kozina, he would have had this information to defend against the charges laid. The officers in question did not play “a peripheral role in the investigation” and the misconduct

may have had a “bearing on the credibility or reliability of the evidence.” While it is true that the dismissal of the initial complaint in 2010 by Chief Boyd concluded that “there was [no] reasonable prospect of success for charges against Kemp, Redlick and Offin” (Brief of the Defendants at para 52), the dismissal makes no reference to Mr. Huff’s allegations being made to multiple individuals at EPS. This dismissal alone is not sufficient to establish that the Huff allegations were not relevant.

[41] Mr. Kozina may well have suffered an injury from the non-performance of an absolute disclosure obligation as contemplated in s 1(e) of the *Limitations Act*. The fact that the Crown, after having been made aware of the Mr. Huff allegations, consented to a striking of pleas and invited a stay of proceedings is evidence that the allegations lend support to Mr. Kozina’s argument.

[42] The facts do not suggest that this action should be barred under a limitations defence. The Statement of Claim cannot be summarily dismissed on this basis.

Improper Pleadings/Unavailable Remedy

[43] According to paragraph 26 of Mr. Kozina’s Amended Statement of Claim, “the Plaintiff’s claim is for damages arising out of the cover-up and failure to disclose.” The Applicants in paragraphs 54-55 of their Brief argue:

On its face, and read generously, the Amended Statement of Claim could potentially be construed to allege two tortious causes of action: malicious prosecution and misfeasance in public office. The Plaintiff has not pleaded negligence.

Neither malicious prosecution nor misfeasance in public office is adequately pleaded.

[44] Paragraph 15 of Mr. Kozina’s Brief says: “the claim may not be properly characterized as one of malicious prosecution as suggested by the Applicants. Nor is it a claim in negligence... [T]he tort is probably more properly described as misfeasance in public office.”

[45] Misfeasance in public office does not need to be specifically pleaded, unlike that of defamation (see *Abrams & McGuinness, Canadian Civil Procedure Law*, 2d (2010) at §10.35: “[w]here a party wishes to rely upon a private Act of Parliament or of the Legislature or a municipal by-law, the existence of such a law must be specially pleaded”; *Defamation Act*, RSA 2000, c D-7). The general abolition of pleading the law was an innovation introduced by the *Judicature Act*:

Under the modern rules of pleading, it is not generally necessary to plead law, for the assumption is made that the disposition of actions is better served by having the parties outline the facts that they intend to prove in support of their respective

cases, rather than to summarize the points of law that they believe entitle them to relief (Abrams & McGuinness, *ibid* at §10.31).

[46] With this in mind, I find that it is not necessary for misfeasance in a public office to be specifically pleaded. According to Stevenson & Côté, para 31 at 3-125: “No one style of pleading is mandatory, and though pleading related facts ... contiguously is often desirable, that is not legally necessary. Misfeasance in public office still needs some details” (*AF v Alberta*, 2014 ABQB 216). In *AF*, the problem in the pleadings identified by Justice Graesser was that “the Plaintiffs [did] not [comply] with the requirement to specify exactly who the offending Crown agent or authority was, and what he or she did or failed to do.” This is not the situation here. Mr. Kozina has listed the Applicants specifically, as well as the misfeasance in question. These preliminary “details” found in the Amended Statement of Claim are sufficiently plead.

[47] As identified in *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 32:

... the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[48] If as alleged there was a cover-up, falsification of documentation, and breach of a duty to disclose, then there was a “deliberate unlawful conduct in the exercise of public functions.” For example, falsification of documentation is a deliberate course of unlawful conduct, and in the context of this case, includes awareness that the falsification would likely injure the plaintiff since his defence in the subsequent criminal proceedings would be stunted.

[49] This in turn would have caused injury to Mr. Kozina to the extent that the Crown may not have pursued a prosecution on certain charges, and at the very least, Mr. Kozina would have had more defence ammunition. This is regardless of whether Mr. Kozina pleaded guilty since his subsequent actions in ignorance of any cover-up included paying certain legal expenses up to and including when he pleaded guilty and included a modified litigation strategy to accept a plea bargain.

[50] The Defendants also argue that any *Charter* remedies are not accessible since the police are private individuals and damages for a *Charter* breach may only be pursued against the state. However, arguably police officers and Chiefs of Police, are government actors, as contemplated by s 32 of the *Charter*. As explained in Patrick Macklem et al, *Canadian Constitutional Law*, 4th ed (Toronto: Emond, 2010) at 802:

“Government” in s. 32 includes the executive branch of government, including cabinet, ... ministers, officials employed in government departments, **police officers**, and other public agencies or agents that are subject to ministerial control or charged with the performance of government responsibilities (emphasis added).

[51] The Supreme Court of Canada has recently clarified the test for when *Charter* damages lie against the Crown when information is withheld (***Henry v British Columbia (Attorney General)***, 2015 SCC 24 at para 82):

... a cause of action for *Charter* damages will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused’s ability to make full answer and defence.

[52] To strike the *Charter* relief sought under r 3.68 of the *Rules*, there must be no reasonable prospect that the plaintiff’s claim will succeed (see e.g. ***Ernst v Encanica Corp***, 2014 ABCA 285). As noted in *Stevenson & Côté*, *supra* para 30 at 3-133: “If the statement of claim is unambiguous and sets up a fact situation or a legal proposition which would mean that the defendant’s liability to the plaintiff would be novel or dubious, the claim cannot be struck out” (citing, among many others, ***Deloitte & Touche Inc v Boychuk***, 2001 ABQB 712).

[53] There is a reasonable argument to be made that the Defendants fall under application of the *Charter* and the test from ***Henry*** could analogously apply to police officers who withhold information. That is, I cannot say that there is absolutely no reasonable prospect that Mr. Kozina’s claim for *Charter* damages against the Defendants could succeed at trial.

[54] The elements of misfeasance in a public office have been met on the facts alleged in Amended Statement of Claim and should not be struck for being improperly pleaded. Similarly, the *Charter* remedy sought at paragraph 29 of the Amended Statement of Claim should remain as part of the pleadings.

Is the Amended Statement of Claim an abuse of process?

[55] The Defendants claim that “[t]o the extent that the Amended Statement of Claim makes allegations regarding the treatment of Mr. Huff, [this] is an abusive attempt to advance busybody litigation on behalf of a person who is not party to this action.” Further, they contend that this action is duplicative in that much of the Amended Statement of Claim duplicates the claims made in a related Statement of Claim filed by Mr. Huff albeit later discontinued. Finally, the Defendants argue that the appropriate venue for this claim is the statutory disciplinary process that is currently under judicial review.

[56] This claim is for misfeasance in a public office with Mr. Kozina claiming damages. The disciplinary proceeding is a process that is confined to disciplinary remedies without the

possibility of compensation. In light of this substantive difference, the disciplinary proceedings (and the subsequent judicial review) cannot be the exclusive venue for the disposition of these matters. Nor can this claim be described as duplicative in the context of the Statement of Claim filed by Mr. Huff. The current claim is, again, one of misfeasance in a public office with damages assessed in the context of Kozina's injuries. This is not "busybody litigation on behalf of a person who is not party to this action" albeit the extensive context provided regarding Mr. Huff's employment at EPS might be considered somewhat more than necessary to inform this claim.

[57] In *Penner*, *supra* para 23, the Supreme Court of Canada allowed for two related claims to proceed in parallel: a civil action and an administrative decision. As the Supreme Court described at para 42:

Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness ... such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context.

[58] Kozina's civil action was filed in September 2015, almost a year before the Binder Decision was released. As such, and borrowing the words of Justice Binnie in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 70 (quoted with favour in *Penner* at para 56): "...the [Defendants] were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings."

[59] Secondly, again adopting the reasoning of the Supreme Court in *Penner* at para 58: "a person in [Mr. Kozina's] position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action."

[60] Following further along and adopting the policy considerations of the Supreme Court of Canada in *Penner* at para 62:

It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner's civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants

in Mr. Penner's position will have every incentive to mount a full-scale case, which would tend to defeat the expeditious operation of the disciplinary hearing.

In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of the disciplinary hearing, or the fairness to the officers in that hearing. Finally, a further significant risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

[61] These are the same kinds of considerations that are at play in this case and the logic of the Supreme Court of Canada applies here.

[62] Finally, the Supreme Court of Canada explained that under the complaints process that was in effect in **Penner**, "the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer." With this fact in mind, the Supreme Court reasoned that:

Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

[63] This situation is exactly what we have in the current Application. The Chief of Police, in ordering Kozina's complaint proceed to a disciplinary hearing, was operating under s 45(3) of the *Police Act*, RSA 2000, c P-17. It is the Chief of Police themselves, "or a person designated by the Chief of Police...who shall conduct a hearing into the matter." As such, summarily dismissing this civil claim on the basis of "relitigating matters already addressed ... through the legislated police discipline process" would have the "effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability." This would be "a serious affront to basic principles of fairness."

[64] Concern is expressed that if the Binder Decision is found to be reasonable on judicial review and this claim is allowed to go to trial, there could be conflicting judicial decisions as an outcome. This disregards the role of a judge which is to weigh the Binder Decision in light of all the evidence and the circumstances of the prior and present proceedings at trial. For example, in **Day v Woodburn**, 2019 ABQB 356 at para 14, Justice Renke explained that:

In separate reasons (2019 ABQB 232), I admitted the transcript of the sentencing submissions and the decision of Justice Sanderman of March 30, 2011 (the Transcript). Justice Sanderman found that at least one officer had used excessive force in the arrest of Mr. Day. I found that Justice Sanderman's excessive force

determination was admissible in these proceedings but that this determination was not conclusive. It remains my responsibility to determine whether excessive force was used and to assess the weight of Justice Sanderman's determination in these proceedings.

[65] If the Binder decision is found to be admissible as evidence during the trial of this action, then the trial judge will assess the weight of that decision in the context of all of the evidence given at trial. It is the place of the trial judge to determine whether or not excessive force was used, and whether or not there was a subsequent cover-up, despite the fact that the Binder decision has already made a determination on this point in the context of a very different kind of proceeding.

[66] In summary, I am not satisfied that the claim is an abuse of process on the basis of the Defendants arguments.

Does the Amended Statement of Claim advance a claim in bad faith?

[67] The Defendants argue that Mr. Kozina “deliberately failed to disclose the true nature of the conduct leading to his charges and guilty plea.” Further, they claim that Mr. Kozina

...specifically stated at paragraph 26 of the Amended Statement of Claim that the damages sought are based on the alleged treatment of Mr. Huff by his former EPS colleagues, not anything relating to the actual Plaintiff, illustrating that this action is brought on the basis of improper or ulterior motives.

[68] While it is true that the Amended Statement of Claim does not explicitly disclose the charges of trafficking, this claim is not explicitly in relation to that charge. This claim is an action for misfeasance in a public office with damages arising from a cover-up and failure to disclose subsequent to arrest.

[69] Paragraph 26 of the Amended Statement of Claim reads: “The Plaintiff’s claim is for damages arising out of the cover-up and failure to disclose as set out in paragraphs 10-21 above.” While paragraphs 10-21 deal almost exclusively with the alleged treatment of Mr. Huff by his former EPS colleagues, the paragraph is also clear that the damages being sought arise out of the cover-up and failure to disclose. The details from Mr. Huff’s circumstances assist in establishing the story of how Kozina got from point A (his arrest) to point B (filing his statement of claim). The pleading is sufficiently clear to appreciate that the claim is not for damages relating to Mr. Huff and does not support a conclusion that it was made with an improper or ulterior motive.

[70] The Amended Statement of Claim should not be struck pursuant to r 3.68(2) of the *Rules*.

Summary Dismissal

[71] Despite finding that no particular part of the Amended Statement of Claim should be struck nor that the entire claim should be summarily dismissed for some sort of immediate fatal

error (such as a limitations defence), what remains is to determine whether or not the Amended Statement of Claim should be summarily dismissed under the **Weir-Jones** framework.

[72] One of the key considerations set out in **Weir-Jones** is that “[h]aving regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?” In my opinion, there are sufficient uncertainties in the facts and the law that it would be inappropriate for me to resolve the dispute on a summary basis. In other words, adopting the language of **Weir-Jones**, I do not have confidence in the state of the record to exercise my discretion to summarily resolve the dispute.

[73] Counsel for the Defendants at the hearing of this Application argued that Mr. Kozina’s evidence (set out primarily in the affidavit of Leanne Fliczuk, filed November 14, 2018) are

... documents that have nothing to do with Mr. Kozina ... We have affidavits in his appeal where he is attempting to get a stay entered and the conviction overturned.
... None of these documents are Mr. Kozina’s documents. We don’t have any evidence from him, and most certainly no evidence about what harms he claims he suffered in his Statement of Claim. So I think we can say that the best foot forward that has been put forward by the Plaintiff here is that there is no evidence of harm.

[74] In my view, the affidavit of Leanne Fliczuk provides evidence which contradicts the evidence of the Defendants. Arguably there is significant evidence through documentation produced by Mr. Huff which helps to establish the tort of misfeasance in a public office. This, combined with the evidence regarding Kozina’s sentencing history for the charges laid against him are arguably sufficient to establish the tort. As noted, the Binder decision is not conclusive of a finding that Huff’s account of harm done to Kozina did not happen although it is evidence to be weighed by a trial judge. There is conflicting evidence that cannot be resolved by me on a summary basis.

[75] In reaching the foregoing conclusion, I am mindful that the Plaintiff has claimed damages of \$1,000,000 inclusive of aggravated and punitive damages and relief as the Court may give under s.24(1) of the *Charter*. The injuries described in paragraph 27 of the Amended Statement of Claim setup a basis for damages but there is no evidence to assist the Court in establishing the quantum. Charter damages, if awarded, are at best difficult to quantify and dependent on the discretion of the Court. In my view, at this stage of the proceedings this is not fatal to the action.

Conclusion

[76] The application by the Applicants is dismissed.

Costs

[77] Counsel for Kozina seeks full indemnity costs on the basis that the argument made regarding the bad faith of the Plaintiff and the apparent alleged attempt in the Amended Statement of Claim to re-litigate Mr. Huff's claim amount to allegations of misconduct against the Plaintiff's lawyer. In my view, the arguments are directed at Mr. Kozina's pleadings and in no way were intended to nor did they reflect on the conduct of Plaintiff's counsel.

[78] Regardless, the Plaintiff has been successful and is entitled to his costs for resisting this application. Noting the lack of evidence supporting the amount claimed, I am the view that costs should be awarded on Column 2 of Schedule C of the *Rules*.

Dated at the City of Edmonton, Alberta this 25th day of September, 2019.

L.A. Smart
M.C.Q.B.A.

Appearances:

Thomas M. Engel, Engel Law Office
for the Plaintiff/Respondent

Sharon A. Roberts, Field Law
for the Defendants Boyd and Knecht

Tab 18

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2010 SKQB 255

Date: 2010 07 20
Docket: Q.B.G. No. 1461/2009
Judicial Centre: Saskatoon

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE
CREDITORS OF BIG SKY FARMS INC., DRYCAST SYSTEMS INC. and
BIG SKY MANAGEMENT CONSULTING CORP.

Counsel:

Kevin C. Mellor	for the appellant, Alberts Construction Ltd.
Jeffrey M. Lee and Naheed Bardai	for the respondent, Big Sky Farms Inc.

JUDGMENT
July 20, 2010

GABRIELSON J.

Introduction

[1] This is an appeal by Alberts Construction Ltd. ("Alberts") from a March 15, 2010, decision of Nicholas J. Stooshinoff (the "Claims Officer"), wherein the Claims Officer dismissed the claim of Alberts against Big Sky Farms Inc. ("Big Sky").

Background

[2] Alberts is a Saskatchewan construction company. Its principals are Mervin Alberts, as president, and Merlin Alberts as director. For several years, Alberts built pig

barns and related facilities for Big Sky at various locations throughout Saskatchewan.

[3] Big Sky is a producer, feeder and marketer of hogs from multiple locations throughout Saskatchewan and Manitoba. In November 2009, Big Sky applied for court protection under the *Companies' Creditors Arrangement Act* (Canada), R.S.C. 1985, c. C-36 ("CCAA"), in order to restructure its business and financial affairs. Drycast Systems Inc. ("Drycast") is a wholly owned subsidiary of Big Sky. Big Sky Management Consulting Corp. ("BSMCC") is an inactive company which was incorporated to facilitate management of third party hog production operations. Both Drycast and BSMCC are guarantors of the principal secured obligations owed by Big Sky to its senior secured lenders and, as a result, were parties to the CCAA application by Big Sky.

[4] In December 2009, Big Sky presented a plan of compromise and arrangement (the "Plan") under the CCAA to its creditors and the Court. As part of the plan, a claims process (the "Claims Process") was proposed. The Claims Process was approved by the Court pursuant to an order dated December 9, 2009 (the "Claims Process Order"). As part of the Claims Process, creditors of Big Sky submit a claim to a monitor (the "Monitor"), who could either accept or disallow the claim. If the claim was accepted by the Monitor, the claimant would be paid a portion of its claim as set out in the Plan. If the claim was not accepted by the Monitor and the claimant disagreed with this disposition, the claim would be referred to the Claims Officer, who would then determine the validity of the disputed claim. The Claims Process also provided for an appeal to the Court from the Claims Officer's determination.

[5] During the course of the Claims Process, a claim (the "Claim") was submitted to the Monitor by Alberts alleging that Big Sky was indebted to Alberts in the amount of \$2,373,790.60 for work done for Big Sky relating to the construction of facilities and roadways at three separate sites, being the Pelly breeder barn ("Pelly One"),

the Pelly nursery barn (“Pelly Two”) and the Porcupine Plain facility (“Porcupine”). The Claim by Alberts was disallowed by the Monitor on the basis that the records of Big Sky indicated that Alberts had been paid in full for the work and, alternatively, that the Claim would be statute barred by the expiration of the limitation period.

[6] Alberts filed a dispute note from the denial of the Claim by the Monitor and sought to have the matter determined by the Claims Officer. A summary trial was held before the Claims Officer on February 12, 2010. Affidavit evidence was submitted by both Big Sky and Alberts. Counsel were allowed to cross-examine the opposing affiants at the hearing. In a decision dated March 15, 2010, the Claims Officer held that Alberts had failed to prove the Claim on a balance of probabilities and, further, that even if the allegations had been proven, the Claim would be statute barred except for the sum of \$68,899.66.

Issues

[7] Although the notice of motion filed by Alberts in this appeal lists 20 grounds of appeal, the parties agree that this list could be reduced to four main issues to be determined by the Court:

1. Did the Claims Officer err in finding that Alberts had failed to prove the Claim on a balance of probabilities?
2. Did the Claims Officer err in finding that Exhibits “E” and “F” to the affidavit of Casey Smit were contracts by which the parties intended to govern their relationship?
3. Did the Claims Officer err in finding that Alberts had sufficient information to prepare its invoices in a timely fashion?

4. Did the Claims Officer err in determining that the majority of the Claim was barred by the expiry of the limitation period?

Further issues to be addressed were the Court's jurisdiction and the standard of review that the Court should follow.

Analysis

1. Jurisdiction and standard of review.

[8] The parties agree that Alberts had a right to appeal the Claims Officer's decision by virtue of paragraph 12(c) of the Claims Process Order and paragraph 24 of the Claims Process set out in Schedule "A" to the Claims Process Order. The parties also agree that the standard of review to be followed by this court is that of an appellate court. The standard of review by an appellant court was outlined by the Supreme Court of Canada in the case of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. In that case, the Court held that deference should be given to a decision of a trial judge with respect to factual findings unless those factual findings constitute a palpable and overriding error. The Court also held that the standard of review on a pure question of law is one of correctness, where the appellate court was free to replace the opinion of the trial judge with its own.

[9] This standard of appellate review has also been applied by courts in Ontario when hearing appeals from claims officers' decisions in CCAA proceedings. See *Re 1587930 Ontario Inc.* (2006), 25 C.B.R. (5th) 264 (Ont. S.C.J.); and *Triton Tubular Components Corp. v. Steelcase Inc.* (2005), 14 C.B.R. (5th) 264 (Ont. S.C.J.).

[10] In this case, the Claims Officer's decision was made after an adversarial proceeding in which each party tendered evidence by affidavit, which evidence was then subject to cross-examination of the affiant. Following written submissions by the parties,

the Claims Officer wrote a detailed decision outlining his findings of fact and conclusions of law. These findings and conclusions should therefore be subjected to the standard of review as set out above: correctness as to questions of law and deference as to findings of fact, except where such findings of fact would amount to a palpable and overriding error.

2. *Did the Claims Officer err in finding that Alberts had failed to prove the Claim on a balance of probabilities?*

[11] Alberts' position is that the evidence submitted by Big Sky through the affidavit of Casey Smit ("Mr. Smit"), wherein he deposed that Big Sky had paid for all the work done by Alberts and that, accordingly, no money was owing, was based upon hearsay and should not have been accepted by the Claims Officer. Further, Alberts position is that the Claims Officer should have drawn a negative inference against Big Sky when it failed to call a witness, Dean Possberg ("Mr. Possberg"), who Alberts says would have given direct evidence as to the issues involved in the Claim. Alberts also submits that the Claims Officer made a palpable and overriding error when he determined that Alberts had not proven the Claim on a balance of probabilities.

[12] Counsel for Big Sky submitted that the Claims Officer had ample support in the evidence to make the findings and inferences of fact, which he did, and that no palpable or overriding error was made.

[13] The Claims Officer made the following findings in reference to the inability of Alberts to prove the Claim on a balance of probabilities:

17. While it may be that Alberts did perform work and provided services to Big Sky for which it has not been paid, on the documentation and evidence produced by both sides I am unable to find on a balance of probabilities if that is the case and if so what that work was, when it was performed and when it was invoiced, and finally, if it was paid for in part or at all.

...

36. Whether or not Alberts has been overpaid or is still owed money cannot be determined on the evidence before me. Big Sky submits that its account ledger indicates that Alberts has been paid in full for all work requested and approved. It indicates that the last payment to Alberts was July 16, 2007 (paragraph 24 of the affidavit of Casey Smit). On the evidence before me I can only conclude that Alberts has failed to prove on a balance of probabilities that it is owed a debt in the amounts alleged or at all.

[14] In the case of *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53, the Supreme Court of Canada referred to the standard of proof in a civil case. At paragraph 40, the Court stated:

40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. ...

...

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[15] The Claims Officer was therefore correct in his finding that Alberts had to prove the Claim on a balance of probabilities and that if the evidence before him did not meet this standard of proof, he must dismiss the Claim.

[16] In respect to the issue of hearsay, while the affidavit of Mr. Smit, the CEO of Big Sky, does refer to discussions he had had with Mr. Possberg, the Claims Officer's

decision was not based upon such evidence but, rather, the lack of evidence provided by Alberts in proof of the Claim. Big Sky's position was that all monies owing to Alberts for work performed had been paid. This position was not based solely on the information provided by Mr. Possberg to Mr. Smit but also on the ledger which Big Sky kept regarding Alberts, which ledger was marked as Schedule "K" to the affidavit of Mr. Smit. This ledger showed a zero balance owing to Alberts. That ledger was the one referred to by the Claims Officer in paragraph 36 of his decision. Accordingly, it cannot be said that hearsay evidence led the Claims Officer to make a palpable and overriding error.

[17] In respect to Alberts' position that an adverse inference should have been drawn by virtue of the failure by Big Sky to call Mr. Possberg, an adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof. *Dwyer v. Mark II Innovations Ltd.* (2006), 208 O.A.C. 305 (Ont. C.A.).

[18] The classic Saskatchewan case concerning situations in which an adverse inference may be drawn from a party's failure to adduce relevant evidence is *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask. C.A.). The Court in that case stated at paragraphs 20 and 21:

20 The subject is dealt with at length by the learned author in *Wigmore on Evidence*, 3rd ed., vol. II, pp. 162 *et seq.* On p. 162 it is stated in part:—"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

21 The party affected by the inference may, of course, explain it away

by showing circumstances which prevent the production of the witness; but where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it. In the pages in *Wigmore on Evidence* following the above quotation many authorities are referred to which indicates that in the Courts of the United States the rule is of wide application.

[19] In the circumstances of this case, Big Sky provided evidence to explain why it did not call Mr. Possberg. At paragraph 13 of his affidavit, Mr. Smit deposes that Mr. Possberg is no longer employed by Big Sky. At Q. 567 of the cross-examination of Mr. Smit, he confirms that Mr. Possberg stopped working for Big Sky in August 2009. As such, Big Sky has provided an explanation as to why Mr. Smit is the affiant, as he is the CEO of Big Sky. There is no property in a witness: *Harmony Shopping Co. S.A. v. Davis*, [1979] 3 All E.R. 177 at 180-81, and *S.M. v. Canada (Attorney General)*, 2005 SKQB 351, 271 Sask. R. 123. If Alberts felt that the evidence of Mr. Possberg could establish its claim, Alberts has the ability to subpoena Mr. Possberg to obtain his evidence.

[20] The finding by the Claims Officer in paragraphs 12 and 36 that Alberts has failed to prove on a balance of probabilities that it is owed a debt by Big Sky or the amount thereof are findings of fact for which deference should be given. I find that there is evidence to support the Claims Officer's findings of fact in this regard. While there may have been evidence as to inconsistencies in Big Sky's documentation as referred to by counsel for Alberts in this appeal that does not assist Alberts in proving its own claim. The finding of fact by the Claims Officer that Alberts did not prove its claim on a balance of probabilities cannot be said to amount to a palpable or overriding error.

3. *Did the Claims Officer err in finding that Exhibits "E" and "F" to the affidavit of Casey Smit were contracts which the parties intended to govern their relationship?*

[21] Exhibits "E" and "F" to the affidavit of Casey Smit are documents "H" and

“I” in the index of documents filed with the Court at the hearing of this appeal. Alberts submits that at paragraph 11 of his decision, the Claims Officer found that Exhibits “E” and “F” were contracts between the parties and that this finding of fact constituted a palpable and overriding error. Big Sky submits that the two documents reflect an understanding between the parties and that the Claims Officer properly made use of them in coming to the conclusions he did concerning the relationship. In any event, Big Sky submits that even if they were found by the Claims Officer to be contracts, such finding would not be a palpable and overriding error.

[22] In his decision, the Claims Officer recognized that Exhibits “E” and “F” were incomplete documents. His conclusion was that, although incomplete, they were contractual documents “intended by both parties to govern their relationship for the construction of Pelly Barn #1 and Pelly Barn #2”. There is evidence to support such a finding found in paragraphs 11 to 13 of Mr. Smit’s affidavit. The Claims Officer found that each side was equally at fault for failing to properly document their contractual relationship and, in my opinion, the evidence supports such a conclusion. The Claims Officer was entitled to use the said documents for the limited purpose that he did. Accordingly, I find the Claims Officer has not committed a palpable and overriding error in referring to these documents as contractual documents.

4. *Did the Claims Officer err in finding that Alberts had sufficient information to prepare its invoices in a timely fashion?*

[23] Alberts’ position is that the Claims Officer made an error of fact in paragraph 30 of his decision when he made the following determination in the last sentence of that paragraph:

30. ... I find that Alberts did in fact have sufficient information to prepare its invoices and at the very least could have entered into an arrangement for determining any short fall [sic] it may have claimed.

[24] The Claims Officer concluded that the dirt quantity listing report dated December 7, 2006, and provided to Alberts on January 10, 2007, (document “E” in the index of documents) was sufficient to allow Alberts to submit its invoice at that time.

[25] Once again, it is clear from his decision that the Claims Officer was aware of the position of Alberts that it could not submit an accurate invoice without additional information from Big Sky in the form of final dirt work quantities. At paragraph 30, the Claims Officer dealt with this submission and made a finding of fact that this position was not accepted for the reasons given. Deference must be given to these findings of fact. The Claims Officer’s findings of fact in this regard cannot be said to amount to a palpable or overriding error.

5. *Did the Claims Officer err in determining that the majority of the Alberts claim was barred by the expiry of the limitation period?*

[26] While the principle reason given by the Monitor for rejecting Alberts’ proofs of claim in respect to monies owing by Big Sky was that Alberts had already been paid for any goods and services provided to Big Sky, the Monitor also gave an alternative reason for disallowing the claim. In the Monitor’s notice of January 20, 2010, the Monitor stated:

... Furthermore, if any claim exists, it would be barred by the expiry of the limitation period for making such a claim.

[27] The Claims Officer dealt with this alternative reason and concluded that the Monitor had been correct in his decision that the vast majority of the claim was time barred. Although the Claims Officer found that invoices for work done in 2004 totalling \$68,899.66 would not have been time barred when *The Limitations Act*, S.S. 2004, c. L-16.1, was amended in 2005, the Claims Officer found Alberts had failed to establish on a balance of probabilities that the claim for 2004 work had been proven. In

this appeal, counsel for Alberts raised three submissions concerning the findings by the Claims Officer that the majority of Alberts' claims were time barred:

- (a) there is no limitation period in respect to CCAA claims;
- (b) the Alberts claim was not time barred because Alberts did not discover its claim until the spring of 2009; and
- (c) the Alberts claim was not time barred because Big Sky had concealed information from Alberts necessary to submit a claim.

Each of these submissions will be dealt with separately.

(a) *Does The Limitations Act apply to CCAA claims?*

[28] Alberts' position is that the CCAA does not provide for any limitation period within that Act. Further, counsel for Alberts submitted that Alberts' claim is not subject to the limitation periods in *The Limitations Act* because Alberts' claim is not commenced by statement of claim or originating notice as referred to in s. 3(1) of that Act. Counsel for Alberts submits that the application before the Claims Officer is in the nature of an appeal from the disallowance of Alberts' claim by the Monitor and that s. 3(2)(a) of *The Limitations Act* clearly exempts appeals. Alberts refers to ss. 2 and 3 of *The Limitations Act* which provide:

Interpretation

2 In this Act:

- (a) “**claim**” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;
- (b) “**claimant**” means a person who has a claim;

...

Application of Act

3(1) Subject to subsections (2) to (5), this Act applies to claims pursued in court proceedings that:

- (a) are commenced by statement of claim; or
- (b) are commenced by originating notice and are not proceedings in the nature of an application.

(2) This Act does not apply to court proceedings that are:

- (a) proceedings in the nature of an appeal;

...

[29] It is the position of Big Sky that *The Limitations Act* does not specifically include or exclude CCAA proceedings. Counsel for Big Sky submits, however, that case law has established that a debt barred by a statute of limitations is not provable within the meaning of the CCAA and accordingly the Act applies to claims such as that brought by Alberts.

[30] Whether *The Limitations Act* applies to a notice of claim filed pursuant to the CCAA is a matter of statutory interpretation. Accordingly, the standard of review is one of correctness.

[31] When considering whether *The Limitations Act* applies to CCAA proceedings, the starting point is to consider the purpose of a statute of limitations. In the case of *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, La Forest J. dealt with the purposes of limitation statutes. He stated at pages 29-31:

... In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the *Limitations Act*, I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales

Statutes of limitations have long been said to be statutes of repose; see *Doe on the demise of Count Duroure v. Jones* (1791), 4 T.R. 301, 100 E.R. 1031, and *A'Court v. Cross* (1825), 3 Bing. 329, 130 E.R. 540. The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. ...

The second rationale is evidentiary and concerns the desire to

foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim; see *Dundee Harbour Trustees v. Dougall* (1852), 1 Macq. 317 (H.L.), and *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.). ...

Finally, plaintiffs are expected to act diligently and not “sleep on their rights”; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. ...

[32] The above noted rationales were referred to and adopted by the Saskatchewan Court of Appeal in the case of *Josvanger v. Folk*, 2005 SKCA 138, 275 Sask. R. 101.

[33] Beginning at paragraph 45 of his decision, it is clear that the Claims Officer was aware of and considered the purposes of limitation periods as referred to above. The issue before me is whether he was correct in his determination that *The Limitations Act* applies in the circumstances of this case.

[34] Although the CCAA does not have an express purpose clause, it is titled “an Act to facilitate compromises and arrangements between companies and their creditors”. This title can be taken to suggest that its purpose was to assist insolvent companies in achieving arrangements with creditors so that the company could find a way to continue operations and avoid bankruptcy. The connection between the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), as amended, can also be seen throughout the CCAA.

[35] Some sections of the CCAA make specific reference to the BIA. Section 2 of the CCAA defines the term “claim” and provides:

Definitions

2. (1) 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*;

...

[36] Section 2 of the *BIA* provides:

Definitions

2. In this Act,

...

“claim provable in bankruptcy”, “provable claim” or “claim provable” includes any claim or liability provable in proceedings under this Act by a creditor;

...

[37] Section 121(1) of the *BIA* defines what is a “claim provable”. It provides:

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.

[38] Numerous cases have held that limitation periods apply to claims under the *BIA*. Most of these cases refer to the case of *Reference re the Debt Adjustment Act, 1937 (Alb.)*, [1943] 2 D.L.R. 1 (P.C.), in which the Privy Council said at page 11:

... In England it has always been held that, subject to the statutory exception as to debts payable at some certain future time, the petitioning creditors’ debt and the debts provable must be debts recoverable by legal process. For example, a debt barred by the Statute of Limitations is not a debt on which a bankruptcy petition can be presented, nor is it one provable in bankruptcy.... The Dominion Act is very similar to the English *Bankruptcy Acts* so far as those matters are concerned, and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words “debt due.” ... [Emphasis added.]

[39] In the case of *Re Hamar* (1921), 63 D.L.R. 241 (Sask. K.B.), MacDonald J. stated at page 241:

A debt barred by the statutes of limitation [is] not provable. *Ex parte Dewdney*; *Ex parte Seaman* (1808), 15 Ves. Jun. 479, 33 E.R. 836; *Ex parte Roffey* (1815), 2 Rose 245; 2 Hals. P. 202, para. 325.

[40] Other cases have also held that a provable claim in bankruptcy proceedings must be one recoverable by legal process and therefore not one for which the limitation period has already run. *Farm Credit Corp. v. Holowach (Trustee of)* (1988), 51 D.L.R. (4th) 501 (Alta. C.A.); and *Re Morton* (1922), 66 D.L.R. 378 (Sask. K.B.).

[41] As s. 2 of the CCAA requires that the claim be “provable” within the meaning of the BIA, following the above authorities, I am satisfied that the Claims Officer was correct in his determination that *The Limitations Act* would apply to claims brought under the CCAA. At paragraph 3 of his decision, the Claims Officer made a finding of fact that the invoices forming the Claim refer to work done prior to August 13, 2007, and that the limitation period had expired by August 13, 2009, prior to the CCAA application. My review of the invoices confirms this finding of fact and, accordingly, his conclusion that the Claim was time barred is not a palpable or overriding error.

(b) *Was the Alberts claim not time barred because Alberts did not discover its claim until the spring of 2009?*

[42] Sections 5, 6 and 18 of *The Limitations Act* are relevant to this issue. They provide:

Basic limitation period

5 Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.

Discovery of claim

6(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant

first knew or in the circumstances ought to have known:

- (a) that the injury, loss or damage had occurred;
 - (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
 - (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
 - (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
- (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

...

Burden of proof

18 If, in a proceeding, a limitation period is raised against a claimant, the claimant has the burden of proving that:

- (a) the limitation period has not expired; or
- (b) there is no limitation period that applies to the claim.

[43] It is the position of Alberts that it did not discover its claim until the spring of 2009 when Mr. Possberg, who was at that time employed by Big Sky, advised Alberts that Big Sky would not pay them any more money for work done by Alberts at the Pelly and Porcupine locations. Alberts also suggests that it did not receive the final dirt quantity numbers as prepared by the engineering technologists and submitted to Big Sky, and that, without these quantities, it has been unable to prepare and submit invoices to Big Sky. Alberts suggests that s. 6(1)(b), (c) and (d) are applicable in the circumstances of this case.

[44] The parties agree that s. 6 of *The Limitations Act* is merely a codification of the existing case law, which was set out by the Supreme Court of Canada in the cases of *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, and *Central Trustco v. Rafuse*, [1986] 2 S.C.R. 147. In discussing this codification, in the case of *Placzek v. Green*, 2009 ONCA

83, 307 D.L.R. (4th) 441, the Ontario Court of Appeal stated at paragraph 52:

52 Whether under the former limitations regime or under the new Act, in the context of limitations law, “discovered” refers to discovering the material facts on which a cause of action or claim is based for the purpose of triggering the limitation period: see *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224; and see s. 5 of the new Act.

[45] The Claims Officer made findings of fact that Alberts was aware of the work it had done and could have pursued a claim but chose not to do so. At paragraphs 49-51 of his decision, the Claims Officer refers to evidence on which he based this determination. Alberts’ position that the limitation period would not commence until they were told by Mr. Possberg in the spring of 2009 that they would not be paid any more money, even if accepted as factual, would not be the date for discovery of the claim as required by the Act but, rather, only discovery of the non-payment of its claim. To take the submission of counsel for Alberts to its logical conclusion, if Alberts had not heard from Big Sky for 20 years, it could still claim the limitation period did not start to run. To say that no money is owed is not an acknowledgment of a debt but, rather, an affirmation that there is no debt. I have reviewed the evidence referred to by the Claims Officer at paragraphs 49 to 51 of his decision and, in my opinion, the Claims Officer did not make a palpable and overriding error in this regard and deference must be given to his determination.

(c) *Was the Alberts claim not time barred because Big Sky concealed information from Alberts necessary to submit a claim?*

[46] Section 17 of *The Limitations Act* provides that the limitation periods established by the Act will not apply if there has been a wilful concealment by the party against whom the claim is made. Section 17 provides:

Concealment

17 The limitation periods established by this Act or any other Act or regulation are suspended during any time in which the person against whom the claim is made:

(a) wilfully conceals from the claimant the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made; or

(b) wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

[47] The position of Alberts is that Big Sky received a report from the engineering technologist as to the final dirt quantities moved by Alberts but failed to provide this report to Alberts such that Alberts was not in a position to invoice Big Sky for the work that had been done. This same submission was also made to the Claims Officer, who dealt with it in paragraphs 52-57 of his decision. The Claims Officer specifically found that Big Sky had faxed a copy of the report to Alberts in a fax dated January 10, 2007. The fax, which is Document “E” in the index of documents, states in part: “Attached are the final excavation quantities for Site 1 and Site 2 @ Pelly.”

[48] While counsel for Alberts submitted that these were not the final dirt quantity reports regarding Pelly and that there were no dirt quantity reports for Porcupine Plain, there was no evidence tendered before the Claims Officer that there had been any “wilful concealment” of the dirt reports. The Claims Officer concluded that both sides bear responsibility for poor record-keeping, but also found that sloppy record-keeping is not wilful concealment. At question 892 of the cross-examination of Mr. Smit, Mr. Smit indicated on behalf of Big Sky that he could not locate any other final quantity report. There was no evidence before the Claims Officer that there is any other final dirt report other than that contained in the January 10, 2007, fax. The onus of proving that Big Sky wilfully concealed such information is upon Alberts, and I conclude, as did the Claims Officer, that Alberts has not met this onus.

[49] In any event, the limitation period found in s. 5 of *The Limitations Act* commences on the day on which the claim is discovered, not when the claimant discovered the precise amount of the claim. The concept of discoverability, which was initially applicable only to actions in tort, has now been codified and incorporated into ss. 5 and 6 of *The Limitations Act*. See *Pusch v. Freshair Enterprises Ltd.*, 2007 SKCA 60, [2007] 11 W.W.R. 1, and *Stomp Pork Farm Ltd. v. Lombard General Insurance Co. of Canada*, 2008 SKQB 405, [2009] 4 W.W.R. 483 at paras. 34-35. The presumptions found in s. 6(2) are applicable in the circumstances of this case. The Claims Officer determined as a fact that Alberts knew it had a claim and could have pursued it but, as a result of the choice by Mervin Alberts, the president of the company, Alberts chose not to initiate proceedings. There was ample evidence on which the Claims Officer could have made such a determination and, accordingly, I find that he made no palpable or overriding error in his determination that s. 17 of the Act did not apply to this case.

Conclusion

[50] For the above noted reasons, the appeal is dismissed with costs to the respondent, Big Sky.

J.
N.G. Gabrielson

Tab 19

In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.

Ontario Reports

Ontario Superior Court of Justice

McEwen J.

April 23, 2019

146 O.R. (3d) 124 | 2019 ONSC 2222

In the Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited In the Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc. [Indexed as: JTI-Macdonald Corp. (Re)]

Case Summary

Debtor and creditor — Companies' Creditors Arrangement Act — Quebec Court of Appeal affirming trial judgment that awarded \$13.5 billion to plaintiffs in class action against applicants — Applicants also facing other class actions and proceedings by provincial governments to recover tobacco-related health care costs — Applicants obtaining orders under Companies' Creditors Arrangement Act granting them protection from their creditors on interim basis — Court having jurisdiction under s. 11 of Act to stay all actions against applicants and all limitation periods — Stay granted — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

The Quebec Court of Appeal ("QCCA") affirmed a trial judgment awarding approximately \$13.5 billion to the plaintiffs in a class action against the applicants. The applicants also faced a significant number of ongoing proceedings, including other class actions and proceedings by provincial governments to recover expended tobacco-related health care costs. The applicants obtained initial orders under the *Companies' Creditors Arrangement Act* ("CCAA") granting them protection from their creditors on an interim basis. JTIM and RBH brought a motion for orders permitting them to file applications for leave to appeal to the Supreme Court of Canada from the QCCA judgment but suspending all further proceedings before the SCC. Imperial did not seek leave to file an SCC leave application, and instead sought a stay of all proceedings by and against the applicants, along with a stay of any applicable limitation periods. [page125]

Held, JTIM and RBH's motion should be dismissed; Imperial's motion should be granted.

The court had jurisdiction under s. 11 of the CCAA to stay any and all of the proceedings against the applicants, including those before the QCCA and any future SCC leave application, and to extend any applicable limitation period. The approach proposed by Imperial was fair, reasonable and sensible. The case law under the CCAA establishes the need to preserve the status quo between all stakeholders in order to preserve a level playing field and maximize the chances of obtaining resolution. The proposal of JTIM and RBH would alter the status quo in their favour. If they were allowed to file SCC leave applications and then obtain a stay, it would be to the

prejudice of the Quebec plaintiffs and would distract JTIM and RBH from the resolution process. To partially lift the stay to allow the Quebec plaintiffs to respond and therefore allow the SCC leave application to proceed in earnest, as requested by the Quebec plaintiffs, would tilt the playing field in favour of the Quebec plaintiffs as against the other stakeholders whose actions were not stayed. A partial stay would also allow for a significant parallel proceeding to commence, which would distract the applicants and the Quebec plaintiffs, cause delay and lessen the chances of achieving a global solution.

U.S. Steel Canada Inc. (Re), [2016] O.J. No. 4688, 2016 ONCA 662, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1, 270 A.C.W.S. (3d) 471, **consd**

Mujagic v. Kamps (2015), 125 O.R. (3d) 715, [2015] O.J. No. 2578, 2015 ONCA 360, 335 O.A.C. 195, 50 C.C.L.I. (5th) 54, 73 C.P.C. (7th) 229, 254 A.C.W.S. (3d) 11; *OpenHydro Technology Canada Ltd. (Re)*, [2018] N.S.J. No. 471, 2018 NSSC 283, 65 C.B.R. (6th) 133, 298 A.C.W.S. (3d) 694, **distd**

Other cases referred to

Air Canada (Re), [2003] O.J. No. 6254, 28 C.B.R. (5th) 52 (S.C.J.); *Muscletech Research and Development Inc. (Re)*, 2006 CanLII 20084 (Ont. S.C.J.); *Scaffold Connection Corp. (Re)*, [2000] A.J. No. 69, 2000 ABQB 35, [2000] 7 W.W.R. 518, 79 Alta. L.R. (3d) 144, 15 C.B.R. (4th) 289, 94 A.C.W.S. (3d) 422; *ScoZinc Ltd. (Re)*, [2009] N.S.J. No. 217, 2009 NSSC 162, 55 C.B.R. (5th) 200, 277 N.S.R. (2d) 246 (Claims Officer)

Statutes referred to

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

Code of Civil Procedure, C.Q.L.R., c. C-25.01

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 11.02(2)(b)

Supreme Court Act, R.S.C. 1985, c. S-26, s. 58(1)

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

MOTIONS by JTIM, RBH and Imperial for orders under *Companies' Creditors Arrangement Act*.

Robert I. Thornton, Leanne M. Williams and Rebecca L. Kennedy, for applicant, JTI-Macdonald Corp.

Deborah Glendinning, Marc Wasserman and John MacDonald, for Imperial Tobacco.

Paul Steep, James Gage and Heather Meredith, for Rothmans, Benson & Hedges.

Avram Fishman, Mark E. Meland, Harvey Chaiton and George Benchetrit, lawyers for Conseil Québécois sur la tabac et la santé [page126] and Jean-Yves Blais and Cécilia Létourneau, Quebec class action plaintiffs.

Jacqueline Wall, Shahana Kar and Edmund Huang, for Her Majesty the Queen in Right of Ontario.

Massimo Starnino and Lily Harmer, for Her Majesty the Queen in Right of Alberta and Newfoundland & Labrador.

Jeffrey Leon, Michael Eizenga and Sean Zweig, for consortium provinces.

Sheila Block, Scott Bommof and Adam Slavens, for receiver of JTIM-MacDonald Corp. and JTIM Canada LCC.

Patrick Flaherty, Bryan Mcleese, Justin Safayeni and Brian Gover, for RJ Reynolds Tobacco Co. and RJ Reynolds Tobacco International.

David Byers and Maria Konyukhova, for British American Tobacco p.l.c., B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited.

Clifton Prophet, for Philip Morris International Inc.

Steven Weisz and Amanda McInnis, for Grand River Enterprises Six Nations Ltd.

Ari Kaplan, for former Genstar U.S. Retiree Group Committee.

Wael Rostom, for Bank of Nova Scotia.

Jay Swartz and Natasha MacParland, for monitor (FTI).

Pam Huff, Linc Rogers and Chris Burr, for Deloitte Restructuring Inc., monitor of JTIM MacDonald Inc.

Shayne Kukulowicz and Jane Dietrich, for monitor of Rothmans, Benson & Hedges.

Jonathan Lisus, Matthew P. Gottlieb and Andrew Winton, for Hon. Warren K. Winkler, in his capacity as interim tobacco claimant coordinator.

Evatt Merchant, Q.C., for certain class action proceedings.

Overview

[1] JTI-Macdonald Corp. ("JTIM"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"), and Rothmans, Benson & Hedges Inc. ("RBH") (collectively "the applicants") have filed for protection pursuant to the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") seeking a resolution of the multiple, significant litigation claims that have been made against them.

[2] The timing of the CCAA Applications was triggered as a result of the judgment of the Quebec Court of Appeal (the "QCCA") released March 1, 2019. That decision largely upheld the earlier trial decision and awarded approximately \$13.5 billion [page127] to the Quebec class action plaintiffs (the "Quebec plaintiffs"). In addition to this action there are a significant number of ongoing proceedings against the three applicants including government-initiated litigation and other class actions.

[3] The three initial orders obtained by the applicants in March 2019 granted the applicants protection from their creditors on an interim basis and allowed for any interested party to apply to this court to vary or amend the initial order.

[4] The parties attended before me on April 4 and 5, 2019 at the come-back hearing to deal with several issues. The parties were able to agree on certain orders and deferred other issues to be dealt with on a later date, if necessary.

[5] These reasons deal solely with the terms of the initial orders that affect ongoing or new proceedings by or against the applicants. In particular, these reasons also deal with any leave applications that the applicants might make to the Supreme Court of Canada (the "SCC leave applications").

Positions of the Applicants

[6] JTIM and RBH seek to obtain orders permitting them to file SCC leave applications but suspending all further proceedings before the SCC. JTIM and RBH essentially submit that it is in the best interests of all stakeholders, including the Applicants and the Quebec plaintiffs, to preserve the status quo by allowing them to file their SCC leave applications but allow for no further steps. They claim this would afford all stakeholders an opportunity to try to resolve all of the outstanding litigation as against the applicants.

[7] Imperial does not seek leave to file an SCC leave application. Imperial states that it does not intend to pursue a SCC leave application unless it must do so to preserve its rights against the possibility that the CCAA proceeding fails. It seeks a stay of all proceedings by and against the applicants along with a stay of any applicable limitation periods. Imperial submits that its proposal effects the best balance between all stakeholders and would entirely preserve the status quo without giving any particular stakeholder an advantage. This would allow all stakeholders to attempt to globally resolve all of the litigation claims. Imperial submits that a blanket stay has the best opportunity of achieving that goal.

[8] Imperial's position is supported by the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (the "Consortium"), as well as the provinces of Alberta and Newfoundland. These provinces currently have actions underway

to recover expended health care costs. Imperial is further supported by the law firm Merchant [page128] LLP, which has commenced a number of class action proceedings against the applicants and others.

[9] The relevant wording set out in the initial orders that the applicants urge upon me to adopt is as follows:

-- The JTIM initial order, at para. 20, states:

[20] This court orders that, notwithstanding anything to the contrary in this Order, [JTIM] is authorized to continue, and the applicable Other Defendants are not stayed from continuing, to contest the Quebec Class Actions during the Stay Period (the "Further Quebec Class Action proceedings"), including without limitation by way of an application for leave to appeal to the Supreme Court of Canada and an appeal on the merits to the Supreme Court of Canada if leave is granted. Nothing in this Order shall prevent any Person from responding to the Further Quebec Class Action Proceedings, provided that during the Stay Period this paragraph does not, without further order of this Court, permit the Applicant to post security or grant any security interest, or permit any Person to seek security from the Applicant in relation to the Further Quebec Class Action Proceedings.

-- The RBH initial order, at para. 20, states:

[20] This court orders that, notwithstanding anything to the contrary in this Order, [Rothmans] is authorized to serve and file an application for leave to appeal the Quebec Appellate Decision to the Supreme Court of Canada, but no further step or proceeding shall be taken by the Applicant or any other Person in respect of such application without further order of this Court.

-- The Imperial initial order, at paras. 18-20, states:

[18] This court orders that until and including April 11, 2019, 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"), including but not limited to any Pending Litigation and any other Proceeding in relation to any other Tobacco Claim, shall be commenced, continued or take place against or in respect of the Applicants . . . except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way or directed to take place against or in respect of any of the Applicants . . . are hereby stayed and suspended pending further Order of this Court. . . .

[19] This court orders that, during the Stay Period, no Proceeding in Canada that relates in any way to a Tobacco Claim or to the Applicants . . . including the Pending Litigation, shall be commenced, continued or take place . . . except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all such Proceedings currently underway or directed to take place . . . are hereby stayed and suspended pending further Order of this Court.

[20] This court orders that, to the extent any prescription, time or limitation period relating to any Proceeding against or in respect of the Applicants, the [page129] ITCAN Subsidiaries or any member of the BAT Group that is stayed pursuant to this Order may expire, the term of

such prescription, time or limitation period shall hereby be deemed to be extended by a period equal to the Stay Period.

The Quebec Plaintiffs' Position

[10] The Quebec plaintiffs firstly submit that this court does not have jurisdiction to amend the relevant provisions of the *Supreme Court Act*, R.S.C. 1985, c. S-26 or the *Code of Civil Procedure*, C.Q.L.R., c. C-25.01. The Quebec plaintiffs therefore argue that I specifically do not have jurisdiction to determine what steps are to be taken in an SCC leave application nor do I have jurisdiction to stay the effect of the QCCA decision. The Quebec plaintiffs further state that the inherent power of the CCAA court granted pursuant to s. 11, as per its wording, only supersedes the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

[11] The Quebec plaintiffs therefore submit that if the applicants wish to commence an SCC leave application they are free to do so but they must abide by whatever conditions that are imposed upon them by the QCCA or the SCC. The Quebec plaintiffs seek an order that if any of the applicants seek to file an SCC leave application that the CCAA proceedings ought to be immediately and automatically terminated. Alternatively, the stay of proceedings provided for in the JTIM initial order and the RBH initial order be partially lifted to allow the Quebec plaintiffs to participate in any SCC leave application and seek the imposition of any conditions that the QCCA or the SCC deem appropriate.

[12] The Quebec plaintiffs seek the same relief against Imperial notwithstanding the different relief sought by Imperial.

[13] The position of the Quebec plaintiffs is supported by Her Majesty the Queen in Right of Ontario ("Ontario"), which also has a claim to recover expended health care costs.

Analysis

[14] For the reasons below, I am satisfied that I have jurisdiction to deal with the QCCA proceeding. I am further persuaded that the proposal put forth by Imperial, as generally set out in paras. 18-20 of its initial order noted above, is the most sensible at this time and should be incorporated into all three initial orders.

Jurisdiction

[15] The parties agree that there are no cases directly on point with respect to the issue of whether s. 11 of the CCAA provides this court with jurisdiction to stay the effect of the QCCA decision and subsequently any SCC leave application. The parties [page130] provided the court, however, with case law that they submit is analogous and relevant. This will be reviewed below.

[16] A good starting point concerning the issue of jurisdiction involves the wording of ss. 11 and 11.02(2) (b) of the CCAA. These sections provide this court with broad jurisdiction. They read as follows:

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.*

.

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

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

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

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

(Emphasis added)

[17] As can be seen from the above, the broad jurisdiction of this court to "make any order that it considers appropriate in the circumstances" includes restraining further proceedings in "any action, suit or proceeding" against the applicants.

[18] This is consistent with the purpose of the CCAA, which is well set out in the decision in *U.S. Steel Canada Inc. (Re)*, [2016] O.J. No. 4688, 2016 ONCA 662, 402 D.L.R. (4th) 450, wherein the Court of Appeal noted that [at paras. 47 and 49]:

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.

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[page131]

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 (Ont. 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.

[19] The above-noted purpose, in my respectful view, provides this court with jurisdiction to deal with proceedings other than those that simply arise before the Ontario Superior Court of Justice. The CCAA legislation is remedial in nature. In order to allow for the proper restructuring of debtor companies, or in this case settlement of multiple significant lawsuits, it would be undesirable to restrict the discretion of this court to matters at the Superior Court level. It would lead to a chaotic situation where only proceedings before the Superior Court and/or other provincial trial courts were stayed but proceedings that had reached the appeal courts were allowed to proceed. This would significantly hamper the stated purpose of the CCAA, which is to attempt to negotiate a compromised plan of arrangement.

[20] A similar conclusion was reached by Farley J. in the decision *Air Canada (Re)*, [2003] O.J. No. 6254, 28 C.B.R. (5th) 52 (S.C.J.). Although he was dealing with motions brought by federal regulators, who argued that this court did not have inherent jurisdiction to impose a stay upon them, I believe his words are instructive wherein he held (at para. 12):

Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 and 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, *it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the direction of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint -- rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case.*

(Emphasis added)

[21] Farley J., in the above passage, recognized the broad jurisdiction of this court in any particular case, subject to the proper exercise of judicial discretion. Once again, this [page132] recognizes the useful purposes of the CCAA in attempting to allow stakeholders to negotiate a compromise. It bears noting that one of the aspects of proper judicial discretion includes the fact that any stay of proceedings in these applications would be without prejudice to any party's right to bring a motion to lift the stay. This focuses the stakeholders on bona fide negotiations and allows this court the discretion to terminate the stay if need be.

[22] I acknowledge that I have adopted the view that the aforementioned provisions of s. 11 provide me jurisdiction to stay any and all actions including those before the QCCA and any future SCC leave application. I respectfully conclude that such an outcome is contemplated by

the CCAA to allow for a successful global resolution without benefiting one stakeholder over the other. Otherwise, as noted, chaotic situations could develop.

[23] Accordingly, the approach proposed by Imperial is fair, reasonable and sensible and one that this court has jurisdiction to make. It provides for a temporary pause that does not amend or usurp the provisions of the *Supreme Court Act* or the *Code of Civil Procedure*. Further, para. 61 of Imperial's initial order also supports the concept of deference that this court must have to the appeal courts by stipulating that the Ontario Superior Court requests the aid and recognition of those courts with respect to the initial order.

[24] Last, I believe that such an outcome is contemplated by s. 58(1) of the *Supreme Court Act*, which provides as follows:

Time periods for appeals

58(1) Subject to this Act or any other Act of Parliament, the following provisions with respect to time periods apply to proceedings in appeals:

(a) in the case of an appeal for which leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served on all other parties to the case and filed with the Registrar of the Court within sixty days after the date of the judgment appealed from[.]

(Emphasis added)

[25] Section 58(1) appears to be broad enough to include the jurisdiction of the CCAA to stay the QCCA proceeding and any further SCC leave applications at this time. Given the above and the broad jurisdiction conferred upon this court by s. 11, it is my view that the *Supreme Court Act* does not oust this court's jurisdiction that is conferred upon it by the CCAA.

[26] I should note that the Quebec plaintiffs rely on a number of decisions to support its position that I do not have [page133] jurisdiction. Primarily, they rely upon the decision of the Ontario Court of Appeal in *Mujagic v. Kamps* (2015), 125 O.R. (3d) 715, [2015] O.J. No. 2578, 2015 ONCA 360 and the decision of the Supreme Court of Nova Scotia in *OpenHydro Technology Canada Ltd. (Re)*, [2018] N.S.J. No. 471, 2018 NSSC 283, 65 C.B.R. (6th) 133. In my view, however, these cases are distinguishable given the broad nature of the authority conferred upon this court by the CCAA and the significant nature of the undertaking that is being pursued by all stakeholders to attempt a global resolution of the multiple, significant claims against the applicants. Also, *OpenHydro* deals with existing *in rem* proceedings solely within the jurisdiction of the Federal Court.

[27] I also accept Imperial's submission that I have jurisdiction to extend any prescription, time or limitation period relating to any proceeding for or against the applicants or related entities that may expire. Such provisions are common in CCAA proceedings and have been granted in initial orders in a number of decisions: *Muscletech Research and Development Inc. (Re)*, 2006 CanLII 20084 (Ont. S.C.J.), at para. 5; *ScoZinc Ltd. (Re)*, [2009] N.S.J. No. 217, 2009 NSSC 162, 277 N.S.R. (2d) 246 (Claims Officer), at para. 5; and *Scaffold Connection Corp. (Re)*, [2000] A.J. No. 69, 2000 ABQB 35, 79 Alta. L.R. (3d) 144, at para. 26. In my view, this result is sensible and desirable. Since all proceedings and future proceedings, including those brought by or against the applicants, are stayed, the interests of all stakeholders are protected.

[28] No party took the position at the motion that I did not have the jurisdiction to stay an existing or pending action and accordingly extend the limitation period. Specifically, neither JTIM nor RBH took issue with Imperial's submissions in this regard. In any event, if I was to grant the relief they sought, I would be in a similar position where I would have to stay the limitation period concerning the Quebec plaintiffs' ability to respond to the SCC leave application.

Implementing the stay

[29] In accepting that the orders proposed by Imperial ought to go in all three applications I am convinced that this would best preserve the status quo as it existed at the time of the filings and provide for the level playing field needed to attempt a resolution of all claims.

[30] The proposal put forth by JTIM and RBH would alter the *status quo* in their favour. If they were allowed to file SCC leave applications and then obtain a stay it would be to the [page134] prejudice of the Quebec plaintiffs. These applicants would be allowed to formally present all of their grounds for appeal, including the alleged flaws in the reasoning of the QCCA, without permitting the Quebec plaintiffs to reply. This not only would affect the status quo but add an impediment to resolution. It would distract these applicants from the resolution process they claim is so important by focusing their attention on the merits of their appeal from a five-member decision of the QCCA.

[31] Further, it is not only the relationship between the applicants and the Quebec plaintiffs that must be taken into consideration. If I was to partially lift the stay to allow the Quebec plaintiffs to respond and therefore allow the SCC leave application to proceed in earnest, as requested by the Quebec plaintiffs in their alternative relief, this would tilt the playing field in favour of the Quebec plaintiffs as against the other stakeholders who have had their actions stayed. Not only would this allow the Quebec plaintiffs to move further ahead and closer to resolution when the other actions are stayed, but it would further allow the Quebec plaintiffs to seek further conditions from the QCCA or SCC concerning the SCC leave application.

[32] Approximately \$1 billion has already been deposited in Quebec subsequent to the trial decision in order that the applicants could pursue appeals to the QCCA. Any further, similar orders would be detrimental to other stakeholders who seek a fair process with the CCAA proceedings. These other stakeholders include the provinces who have significant actions concerning the health recovery costs and the other class actions. In fact, two of the provinces' claims -- Ontario and New Brunswick -- are edging towards trial. This does not seem fair as it would allow the Quebec plaintiffs a benefit not available to other plaintiffs.

[33] Furthermore, if I was to partially lift the stay as requested by the Quebec plaintiffs so that the SCC leave application and a subsequent potential appeal could proceed it would undermine the CCAA proceeding. It would allow for a significant parallel proceeding to commence. Not only would this create a shift in the level playing field as noted above, it would no doubt greatly distract the applicants and the Quebec plaintiffs from the important purposes of the CCAA. Enormous resources would be diverted to the litigation. This would cause delay and lessen the chances of achieving a global resolution. [page135]

[34] The CCAA case law clearly establishes the significant need to preserve the status quo between all stakeholders to preserve a level playing field and maximize the chances of obtaining resolution.

[35] Last, I note that the Quebec plaintiffs also submitted that the "well-documented reprehensible behaviour" set out in the trial decision and QCCA decision should also be taken into consideration on this motion. I reviewed the relevant portions of the aforementioned decisions. No doubt, significant criticism was leveled in various portions of the judgments. In my view, however, insofar as the CCAA process is concerned, the past behaviour of the applicants should not be allowed to undermine attempts to reach a global resolution to the benefit of all stakeholders.

Disposition

[36] The motions of JTIM, RBH and the Quebec plaintiffs with respect to the SCC leave application are dismissed.

[37] An order shall go staying any and all current proceedings by or against the applicants and related entities and prohibiting the commencement of any further proceedings by or against them with the leave of this court. It is further ordered that, to the extent of any prescription, time or limitation period relating to any proceeding against the applicants that is stayed pursuant to this order may expire, the term of such prescription, time or limitation period shall thereby be deemed to be extended by a period equal to the stay period.

*JTIM and RBH's motion dismissed; Imperial's motion
granted.*