Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

BRIEF OF AUTHORITIES

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INDEX

INDEX

TAB 1

Indexed as:

Playdium Entertainment Corp. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of Playdium Entertainment Corporation et al.

[2001] O.J. No. 4459

[2001] O.T.C. 828

31 C.B.R. (4th) 309

2001 CanLII 28282

109 A.C.W.S. (3d) 683

Court File No. 01-CL-4037

Ontario Superior Court of Justice
Commercial List

Spence J.

Heard: November 9, 2001.
Judgment: November 15, 2001.

(45 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval.

Supplemental reasons addressing Famous Players's request to have a clause added to the order regarding the assignment of the Material Agreements to provide that the transfer of assets pursuant to the Techtown Agreement was subject to Famous Players's claims arising from its contractual entitlements under that agreement. Famous Players claimed that the court did not have the jurisdiction under the CCAA to order the assignment of the Techtown Agreement on the proposed terms because the order was permanent and imposed positive obligations on Famous Players. The assignment of the agreement resulted in a New Playdium that became bound to perform the obligations of

Playdium from and after the date of the transfer. The New Playdium was entitled to obtain performance by Famous Players of its obligations under the agreement. Under the transaction, Famous Players retained its rights against Playdium relating to the pre-transfer period and was entitled to assert its claims against the New Playdium relating to the period after the transfer.

HELD: It was not necessary to add the clause sought by Famous Players. A restrictive view of the jurisdiction under s. 11(4) of the CCAA was not appropriate, given its remedial nature. Nothing in the proposed transaction altered Famous Players's rights of action. Orders under s. 11(4)(c) of the CCAA were made until "Otherwise ordered by the court." Approval of the assignment was an exercise of the court's inherent jurisdiction. The order could not be effective unless it bound all parties, including Famous Players.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, ss. 9(e), 11(3), 11(4)(a), 11(4)(b), and 11(4)(c).

[Quicklaw note: Original reasons for judgment were released November 2, 2001. See [2001] O.J. No. 4252.]

Counsel:

Paul G. Macdonald, for Covington Fund I Inc.
Gary C. Grierson, for Famous Players Inc.
Gavin J. Tighe and B. Bish, for Playdium Entertainment Corporation.

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1 **SPENCE J.**:-- These reasons are supplemental to the reasons for decision which I released November 2, 2001. Reference is made to those reasons. The defined terms employed in those reasons are also used below.

2 Covington and TD Bank propose that the order appointing the interim receiver should contain, as regards the assignment of the Material Agreements (including the Techtown Agreement), the provisions set out in Part V, paragraphs 10 through 13, of the draft order now before the court.

3 This draft order is different from the form of order in the motion record but apparently not different in respect of the matter now in issue between Covington, TD Bank and Playdium on the one side and Famous Players on the other. The hearing on October 29 and 30 did not address the specific terms of the order but it did address the intended effect of the assignment of the Techtown Agreement. It was submitted that the assignment was intended to result in New Playdium, as assignee, becoming bound to perform the Playdium obligations under the agreement from and after the transfer date and becoming entitled to obtain performance by Famous Players of its obligations under the agreement from and after that date. Special provision has been made in respect of s. 9(e) defaults, as referred to in the reasons for decision of November 2, 2001. The insolvency defaults of Playdium which led to the CCAA order are in effect stayed, which is not an issue.

The Issue

4 Famous Players now submits that the form of order should be revised to provide that the transfer of assets should, in effect, be made subject to "any and all claims of Famous Payers arising from its contractual entitlements under the Techtown Agreement".

5 Famous Players submits that a provision to that effect is necessary because otherwise it will suffer the loss of certain of those claims and that it ought not to be deprived of those claims by the order of the court and that the court has no jurisdiction to make such an order.

The Terms of the Assignment

6 Famous Players will continue to have any rights of action it now has or which may subsequently arise in its favour against Playdium (subject to any subsequent court determination to the contrary), because nothing in the proposed transaction purports to alter those rights. It is not indicated whether Playdium is to have liability in respect of events occurring after the transfer. In any event, the continuing liability of Playdium is of no practical consequence to Famous Players' concerns, given Playdium's insolvency.

7 As against New Playdium, by reason of paragraph 13 of the draft order, Famous Players would be able to exercise a contractual right to terminate as a result of a default that arises or continue to exist after the transfer, except for an insolvency default.

8 Counsel for Covington said that if there is an existing misrepresentation as to the state of the equipment, that would be brought forward, which I take to mean that the rights of Famous Players in that respect would be preserved for purposes of Famous Players being able to assert those rights against New Playdium.

9 It was submitted that the proposed terms in the draft order would assign the benefit of the agreement without the burden. However, on the basis of the material and the submissions for Covington and TD Bank, the intention is that New Playdium would assume the burden of the agreement as of and from the transfer date in respect of the obligations of performance then in effect or arising subsequently.

10 What New Playdium would not assume or be liable for would be any claims that may arise in the future in favour of Famous Players against Playdium in respect of matters which occurred prior to the transfer and do not constitute a continuing default on the part of Playdium at the time of the transfer.

11 An example of such a contingent claim might be a claim for indemnity by Famous Players against Playdium in respect of damages payable by Famous Players for injury suffered resulting from Playdium's equipment in an occurrence prior to the transfer to New Playdium but not asserted by the claimant until a time subsequent to the transfer. It was submitted that such a claim cannot properly be viewed as part of the continuing burden of the agreement as regards New Playdium because the event giving rise to it antedates New Playdium's involvement. It was also submitted that such a claim is nothing other than a contingent unsecured claim of a person who, in respect of the claim, is a creditor or prospective creditor of Playdium and the claim should not be entitled to any different recognition than other unsecured contingent claims of Playdium. These submissions have merit.

12 For Famous Players it was submitted that New Playdium is seeking to take an assignment of the agreement without being subject to the equities. However, it appears that Famous Players' rights

of termination are preserved (except for the insolvency default), in respect of defaults under the agreement existing at or subsequently arising after the transfer date.

13 It was not suggested that New Playdium seeks to take an assignment from Playdium of rights against Famous Players in respect of matters that have occurred previously under the agreement and which might be the subject of a claim of set-off or counterclaim. If that were intended, that might well constitute a case of assignment without being subject to the equities. For that reason, it would be appropriate that New Playdium should not be able to assert such rights against Famous Players without being subject to any such claims (i.e. set-offs and counterclaims) of Famous Players relating to such rights. A provision to that effect ought to be included in the order and it should state that the provision is subject to any further order of the court based on CCAA consideration.

Jurisdiction of the Court Under CCAA

14 As for the jurisdiction of the court to order the assignment on the terms proposed, Famous Players submits that the authority of the court must derive from the CCAA and there is no provision in the CCAA sufficient for this purpose. This raises an issue of fundamental importance about the scope of the CCAA.

15 Section 11(4) of CCAA provides as follows:

> Other than initial application court orders - a court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

16 Famous Players now submits that s. 11(4) of the CCAA is not sufficient to give the court authority to make an order which has a permanent effect against a third party and that no other provision of the CCAA assists and neither does the inherent jurisdiction of the court.

17 As the parties presumably realize, the submission of Famous Players goes not just to the terms proposed but to the jurisdiction of the court to order the assignment itself, a matter that was dealt with in the reasons of November 2, 2001. Since the order has not yet been taken out, the matter is still before me. Because of the importance of the issue, it is appropriate to consider the further submissions made at the present hearing.

The Case Law

18 The following excerpts from decisions in cases under the CCAA provide assistance in assessing the extent of the jurisdiction of the court.

19 From Re Lehndorff General Partner Limited (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at pages 33 and 34, by Farley J.; with reference to s. 11 of the Act as it was at that time:

> The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1988] A.J. No. 1049, supra, at pp. 12-17 (C.B.R.) and Quintette Coal Ltd. v. Nippon Steel Corp., [1990] B.C.J. No. 1398, supra, at pp. 296-298 (B.C.S.C.) and pp. 312-314 (B.C.C.A.) and Meridan Developments Inc. v. Toronto Dominion Bank, 11 D.L.R. (4th) 576, supra, pp. 219 ff.
>
> The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see Gaz Metropolitain v. Wynden and Qintette Coal Ltd. v. Nippon Steel Corp.,44 C.B.R. (N.S.) 285, supra, at pp. 311-312 (B.C.C.A.).

20 From re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at page 315, by Blair J.:

> The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in Dylex Ltd., supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.

21 From the endorsement in re American Eco Corporation, Court File No. 00-CL-3841, unreported Endorsement of Farley J., October 24, 2000:

> The only fly in the ointment as I was advised was that BFC was not agreeable to giving its consent, which consent is not to be unreasonably withheld as to the transfer of the j.v. contract participation from Industra to members of the Lockerbie Group ...
>
> Thus it appears to me that in relative terms, the financial aspects of this transfer vis a vis the joint venture is covered off by the asset/equity substance of the consolidated Lockerbie group and the provision of the completion bond. As well from a work performance aspect, one should note that if Lockerbie was not allowed the transfer, then BFC would be looking at an insolvent j.v. venturer Industra - with the result that as opposed to the Industra team being kept together (as assumed by Lockerbie purchasers), the team would be "let go" and BFC

> would not have this likely package but would have to go after the disintegrated team on a one by one basis.
>
> But perhaps more telling is the BFC October 12/2000 letter that "Therefore, we would only be prepared to seventy five (75) percent". Thus it appears that there is no financial or operational reason to refuse the assignment - but merely, a bonus which in my view is not related to any true risk - but merely a "bare consideration" bonus. See paragraph 194 of Welch Foods v. Cadbury Beverages Canada Inc. I find that BFC would be unreasonable to withhold its consent if the Lockerbie group provided the aforesaid guarantees and bond.
>
> While it is true that the assignment provision is there irrespective of it being in an insolvency setting or not, it would seem to me that in the fact circumstances prevailing of the insolvency that BFC is attempting to confiscate value which should otherwise be attributable to the creditors.

22 Famous Players is not seeking a bonus for its consent. But its only apparent remaining reason for withholding consent, vis a vis the prospect now afforded of a solvent Playdium business under the new owners, is that it has a better prospective deal with Starburst, which is not dissimilar to the Industra situation.

23 From Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 676 (Alberta C.A.) at pages 10 and 13 by Hunt J.A.

> 47 The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as Norcen, supra, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the CCAA ...
>
> 49 ... Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).
>
> 50 The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empowers the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceedings" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
>
> 72 ... I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the CCAA proceedings. I as-

sume that, in settling the details of the CCAA procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

24 Paragraph 72 of the Luscar decision appears to me not to intend a limitation on the scope of the authority of the court as characterized in paragraph 50, but rather as an expression of the need for caution as to the manner in which that jurisdiction is exercised.

25 It appears to me that the approach taken by courts to the CCAA in the decided cases to which I have been referred is consistent, in terms of the views expressed about the proper application of the Act and the decisions taken in the particular cases, with the approval that is sought here for the assignment of the Techtown Agreement.

Analysis

26 Section 11(4) of the CCAA, in subsections (a), (b) and (c), provides only for orders of a negative injunctive effect until otherwise ordered by the court, in respect of proceedings against the company, i.e. in this case, Playdium. However, the order sought is in effect to require Famous Players to be bound by an assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s. 11(4) (a), (b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

27 Section 11(4)(c) warrants further consideration in this regard. Section 11(4)(c) does not require that an order be made only for a limited period, as s. 11(4)(a) appears to do. By its terms it would seem to permit an order to prohibit the commencement of any action, suit or proceeding against Playdium on the basis of the Techtown Agreement including the purported assignment of the agreement to New Playdium. Such an order would seem to be legitimate in its formal compliance with s. 11(4)(c) but it would leave the matter of the status of the Techtown Agreement unresolved with respect to all concerned, unless it could go on, through an ancillary order, to give effective approval to the assignment.

28 Consideration must also be given to the words, in the opening part of s. 11(4) which provide that the court may make an order on such terms as it may impose" (emphasis added).

29 It is instructive to compare s. 11(4) of the CCAA with s. 11(3). Section 11(3), relating to initial application court orders also provides that the order may be made on such terms as the court may impose, but the provision adds the qualification "effective for such period as the court deems necessary not exceeding thirty days".

30 It is relevant to the analysis of this issue that Famous Players is not a mere "third party" but is, as counsel said, a significant stakeholder. Under the proposed transaction, Famous Players will retain its rights against Playdium in respect of claims relating to the pre-transfer period and will be entitled to assert, in respect of the period from and after transfer, the same rights against New Playdium as it had against Playdium, including rights to terminate for default, except the insolvency default which occasioned and was the subject of the CCAA stay. So it is difficult to see how the circumstances of Famous Players in respect of the Techtown Agreement could be said to have changed to the detriment of Famous Players in any material way.

31 In substance, what will have happened, to put the matter in terms of s. 11(4), is that Famous Players will have been prohibited from taking proceedings in respect of the Techtown Agreement except on and subject to the terms of the assignment to New Playdium and to make that order effec-

tive terms will have been imposed by the court which provide for the Techtown Agreement to be assigned by the required date to New Playdium on terms that assure to Famous Players the same rights against New Playdium as it had against Playdium for the post-transfer period and leave Famous Players with its rights against Playdium in respect of the pre-transfer period.

32 In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the court should not take such a restrictive view of the s. 11(4) jurisdiction.

33 Famous Players objects that the order is not only permanent but positive, i.e. rather than simply restraining Famous Players, the order places it under new obligations. It would be more precisely correct to say that the order places Famous Players under the same obligations as it had before but in favour of the new owners of the business. Moreover, the new owners are not third parties but rather the persons who have the remaining economic interests in Playdium.

34 In view of the remedial nature of the CCAA, it does not seem that in principle, a change of this kind, which is a change occasioned only by the ownership changes effected by the compromise itself and one that does not involve any materially greater or different obligations, should be regarded as beyond the jurisdiction created by the CCAA. This view is examined further below with respect to the issue of positive obligations.

The Imposition of Positive Obligations

35 The requested approval of the assignment can be analyzed conceptually as follows in terms of s. 11(4)(c). The court prohibits any proceedings by Famous Players against Playdium (and therefore against its assignees) except on the following terms, i.e., that any such proceeding must be consistent with any assignment of the Agreement approved by the court. It is a further term, or an order to give effect to the stated terms, that the court approves the assignment to New Playdium for this purpose. An order on these terms conforms to the requirements of s. 11(4)(c).

36 Famous Players objects that the order is also to have positive effect: i.e. it imposes obligations on Famous Players as distinct from merely staying proceedings by it. However, the order as analyzed above could not be effective unless the assignment binds all parties, i.e. Famous Players as well as New Playdium and Playdium.

37 Also, if the order could not bind Famous Players in a positive manner, the result would be that Famous Players could assert rights under the Agreement as assigned but would not be subject to the corresponding obligations under it. This would not be fair.

38 So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent ju-

risdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute.

39 Reference has been made in CCAA decisions to the inherent jurisdiction of the court in CCAA matters. The following excerpt from the decision of Farley J. in Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc. (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div.) at pp. 184 and 185 is instructive:

> Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see Ultracare Management Inc. v. Gammon, order of Austin J. dated October 19, 1993; Liquidators of Wallace Smith Trust Co. Ltd. v. Dundalk Investment Corp. Ltd., order of Blair J. dated September 22, 1993. As MacDonald J. said in Re Westar Mining Ltd. (1992), 14 C.B.R. (3d) 88 at p. 93, [1992] 6 W.W.R. 331, 70 B.C.L.R. (2d) 6 (S.C.):
>
> > I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see Winnipeg Supply & Fuel Co. v. Genevieve Mortgage Corp., [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
>
> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., vol. 37, para. 14) as:
>
> > "... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so ..."
>
> Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

In commenting on this decision and discussing the stay provisions of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") and the U.S. Bankruptcy Code, Tysoe J. observed in Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 at pp. 247-8, [1993] B.C.J. No. 42:

> Hence it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In Westar Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisitive to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is

> exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
>
> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

40 It should be noted that orders made under s. 11(4)(c) are to be made "until otherwise ordered by the court". A proviso to this effect (e.g. "subject to any further order of the court pursuant to s. 11(4)(c) of the CCAA") should be included in any vesting order to be made in favour of New Playdium with respect to the assignment of the Techtown Agreement.

Whether the Order is Appropriate

41 The circumstances that are relevant in the present case are dealt with in the earlier reasons at paragraphs 24 through 33 and in the preceding paragraphs of the present reasons.

Conclusion

42 Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

43 Provided that terms are added to the assignment and to the vesting order to the effect directed above, Famous Players will not be subjected to an inappropriate imposition or to an inappropriate loss of claims, having regard to the purpose and spirit of the regime created by CCAA and my reasons for decision of November 2, 2001.

44 Accordingly, it is appropriate for the assignment to be approved and it is not necessary to add the clause requested by Famous Players to the form of order now before the court.

45 Counsel may consult me about costs.

SPENCE J.

cp/d/qlhcc/qldah/qlcas

TAB 2

Indexed as:

Woodward's Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF the Company Act, R.S.B.C. 1979, c. 59
IN THE MATTER OF Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.

[1993] B.C.J. No. 42

79 B.C.L.R. (2d) 257

17 C.B.R. (3d) 236

1993 CarswellBC 530

37 A.C.W.S. (3d) 1040

Vancouver Registry No. A924791

British Columbia Supreme Court
Vancouver, British Columbia
(In Chambers)

Tysoe J.

Heard: January 8, 1993
Judgment: January 11, 1993; filed January 12, 1993

(25 pp.)

Counsel for Woodward's Limited, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd.:R.A. Millar, M.A. Fitch and J. Irving.
Counsel for W.J. Woodward and others: D.B. Kirkham, Q.C. and G. Tucker.
Counsel for H.J. Zayadi: E.J. Adair.

1 **TYSOE J.**:-- The aspect of these proceedings presently under consideration is whether the Court should grant a stay in respect of payments owing to retired or terminated senior executives of Woodward's Limited ("Woodward's") which are secured by letters of credit issued by Woodward's banker in favour of two trust companies acting as trustees pursuant to agreements or plans benefitting Woodward's senior executives.

2 On December 11, 1992 I granted an interim stay Order pursuant to the Companies' Creditors Arrangement Act (the "CCAA") in favour of Woodward's, Woodward Stores Limited and Abercrombie & Fitch Co. (Canada) Ltd. The Order was granted on an ex parte basis and it was expressed to expire at 6 p.m. on January 8, 1993, the day on which the hearing of the Petition in this matter was intended to take place. On December 17 and 24, 1992 I made further interim Orders which, among other things, contained a stay in relation to the letters of credit held by the two trust companies.

3 The hearing of the Petition began on January 8, 1993 but there were also between 10 and 15 related applications scheduled to be heard on January 8 and the following days. On January 8, when it was clear that the hearing of the Petition and related applications would take several days, I extended the interim Orders until further Order with the intent that they would continue until I made my determinations on the various issues to be decided. There appears to be little doubt that there will be an extension of the stay Order generally and it is the terms of the continuing stay Order that are in dispute. These Reasons for Judgment relate to one of the issues that is in dispute. I will approach this matter on the basis that the CCAA stay is going to be extended and the issue to be determined is whether the stay can or should apply in relation to the former senior executives and the trust companies acting as the trustees of the letters of credit.

4 Woodward's decided at some point in the past that it would make provision for retiring allowances to benefit its senior executives when they retired or when they were terminated without cause. Until 1991 Woodward's entered into individual agreements with certain senior executives in relation to the retiring allowances. In 1991 Woodward's established its Retiring Allowance Plan which applied to designated senior executives.

5 Mr. Kirkham's clients entered into the individual agreements prior to 1991. Letters of credit have been lodged with The Canada Trust Company ("Canada Trust") pursuant to these agreements as security for the payment of the retiring allowances. Ms. Adair's client was covered by the Retiring Allowance Plan which continues in effect and also applies to senior executives who are still employed by Woodward's. A letter of credit has been lodged with Montreal Trust Company of Canada ("Montreal Trust") pursuant to the Retiring Allowance Plan as security for the payment of the retiring allowances.

6 All of the letters of credit have been issued to the two trust companies by Woodward's banker, Canadian Imperial Bank of Commerce (the "Bank") which holds security against the assets of Woodward's for these contingent obligations. Counsel for Woodward's advised the Court that approximately $10.2 million has been paid by Woodward's to the Bank to "cash collateralize" the letters of credit. Counsel was unable to advise me when this payment was made but I believe that it was made recently and that it was not made at the time of the issuance of the letters of credit.

7 Woodward's entered into trust agreements with both of Canada Trust and Montreal Trust in relation to the letters of credit. It is useful to refer to the relevant portions of the trust agreements deal-

ing with the calling of the letters of credit. Paragraphs 3, 4 and 5 of the trust agreement with Canada Trust (the "Canada Trust Agreement") read, in part, as follows:

> 3. The Trustee shall be entitled at any time and from time to time to draw on the Letter of Credit comprised in the Fund, either in whole or in part, to obtain money for the purpose of making any payment required to be made by it hereunder.....
> 4. If from time to time the Company shall for any reason whatsoever fail to pay or cause to be paid to the Executive or to a Beneficiary, as the case may be, any amount owing to the Executive or a Beneficiary under the Retiring Allowance Agreement for a period of ten days after its due date, the Executive may deliver to the Trustee an executed or certified true copy of the Retiring Allowance Agreement and concurrently certify in writing to the Trustee that the amount has not been paid thereunder and that he or she is entitled to receive the payment. The Trustee shall within five days after receipt of the certificate report in writing to the Company the claim so submitted. If within seven days after delivery of the Trustee's report to the Company the Trustee has not been notified by the Company that the Company has made the payment and has not received the certificate of the Company hereinafter mentioned, the Trustee shall pay the claimed amount out of the Fund to the Executive or the Beneficiary, as the case may be, in full discharge of the Company's liability for the payment....
> 5. If the Company ..... becomes insolvent ..... and the Executive certifies to the Trustee that such an event has occurred, the Trustee shall draw the full amount of the Letter of Credit comprised in the Fund .....

8 Paragraphs 8 and 9 of the trust agreement with Montreal Trust (the "Montreal Trust Agreement") read, in part, as follows:

> 8. If the Company ..... becomes bankrupt or insolvent ..... and any officer of the Company or any Senior Executive ..... certifies in writing ..... to the Trustee that such an event has occurred and giving particulars thereof, the Trustee shall within five days after receipt of the certificate deliver a copy to the Company. Subject to any order of a court of competent jurisdiction, the Trustee shall, after the expiration of 14 days from the date of delivery of the certificate to the Company, draw the full amount of all Letters of Credit comprised in the Trust Fund .....
> 9. If the Company shall from time to time for any reason whatsoever fail to pay or cause to be paid to a Senior Executive or a Beneficiary, as the case may be, any amount owing to the Senior Executive or Beneficiary under the Retiring Allowance Plan for a period of ten days after its due date, the Senior Executive or Beneficiary ..... may certify in writing ..... to the Trustee that the amount has not been paid thereunder and that the Senior Executive or Beneficiary named in the certificate, as the case may be, is entitled to receive the payment. The Trustee shall within five days after receipt of the certificate report in writing to the Company the claim so submitted. If, within seven days after delivery of the Trustee's report to the Company, the Trustee has not been notified in writing by the Company that the Company has made the payment and has not received the certificate of

> the Company hereafter mentioned, the Trustee shall draw under the Letter of Credit .....

9 It not disputed by Woodward's that monthly retirement allowances owing to the former senior executives are overdue or that it has become insolvent.

10 It is the position of Woodward's that the calling of the letters of credit can and should be stayed pursuant to s. 11 of the CCAA or, alternatively, that the Court has the inherent jurisdiction to grant such a stay. Counsel for the former senior executives submit that the Court has no jurisdiction to grant a stay preventing the trust companies from calling on the letters of credit.

11 Section 11 of the CCAA reads as follows:

> 11. Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either of them; (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and (c) make an order that no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

12 Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

13 An example of the broad interpretation given to s. 11 is Quintette Coal Limited v. Nippon Steel Corporation (1990), 51 B.C.L.R. (2d) 105 (B.C.C.A. - leave to appeal to S.C.C. dismissed). The B.C. Court of Appeal held that s. 11 was sufficiently broad to prevent a creditor from exercising a right of set-off against the insolvent company. The Court confirmed that the word "proceeding" in s. 11 encompassed extrajudicial conduct and it held that the exercise of a right of set-off was a "proceeding" within the meaning of s. 11. Gibbs J.A. commented on s. 11 in the following general terms at p. 113:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially.

14 Coincidentally, the authority that is generally considered to be the landmark decision in respect of the broad interpretation to be given to s. 11 is a case involving a letter of credit issued by a bank at the request of the insolvent company in favour of a creditor, Meridian Developments Inc. v. Toronto Dominion Bank (1984), 11 D.L.R. (4th) 576, [1984] 5 W.W.R. 215 (Alta. Q.B.). Wachowich J. posed the issues before him in the following manner at pp. 579-580 of D.L.R. and p. 219 of W.W.R.:

> 1. Is payment of the letter of credit a "proceeding" within the meaning of cl. 2 or 3 of the 21st March order?
>
> 2. If so, is it a proceeding "against the Petitioner" [Nu-West] so as to be restrained by cls. 2 or 3 of that order?
>
> 3. If it is found to be a "proceeding" should the court in any case give leave to Meridian in the circumstances to obtain payment of the letter of credit?

Cls. 2 and 3 of the Order referred to by Wachowich J. followed the wording of s. 11 of the CCAA.

15 Wachowich J. first decided that the payment of a letter of credit fell within the meaning of the word "proceeding" in s. 11 of the CCAA and it is this portion of his judgment that deals with the broad interpretation to be given to s. 11. However, Wachowich J. went on to conclude that the payment of the letter of credit could not be termed "a proceeding against the company" with the result that the stay Order did not prevent the calling of the letter of credit.

16 Counsel for Woodward's submitted that the present situation falls within an exception enunciated by Wachowich J. He first points to the following passage at p. 584 of D.L.R. and p. 224 of W.W.R.:

> It must be noted, however, that by the terms of the March 21, 1984 order it is only "further proceedings in any action, suit or proceeding against the petitioner" that are restrained. Unless the payment of the letter of credit is a "proceeding against the petitioner" (Nu-West) it was not restrained by this order. I agree with counsel for Meredian that the payment of the letter of credit cannot be termed a proceeding against Nu-West unless the money to be paid is Nu-West's property. (my italics)

Counsel next points to points to a passage on p. 588 of D.L.R. and p. 227 of W.W.R. where Wachowich J. is reviewing the American authority of Page v. First National Bank of Maryland (1982), 18 B.R. 713:

17 At p. 4 of the (unreported) decision the court stated:

> In issuing the letter of credit the bank entered into an independent contractual obligation to pay W.C.C. out of its own assets. Although cashing the letter will immediately give rise to a claim by the bank against the debtors pursuant to the latter's indemnification obligation, that claim will not divest

> the debtors of any property since any attempt to enforce that claim would be subject to an automatic stay pursuant to 11 U.S.C., para. 362(4).

> In my view, the Toronto-Dominion Bank is in the same position. It is obliged to honour its contract with Meridian even though the cashing of the letter of credit will increase Nu-West's debt to the bank and even though the bank has no method of enforcing its claim against Nu-West because of the March 21st order.

18 Counsel for Woodward's submits that the present situation falls within the exception recognized in the Meridian case in the sense that the money to be paid under the letter of credit is the property of Woodward's and that payment on the letters of credit will divest Woodward's of its property because the letters of credit are "cash collateralized" by $10.2 million of Woodward's money. I do not accept this submission.

19 The fact that Woodward's may have secured its obligations to the Bank in respect of the letters of credit does not mean that the letters of credit will be paid with Woodward's money. The letter of credit is an independent obligation of its issuer which is obliged to honour a call on the letter of credit with its own money. After being required to make a payment under a letter of credit, the issuer of the letter of credit is then entitled to look to its customer pursuant to the indemnification agreement that usually exists in relation to a letter of credit. If the issuer of the letter of credit holds a cash deposit from its customer as security for the obligations under the indemnification agreement, it may indemnify itself from the cash deposit. This involves the issuer of the letter of credit utilizing the money of its customer to indemnify itself but it is not the money on deposit that is to be used to make payment under the letter of credit.

20 After Wachowich J. made his statement that payment of the letter of credit cannot be termed to be a proceeding against Nu- West "unless the money to be paid is Nu-West's property", he proceeded to review the general nature of a letter of credit and he then reached his conclusion that payment of the letter of credit could not be termed a proceeding against Nu-West. It is my view that Wachowich J. was not creating an exception when he made the statement. Rather, he was stating the issue to be determined in deciding whether it could be termed a proceeding against Nu-West. After he review the general nature of a letter of credit and immediately before stating his conclusion, Wachowich J. said the following at p. 587 of D.L.R. and p. 226 of W.W.R.:

> The customer of the bank has, in my view, never had "ownership" of any funds represented by the letter of credit. He can lay claim only to the debt that has been thereby created.

In addition, it should be noted that in the Parker v. First National Bank of Maryland decision relied upon by Wachowich J., the bank held a certificate of deposit as security for the indemnification obligations of its customer and the U.S. District Court held that a claim on the letter of credit would not divest the debtor of any of its property.

21 Accordingly, I do not think that the letters of credit presently under consideration fall within any exception in Meridian. However, that does not end the s. 11 analysis in my view.

22 Section 11 cannot be utilized to prevent the holder of a letter of credit from requiring the third party who issued the letter of credit to honour it because no steps are taken against the insolvent company when a call is made on the letter of credit. But there will be circumstances where the

holder of the letter of credit will not be entitled to call on it unless he or she first does take some step that is a prerequisite to a drawing under the letter of credit. If such a step constitutes a proceeding against the insolvent company, it may be stayed by the Court under s. 11. For example, the step taken against the insolvent company could be the making of demand on the company. Stay Orders under the CCAA frequently prevent creditors from making demand on the insolvent company.

23 The issue thus becomes whether any proceeding must be taken against Woodward's before the letters of credit may be called upon. The prerequisites under paragraph 4 of the Canada Trust Agreement are the following:

(a) the Company has failed to make a payment;
(b) the Executive has delivered to the Trustee a copy of the Retiring Allowance Agreement and a certificate to the effect that he or she has not been paid;
(c) the Trustee has reported in writing to the Company that a claim has been submitted;
(d) the Company has not notified the Trustee that the payment has been made.

The prerequisites under paragraph 5 of the Canada Trust Agreement are that the Company has become insolvent and that the Executive has certified the occurrence of that event to the Trustee.

24 The prerequisites under paragraph 8 of the Montreal Trust Agreement are as follows:

(a) the Company has become insolvent;
(b) the Executive has certified the occurrence of the event to the Trustee;
(c) the Trustee has delivered a copy of the Executive's certificate to the Company:
(d) a court of competent jurisdiction has not made an order preventing the Trustee from drawing on the letters of credit.

The prerequisites under paragraph 9 of the Montreal Trust Agreement are the same as the prerequisites under paragraph 4 of the Canada Trust Agreement.

25 It is clear that paragraph 5 of the Canada Trust Agreement does not require that any proceeding be taken against the Company before the Trustee can draw on the letter of credit. Paragraph 4 of the Canada Trust Agreement becomes academic because Woodward's is insolvent and Canada Trust can call on the letter of credit pursuant to paragraph 5.

26 Both of paragraphs 8 and 9 of the Montreal Trust Agreement require a step to be taken vis-a-vis the Company before the Trustee can call on the letter of credit. Paragraph 8 requires that the Trustee deliver to the Company a copy of the certificate of the Senior Executive. Paragraph 9 requires that the Trustee must report to the Company that a claim has been made. It is my view that the delivery of a copy of the certificate to the Company and the making of a report to the Company are both proceedings against Woodward's that can be stayed pursuant to s. 11 of the CCAA.

27 If a step must be taken vis-a-vis the insolvent company before a creditor (or a trustee on behalf of a creditor) may enforce its rights, the form of the step should make no difference for the purposes of s. 11 of the CCAA. It should not matter whether the step is a demand for payment on the company, the delivery to the company of a notice of acceleration or the delivery to the company of some other type of document such as a copy of a certificate or a report. In the Meridian case, supra, Wachowich J. quoted the following portion of the definition of the word "proceeding" in Black's Law Dictionary, 5th ed. (1979) (at p. 582 of D.L.R. and p. 221 of W.W.R.):

> Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. Rooney v. Vermont Invt. Corp. (1973), 10 Cal. (3d) 351, 110 Cal. Rptr. 353, 515 P. (2d) 297 (Cal. S.C.).

The delivery of a copy of a certificate or a report to Woodward's is no less a proceeding than the payment of a letter of credit (Meridian) or the exercise of a right of set-off (Quintette). It is a proceeding against Woodward's because the copy of the certificate or the report must be delivered to Woodward's.

28 The result is that a stay under s. 11 of the CCAA can effectively prevent Montreal Trust from calling on the letters of credit held by it but Canada Trust cannot be restrained by such a stay from calling on the letters of credit held by it. It is therefore necessary to consider Woodward's alternative argument that the Court has the inherent jurisdiction to grant a stay that prevents a creditor (or a trustee on behalf of a creditor) from taking proceedings against third parties.

29 To my knowledge, the only example of the Court exercising its inherent jurisdiction in relation to the CCAA is Re Westar Mining Ltd., [1992] B.C.J. No. 1360 (June 15, 1992, B.C. Supreme Court Action No. A921164). In that case Macdonald J. exercised the inherent jurisdiction of the Court in order to create a charge against the assets of Westar for the benefit of suppliers which were continuing to provide goods and services to Westar after the commencement of the CCAA proceedings. Macdonald J. created the charge on June 10, 1992 without giving extensive reasons. His Order was made without prejudice to the claims of the Crown which did oppose the creation of the charge a few days later on the basis that it altered the priorities in the event that Westar went into bankruptcy. In his Reasons for Judgment dated June 16, 1992 Macdonald J. first explained how and why he created the charge (at p. 3):

> The charge has already been created. In doing so, I purported to exercise the inherent jurisdiction of this court. The Company would have no chance of completing a successful reorganization without the ability to continue operations through the period of the stay. It must be able to arrange for further limited credit from its suppliers if it is to continue operations. Thus, security which is sufficient, in the eyes of its suppliers, to justify the extension of some further credit is a condition precedent to any acceptable plan of reorganization.

Macdonald J. rejected the argument of the Crown and he elaborated on the use of the Court's inherent jurisdiction at pp. 9 and 10:

> The issue is whether or not those suppliers who are prepared (or have been compelled, between May 14 and June 10) to extend credit which will hopefully keep the Company operating during the period of the stay, should be secured. I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end. (See, Winnipeg Supply & Fuel v. Genevieve Mortgage Corp. [1972] 1 W.W.R. 651 (Man. C.A. at p. 657).

> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., volume 23, para. 14) as:
>
> > ...the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so...
>
> Proceedings under the CCAA are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

30 Mr. Kirkham submitted that Westar is distinguishable on the basis that the assets against which the Court created a charge were within the jurisdiction of the Court because they belonged to Westar and that in this case his clients and Canada Trust are not before the Court. I do not think that this is a valid distinction because the charge against Westar's assets affected the Crown which was not before the Court any more than Mr. Kirkham's clients and Canada Trust.

31 It may be argued that the Court should only exercise its inherent jurisdiction to "flesh out the bare bones" of the CCAA and that the Court should not utilize its inherent jurisdiction to grant stays because s. 11 of the CCAA already deals with the subject matter of stays and it contains Parliament's full intentions in that regard. This potential argument has not been given effect in analogous circumstances in the United States when proceedings under Chapter 11 of the U.S. Bankruptcy Code are pending. Under Chapter 11 there is an automatic stay of proceedings and, like s. 11 of the CCAA, it is a stay of proceedings against the debtor company only. The U.S. Courts have used an equivalent of inherent jurisdiction (i.e., a general provision in the U.S. Bankruptcy Code to make necessary or appropriate orders) to grant stays in relation to proceedings against third parties. The most common example is a proceeding against the principals of the insolvent company whose efforts are required to attempt to reorganize the company. One of the leading U.S. authorities is Re Johns-Manville Corp. (1984), 40 B.R. 219 which was referred to by Macdonald J. in the decision of Re Philip's Manufacturing Ltd. (1991), 60 B.C.L.R. (2d) 311 where he declined to continue a stay of all proceedings against the directors and officers of the insolvent company. In that case Macdonald J. expressed a reservation about whether the inherent jurisdiction of the Court could be utilized but this predated his decision in Westar, supra.

32 Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In Westar Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.

33 In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the bene-

fit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

34 In this case I am persuaded that it is important to the reorganization process that the former senior executives not be allowed to be paid the entire amounts of their retirement allowances at this time. On the day of the hearing of this matter Woodward's took the first step in implementing the reorganization of its business affairs (which involves a downsizing of its operations) by terminating approximately 1,200 of its 6,000 employees. These terminated employees will be entitled to severance pay which will be a significant obligation of Woodward's. They will be creditors of Woodward's who will be involved in the reorganization of its financial affairs and who will be entitled to vote on the reorganization plan. These former employees will undoubtedly be unhappy when they realize that their severance pay entitlement is an unsecured obligation of Woodward's that will be compromised as part of the reorganization while the former senior executives have security for the entire amounts of their retirement allowances (which are in reality severance payments in the cases of the senior executives who were terminated). If the former senior executives are paid the full amounts of their retirement allowances at this time, the recently terminated employees may not be understanding and it may cause them to vote against Woodward's reorganization plan even if it is in their economic interests to vote in favour of the plan. Negotiations under the CCAA require a delicate balance and payment of the full amounts of the retirement allowances at this time could well irreparably upset the balance.

35 The former senior executives will not be materially prejudiced if the full amounts of the letters of credit are not paid at this time. The amounts owed to them are fully secured by the letters of credit and there will not be any deterioration in the security if the right to draw on the full amounts of the letters of credit is postponed pending the outcome of Woodward's reorganization effort. There was some evidence that there may be adverse income tax consequences if the full amounts of the letters of credit are drawn upon.

36 Another consideration is the dominant intention of the two trust agreements in allowing the full amounts of the letters of credit to be drawn upon. In quoting the relevant provisions of the two trust agreements, I only make reference to the triggering event of Woodward's becoming insolvent. The other triggering events are as follows:

(a) if Woodward's ceases operations;
(b) if Woodward's makes a general assignment for the benefit of creditors or files an assignment in bankruptcy or otherwise becomes bankrupt;
(c) if Woodward's is wound up or dissolved;
(d) if any receiver, trustee, liquidator of or for Woodward's or any substantial portion of its property is appointed and is not discharged within a period of 60 days.

The primary purpose of these triggering events in my view was to allow the former senior executives to cause the full amounts of the letters of credit to be paid if Woodward's has effectively come to an end. The draftspersons of the trust agreements happened to chose insolvency as one of the triggering events because insolvency of a company frequently signifies its end. However, in this case, it will not be known whether Woodward's insolvency will result in its demise until it has made an attempt to reorganize pursuant to the CCAA. I am not saying that the Court should ignore the

wording of the agreements but it is open to the Court to take into consideration the overall intent of the parties when deciding whether it is just and equitable to invoke its inherent jurisdiction.

37 The decision in Meridian, supra, is distinguishable from this case. In Meridian the Court was interpreting an Order that it had previously made and it was not considering whether a further Order could be made pursuant to its inherent jurisdiction.

38 Although I have concluded that the relative benefit of staying the calling of the letters of credit in their entirety outweighs the prejudice to the former senior executives and that I should exercise the Court's inherent jurisdiction to grant a stay to prevent the letters of credit from being fully drawn, it does not necessarily follow that the stay should prevent partial draws upon the letters of credit. In exercising its inherent jurisdiction in these circumstances the Court should endeavour to exercise the jurisdiction in a manner that balances the interests of the parties as much as possible.

39 The main prejudice to the former senior executives if they are not permitted to cause any call to be made on the letters of credit is the fact that the monthly payments of the retiring allowances will not be made. The monthly payments provide a source of income to the former senior executives and they will be prejudiced if the payments cease. Both of Mr. Kirkham and Ms. Adair indicated that if I did grant a stay of proceedings with respect to the letters of credit, one or more of their clients may make an application to have the stay discontinued on the basis that it creates a hardship to them.

40 On the other hand, the continuation of the monthly payments of the retiring allowances is much less likely to create a difficulty in the negotiations with the recently terminated employees than the payment of the retiring allowances in full. Although the former senior executives will be paid the monthly amounts of the retiring allowances without compromise pending the reorganization attempt, they will have to accept payment over a period of time. In addition, the recently terminated employees will hopefully appreciate that Woodward's would not be voluntarily making the monthly payments to the former senior executives and that it is the Court which is allowing the payments to be made.

41 It is my view that the interests of the parties can be largely balanced if the Court exercises its inherent jurisdiction to grant a stay that prevents payment on the letters of credit except to the extent of satisfying the obligation of Woodward's to make the monthly payments of the retiring allowances. In exercising the Court's discretion in this fashion I appreciate that a stay under s. 11 of the CCAA could effectively prevent the calling on the letters of credit for the purpose of paying the monthly amounts. In view of the fact that the Court is exercising its inherent jurisdiction to prevent the letters of credit being drawn in their entire amounts, I am exercising my discretion to decline to grant a stay under s. 11 which would prevent the calling on the letters of credit for the purpose of paying the monthly amounts.

42 It is necessary for the Court to exercise its inherent jurisdiction because a stay under s. 11 could not be utilized to prevent Canada Trust from drawing the full amounts of the letters of credit that are held by it. However, a stay under s. 11 could effectively prevent Montreal Trust from making any call on the letter of credit in its favour. I must now decide whether I should exercise my discretion under s. 11 to prevent Montreal Trust from making the partial draws on its letter of credit that I am permitting Canada Trust to make on each of its letters of credit.

43 As I have indicated above, the main purpose of s. 11 is to preserve the status quo among the creditors of the insolvent company. Huddart J. commented on the status quo in Re Alberta- Pacific Terminals Ltd. (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) at p. 105:

> The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

44 In that case Huddart J. dismissed the application of the owner of the insolvent company's operating facilities for payment of ongoing amounts owing under the operating agreement between the two parties. In essence, the payments were the equivalent of rental payments under a lease. Huddart J. dismissed the application because there were insufficient funds to make the payments and the owner of the facilities had not shown hardship. The circumstances in that case were quite unusual because the insolvent company was continuing to pay interest to one of its lenders. In more normal cases under the CCAA one would expect during the reorganization period that rental payments for the ongoing use of facilities would be made and that interest on debt would not be paid. In any event, the case is an example of a situation where the status quo was maintained by way of different treatment of creditors.

45 In the present case I have decided to exercise my discretion under s. 11 of the CCAA so that Montreal Trust is treated in the same fashion as Canada Trust. It is my view that the status quo is best maintained in this case by giving equal treatment to creditors within the same class irrespective of the different wording in the two trust agreements. I add that Woodward's does have surplus cash at the present time and that other creditors will not be materially prejudiced by allowing partial payments to be made under the letter of credit held by Montreal Trust.

46 In the result, I continue the stay to prevent Canada Trust from calling on the letters of credit held by it except to the extent that it may be necessary to obtain payment of the monthly retiring allowances that are overdue. I grant a stay restraining Montreal Trust from delivering to Woodward's a copy of any certificate provided to it under paragraph 8 of the Montreal Trust Agreement.

47 The Order dated December 11, 1992 stipulates that Woodward's is to retain its funds in its operating accounts with the Bank and that Woodward's may only use the funds for certain specified purposes. I anticipate that the continuing stay Order will have a similar provision. If it does contain a similar provision, the permitted purposes for use of funds may include the payment of the monthly retiring allowances to the former senior executives. I appreciate that Woodward's may prefer to require that the letters of credit be called upon so that there is no appearance to the recently termi-

nated employees that Woodward's is voluntarily making payments to the former senior executives. On the other hand, Woodward's may not want to create an administrative nuisance for the Bank by having numerous calls being made on the letters of credit. Woodward's may exercise its discretion as to whether the monthly payments to the former senior executives are made voluntarily or involuntarily, recognizing of course that they will be made involuntarily if they are not made voluntarily.

TYSOE J.

TAB 3

Indexed as:

Century Services Inc. v. Canada (Attorney General)

Century Services Inc. Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent.

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrange-

ment Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

[page380]

Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the

BIA because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the

CCAA to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

[page383]

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[page384]

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

[page385]

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Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

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By Abella J. (dissenting)

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[page388]

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611

(QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 DESCHAMPS J.:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

(S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

[page390]

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

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

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

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

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

[page392]

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective

> process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[page399]

3.2 *GST Deemed Trust Under the CCAA*

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

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in

this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

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

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

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's

property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

[page402]

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

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

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

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

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

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

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

[page404]

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

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

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

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

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

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

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

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

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

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

[page408]

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

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-

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

[page409]

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

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

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

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

[page412]

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accord-

ingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

[page414]

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary

authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

[page418]

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's

GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion

is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 *Express Trust*

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

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

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

[page422]

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

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and

the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

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

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

The following are the reasons delivered by

FISH J. --

I

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

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to compet-

ing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

[page425]

II

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

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

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

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

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

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
>
> ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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

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

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

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

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

[page427]

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in

almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

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

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

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

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
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> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
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> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

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

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

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

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

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

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

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter,

> may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

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

[page431]

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

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

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*,

has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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

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

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

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

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

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there

> be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[page434]

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

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

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

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

[page435]

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008),

at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

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

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

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It di-

rects that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

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

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

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

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

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

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

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

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

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

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

136 I would dismiss the appeal.

* * * * *

APPENDIX

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

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

...

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

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

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

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

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

[page440]

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,

[page441]

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

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

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

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

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

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

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

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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

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

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

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

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

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

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

[page445]

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

...

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

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

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

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

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

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the

restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

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

[page447]

> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

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

...

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

> (*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income*

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

(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

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

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

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

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

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

ployment Insurance Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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

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

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

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

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

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

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

[page451]

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

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

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

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

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

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

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

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

...

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

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

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

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

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

[page453]

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

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

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

but it shall comprise

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

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

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

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

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

[page454]

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

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

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

...

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

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

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

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

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

[page455]

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

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

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

cp/e/qlhbb

1 Section 11 was amended, effective September 18, 2009, and now states:

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

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

TAB 4

Case Name:

Nexient Learning Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nexient Learning Inc. and Nexient Learning Canada Inc.

[2009] O.J. No. 5507

62 C.B.R. (5th) 248

2009 CarswellOnt 8071

2009 CanLII 72037

Court File No. CV-09-8257-00CL

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: November 30, 2009.
Judgment: December 23, 2009.

(102 paras.)

!!INV1339.010 !!INV00

[QL:QLKEYWORDS/]

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act matters -- Compromises and arrangements -- Directions -- Motion for authorization of assignment of contract by debtor to purchaser dismissed -- The debtor was insolvent -- Its assets were sold to the purchaser -- Post-sale, the debtor sought to assign a licensing agreement to the purchaser with a permanent stay binding the licensor from terminating the agreement due to the debtor's insolvency -- The court found that the proposed relief did not advance the protection proceedings or the reorganization -- The court's discretion was not available to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets -- Companies' Creditors Arrangement Act, s. 11(4).

Motion by the insolvent companies, Nexient Learning and Nexient Learning Canada, for an order authorizing assignment of a contract to Global Knowledge Network. Nexient was a Canadian company that provided corporate training and consulting. Certain of its curriculum and course materials were licensed to Nexient by the respondent, ESI International. Two licensing agreements granted Nexient an exclusive right to offer the course materials in Canada in exchange for certain royalty and one-time payments. ESI regarded its contracts with Nexient as part of an umbrella agreement including both written agreements, oral understandings and a course of dealings in the context of a strategic partnership. The insolvency of Nexient was one of three trigger events that gave rise to a right to termination of the licensing agreements. Global was one of ESI's largest competitors and was the successful bidder for the purchase of Nexient's assets as a going concern. The potential purchase received court approval and closed. In co nnection with the purchase, Nexient sought assignment of one of its agreements with ESI to Global on terms that would permanently stay the right of ESI to exercise rights of termination arising from Nexient's insolvency. Following the entry of Nexient into creditor protection, ESI had purported to terminate the agreement on the grounds of insolvency. Nexient owed ESI approximately $733,000 in royalties. ESI further alleged that the disclosure to potential purchasers of Nexient's assets breached the confidentiality provisions of the agreement. Nexient took the position that the stay of proceedings in the protection order rendered ESI's notice of termination of no force or effect.

HELD: Motion dismissed. The court had jurisdiction to authorize assignment of the agreement to Global notwithstanding any provision to the contrary in the agreement. However, it was not appropriate to exercise discretion to authorize the proposed assignment. The requested relief would not further the protection proceedings or reorganization process, and had no impact on Nexient or its stakeholders given that the sale transaction with Global had already completed. The only impact of the proposed relief was to adversely affect ESI's right to terminate the agreement. There was no evidence that, upon entering the sale process, Nexient and Global intended an assignment on the basis of a permanent stay preventing ESI from terminating the agreement. There was thus no basis to rectify the sale approval order to include such provisions. Global failed to demonstrate circumstances that would justify imposition of a permanent stay against ESI. ESI based on its business model on delivering all of its product lines through a strategic partnership. The court's discretion was not available to competitively disadvantage ESI, as licensor to the debtor, Nexient, in favour of Global, as purchaser of the debtor's assets.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 57.01(6)

Counsel:

George Benchetrit, for Nexient Learning Inc. and Nexient Learning Canada Inc.

Margaret Sims and Arthi Sambasivan, for Global Knowledge Network (Canada) Inc.

Catherine Francis, David T. Ullman and Melissa McCready, for ESI International Inc.

Lynne O'Brien, for the Monitor, RSM Richter Inc.

ENDORSEMENT

1 **H.J. WILTON-SIEGEL J.**:-- On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statute.

Background

The Parties

2 Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

3 Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

4 ESI is a United States corporation having its head office in Arlington, Virginia.

5 Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions -- business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

6 The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

7 Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

8 ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

9 Global Knowledge Training LLC, a United States corporation ("Global Knowledge U.S."), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI's largest competitors.

Relevant Provisions Of The BA Agreement

10 Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three "trigger" events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

> 6. Term and Termination
>
> 6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:
>
> ...
>
> 6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.
>
> 6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

11 Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

12 Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings Under The CCAA

13 On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

14 On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI

and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

15 By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

16 No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

17 It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

18 By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

19 The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

20 Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

21 Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

22 Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

> 2.7 Purchaser's Rights to Exclude

> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

23 It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

24 Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

25 On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

26 Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

27 Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

28 The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

29 The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

30 "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

31 The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

32 At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

33 Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

34 At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

35 According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA

Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

36 Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

37 Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

38 As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

39 In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional -- that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

40 ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

41 Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

42 On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

43 ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that

all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

44 As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

45 First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

46 Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

47 Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

48 I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

49 Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

50 Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?
2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

51 The issue of the assignability of the BA Agreement has two elements -- the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

52 I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

53 The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp. (Re)*, [2001] O.J. No. 4459 (S.C.J.).

54 In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....
>
> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

55 However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

56 On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Re Woodwards Ltd.*, [1993] B.C.J. No. 42 (S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

57 In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

58 Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

59 It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

60 This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

61 Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

62 However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination

rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

63 There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

64 Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

65 First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

66 Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

67 In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by Nexient and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

68 There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I as-

sume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

69 Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

70 Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

71 As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

72 The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium* illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

73 In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

74 Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7

of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers - the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

75 Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

76 There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

77 Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

78 There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

79 This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it

would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

80 Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

81 However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

82 The applicants' request for relief is denied for the following three reasons.

83 First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

84 The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction - in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets - it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

85 Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

86 The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

87 More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options -- to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

88 In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

89 It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

90 Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

91 Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

92 I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

93 However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

94 First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

95 Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

96 This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

97 First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

98 Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

99 ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely,

the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

100 Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

101 Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

102 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

H.J. WILTON-SIEGEL J.

cp/e/qlafr/qljxr/qlaxw/qlced/qlisl

TAB 5

Case Name:

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.

Between
Ford Motor Company of Canada, Limited, Appellant, (Applicant),
and
Welcome Ford Sales Ltd. and Royle Smith, Respondents,
(Respondents)
And between
Ford Motor Company of Canada, Limited, Appellant, (Applicant),
and
Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Myers Norris Penny Ltd. and Bank of Montreal, Respondents, (Respondents)

[2011] A.J. No. 592

2011 ABCA 158

[2011] 8 W.W.R. 221

77 C.B.R. (5th) 278

505 A.R. 146

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44 Alta. L.R. (5th) 81

Dockets: 1003-0089-AC, 1003-0362-AC

Registry: Edmonton

Alberta Court of Appeal
Edmonton, Alberta

K.G. Ritter, P.W.L. Martin and M.B. Bielby JJ.A.

Heard: March 4, 2011.
Judgment: May 27, 2011.

(73 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Sale of property -- Administrative officials and appointees -- Duties and powers -- Appeal by Ford Motor Company from decision granting permission to bankruptcy trustee to sell auto dealership agreement to a third party over objections of appellant dismissed -- No fundamental breach of dealership agreement had occurred -- Appellant's refusal to co-operate with sale was only reason agreement could not be performed -- Effect of s. 84.1 of Bankruptcy and Insolvency Act was to override common law unilateral right of innocent party to contract to accept repudiation and end contract.

Contracts -- Parties -- Assignment of contractual rights -- Appeal by Ford Motor Company from decision granting permission to bankruptcy trustee to sell auto dealership agreement to a third party over objections of appellant dismissed -- No fundamental breach of dealership agreement had occurred -- Appellant's refusal to co-operate with sale was only reason agreement could not be performed -- Effect of s. 84.1 of Bankruptcy and Insolvency Act was to override common law unilateral right of innocent party to contract to accept repudiation and end contract.

Appeal by Ford Motor Company from a decision granting permission to a bankruptcy trustee to sell an auto dealership agreement to a third party over the objections of the appellant, pursuant to s. 84.1 of the Bankruptcy and Insolvency Act. Welcome Ford operated a franchise dealership with the appellant pursuant to the terms of a written dealership agreement. The dealership ceased operations after Ford Credit discovered a large defalcation apparently made by a senior employee of the dealership. A receiver was appointed over Welcome Ford. Notwithstanding the objections of the appellant, the chambers judge granted an order authorizing the trustee to market the dealership. After the dealership was placed into bankruptcy, the chambers judge approved the trustee's application to assign the rights and obligations of Welcome Ford under the dealership agreement to the ultimate purchaser pursuant to s. 84.1. The chambers judge concluded that the dealership agreement was assignable by reason of its nature based on an assessment of evidence showing that the proposed assignee would be able to discharge the dealer's obligations thereunder. Further, the chambers judge concluded that it was appropriate to assign the agreement based on evidence that the appellant unreasonably withheld its consent, that the effect of earlier breaches of the agreement would be remedied through its assignment, and that the appellant's rights and remedies under the agreement would carry on unchanged. The appellant argued that the dealership agreement had been terminated as a result of a fundamental breach occurring before the granting of the receivership order such that there was nothing left to assign to the ultimate purchaser.

HELD: Appeal dismissed. No fundamental breach of the dealership agreement had occurred. The appellant's refusal to co-operate with the sale was the only reason the agreement could not be performed. The appellant, as franchisee, was capable of carrying on the commercial purpose of the dealership agreement but chose not to do so, which fell far short of meeting the test for fundamental breach. Upon the reopening of the dealership, there was nothing to suggest that the appellant would not be able to carry on the commercial purpose of the dealership agreement. The proposed sale cured the effect of those breaches in that it put a financially sound, experienced person in charge of the resumed operation in the form of a new business operating outside of the receivership. The effect of s. 84.1 was to override the common law unilateral right of the innocent party to the contract

to accept the repudiation and end the contract. Section 84.1(3) was to be interpreted upon considering, among other things, the capacity of the proposed assignee and whether it was appropriate to assign the rights and obligations as set out in s. 84.1(4). Nothing in the agreement rendered it unassignable, either because it was said to be personal or not to be assigned without the appellant's consent.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 84.1, s. 84.1(3), s. 84.1(4)

Appeal From:

Appeal from the Order by The Honourable Mr. Justice D.R.G. Thomas Dated the 25th day of March, 2010 Filed on the 26th day of March, 2010 (2010 ABQB 199, Docket: 1003 00638).

Counsel:

K.B. Mills, K.J. Bourassa, for the Appellant.

J.H. Hockin, B.P. Maruyama, for the Respondents, Welcome Ford Sales Ltd., Royle Smith and Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Meyers Norris Penny Ltd.

R.C. Rutman, A.L. Murray, for the Respondent, Bank of Montreal.

Memorandum of Judgment

The following judgment was delivered by

THE COURT:--

INTRODUCTION

1 This appeal was dismissed from the bench with reasons to follow.

2 This was an appeal from a decision granting permission to a bankruptcy trustee to sell an auto dealership agreement to a third party over the objections of the other party to the agreement, an auto manufacturer, pursuant to the provisions of the relatively new s. 84.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

3 Welcome Ford, owned by Royale Smith ("Smith"), operated a franchise dealership with the Appellant, Ford Motor Company of Canada, Limited ("Ford") in Fort Saskatchewan, Alberta pursuant to the terms of a written dealership agreement. The dealership ceased operations on January 13, 2010 after Ford Credit Canada Ltd. ("Ford Credit"), while conducting a physical audit on its premises, discovered a large defalcation apparently made by a senior employee of the dealership. The following day, the chambers judge, acting as *de facto* case manager, appointed Myers Norris Penny ("MNP") the Receiver of Welcome Ford on the application of Ford Credit.

4 Ford Credit tendered evidence in support of that application showing that over $3.7 million to which it was entitled had been misappropriated. At that time, Welcome Ford owed Ford Credit ap-

proximately $7.7 million and owed the Bank of Montreal ("BMO") approximately $2.7 million. Ford Credit had priority in relation to the vehicle inventory, while BMO had a priority claim to all other assets. As a result, Ford Credit seized and removed all vehicles over which it had security. It is an unsecured creditor for any shortfall on its debt remaining after the sale of those vehicles.

5 The order appointing the Receiver stayed all rights and remedies against Welcome Ford; in particular, it ordered that no agreements then in place, including the dealership agreement, be terminated without consent of the court. Ford advised as early as January 29, 2010 that it would not consent to the assignment/sale of the dealership agreement to any party. However, on March 23, 2010, the chambers judge granted an order authorizing MNP to market the dealership while adjourning Ford Credit's application to lift the stay so as to be able to terminate the dealership agreement ("the March order").

6 On May 19, 2010, BMO obtained an order placing Welcome Ford into bankruptcy with MNP as trustee, which had the effect of making the administration subject to the BIA, including s. 84.1 of that statute.

7 MNP marketed the dealership to existing Ford dealers only, receiving offers to purchase from the ultimate purchaser and two others. Ford maintained its refusal to consent to a sale, even to one of its own dealers, notwithstanding that the offer made by the ultimate purchaser, the highest bidder, would have produced sufficient funds to retire the debt to BMO in its entirely and produce a further $570,000 (before professional fees) to be distributed among the unsecured creditors. In comparison, liquidation of the assets without sale of the dealership agreement was expected to produce a far smaller sum, one which would leave more than $1 million of the debt to BMO unpaid and produce nothing for any other creditor.

8 On December 10, 2010, the chambers judge approved MNP's application to assign the rights and obligations of Welcome Ford under the dealership agreement to the ultimate purchaser pursuant to s. 84.1 of the BIA. At the same time, he dismissed Ford's application for a declaration that the dealership agreement could not be assigned without its consent and to lift the stay ("the December orders"). This appeal was then brought against each of the March and December orders.

9 The BIA was amended on December 15, 2009 by the addition of s. 84.1, which allows a court, upon being satisfied that certain prerequisites are met, to grant an order assigning the rights and obligations of the bankrupt under any agreement to a purchaser, even without the consent of the counter-party to the agreement.

10 The Respondents argued that the dealership agreement was properly assignable to the ultimate purchaser under this section, even absent Ford's consent. Ford argued that the dealership agreement had been terminated as a result of a fundamental breach occurring before the granting of the receivership order such that there was nothing left to assign to the ultimate purchaser. It, alternatively, argued that the dealership agreement is not assignable by reason of its nature and, as such, the issues of whether the ultimate purchaser is able to perform the obligations under it and whether it is appropriate to assign it are irrelevant.

11 The issues raised on appeal are:

(A) Has the dealership agreement terminated because of fundamental breach?
(B) How is s. 84.1 of the BIA to be interpreted?

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?
(ii) Are the rights and obligations imposed by the dealership agreement not assignable by reason of their nature because:

(a) the estate will not benefit from the assignment?; or
(b) they are personal in nature?

(iii) Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome Ford's rights and obligations under s. 84.1(4)?

STANDARD OF REVIEW

12 The standard of review to be applied to the interpretation of s. 84.1 of the BIA, a question of law, is that of correctness. The chambers judge's findings of fact and application of facts to the law are subject to deference absent palpable and overriding error. The application of deference is amplified when, as here, the decision was not issued by a chambers judge in the normal course but by a case management judge whose decision is part of a series of decisions in relation to the same matter: see ***De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada***, 2010 ABCA 394 at para. 13.

ANALYSIS

(A) *Has the dealership agreement terminated because of fundamental breach?*

13 Ford argued that Welcome Ford "fundamentally breached" the dealership agreement before the appointment of the Receiver, with the result that the agreement came to an end such that nothing remained for the trustee to assign to the ultimate purchaser. It submitted the acts amounting to "fundamental breaches" include the abandonment of the business on January 13, 2010 and Smith's failure to properly supervise employees.

14 We note the decision of the Supreme Court of Canada in ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2010 SCC 4, [2010] 1 S.C.R. 69 to the effect that the concept of fundamental breach no longer exists, at least in relation to exclusion clauses. The Court stated at 62:

> On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, ..."

and at 82:

> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. ...

15 As no party raised this issue, and the breaches in question here were not of exclusion clauses, we will proceed to our analysis on the basis of the case as argued. That said, it may well be that the simple answer to the issue of whether the dealership agreement was terminated as a result of fundamental breach must be "no" because no such breach was possible.

16 Ford agreed the test for fundamental breach and its application to a franchise agreement is that relied upon by the chambers judge, established in ***Shelanu Inc. v. Print Three Franchising Corporation*** (2003), 64 O.R. (3d) 533 (C.A.) at paras. 113 and 114 as follows:

> [113] In *Majdpour v. M & B Acquisition Corp.* (2001), 56 O.R. (3d) 481, 206 D.L.R. (4th) 627 (C.A.), the event alleged to have triggered a fundamental breach of the franchise agreement by the franchisor was a bankruptcy. Because the franchisee was able to carry on the commercial purpose of the agreement intact after the bankruptcy, MacPherson J.A. dismissed the franchisee's claim [sic] it was discharged from further performance. That reasoning is equally applicable in this case.
>
> [114] In dismissing the claim for fundamental breach, MacPherson J.A. noted that the test was a restrictive one, namely, whether the conduct of one party deprived the other party of "substantially the whole benefit of the contract" as stated by Wilson J. in *Hunter Engineering, supra*, [1989] 1 S.C.R. 426. This is the classic formulation of the test as set out by Diplock L.J. in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 1 All E.R. 474, [1962] 2 Q.B. 26 (C.A.) at p. 66 Q.B.:
>
> > [D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the benefit which it was the intention of the parties as expressed in the contract that he should obtain in consideration for performing those undertakings?

17 In application of this test to the facts in this case, the question becomes whether the "abandonment" of the business or Smith's failure to supervise employees, leading to the defalcation, deprived Ford of the ability to carry on the commercial purpose of the dealership agreement.

18 The chambers judge concluded that the reason Welcome Ford had not operated since mid-January, 2010 was not for lack of trying by the Receiver, but rather because it was met at every step by resistence from Ford. Without receipt of new product and manufacturer's support of that product, the Receiver could not operate the dealership. He found that the proposed sale of the dealership including the dealership agreement would substantially, if not entirely, cure all of the alleged defects under that agreement.

19 It is not clear from the evidence that the dealership business was "abandoned", as suggested by the Appellant. Rather, Ford Credit arrived unannounced to conduct an audit in early January, 2010. The manager, Greg Duffy, sent the staff home on January 13. He remained on the premises both that day and the next, when the receivership order was obtained. He advised the Receiver that he had been involved in improprieties relating to cars, money or business arrangements on the premises for the past eight years and that the owner of the dealership had for years been residing in the Dominican Republic.

20 MNP did not reopen the dealership. It pressed Ford for its consent to a sale/assignment of the dealership agreement. On January 29, 2010, Ford advised that it would not consent, a position it consistently maintained thereafter. It advised by letter dated February 12, 2010 that it had no obligation under the dealership agreement to do business with the Receiver or its assignee. Ford Credit removed the vehicles upon which it had security. For the first time on February 24, 2010, Ford took the position that there had been a fundamental breach of the dealership agreement.

21 Ford argued the dealership agreement provided that a closure of the business for seven days constituted an event allowing for termination of the agreement (see clause 17(b)(3)(ii)). However, clause 17(b) of that agreement also provides that termination is only effective upon such an event occurring where Ford elects to terminate and gives the dealer 15 days written notice of its intention to do so. In this case, the first notice of termination given by Ford was six weeks after the Receiver was appointed, well after Ford had taken the position it would not cooperate with any assignment.

22 Ford argued this situation is akin to that faced by Yamauchi, J. in ***Canada Western Bank v. 702348 Alberta Ltd.***, 2009 ABQB 271, 472 A.R. 297, commonly known as the ***Guild*** decision, where he found fundamental breach of various leases of a commercial building in relation to a builder who went into receivership prior to the completion of construction. The Receiver did not have sufficient funding to complete construction and did not do so. Justice Yamauchi declared that two of the tenants had properly terminated their leases, finding fundamental breach had occurred because of the indefinite delay in construction. The Receiver had provided no evidence as to when a potential purchaser might recommence construction.

23 The chambers judge properly distinguished ***Guild*** by noting that there the Receiver decided not to remedy the lease breaches through completion of construction, whereas here Ford advised the Receiver early on that it would not consent to the Receiver's operation of the dealership. Here, in other words, it was the counter-party to the agreement who refused performance rather than the Receiver. He found that it was Ford which was blocking the breach from being remedied by refusing to cooperate with the reopening of the business by the Receiver.

24 In ***Guild***, it was not clear when, if ever, the buildings which were the subject of the leases in question would be completed (i.e., when the tenants would obtain the commercial benefit they were intended to receive under the leases). Here, Ford would obtain the commercial benefit under the dealership agreement immediately upon its consenting to the Receiver operating it or, alternately, to its sale to a party who could operate it. Ford's refusal to cooperate was the only reason the agreement could not be performed. It, as franchisee, was capable of carrying on the commercial purpose of the dealership agreement; it simply chose not to do so, which falls far short of meeting the test for fundamental breach established in ***Shelanu***.

25 In relation to the argument that Smith failed to properly supervise his employees with the result that the defalcation occurred, Ford tendered a Statement of Claim which maintained that a Welcome Ford manager misappropriated over $1.2 million by way of fraud. The chambers judge noted the lack of evidence that Smith was involved in the fraud or any convincing evidence of resulting damage to Ford's reputation. Needless to say, the manager in question was no longer employed by the time the sale was approved. There was no evidence before the chambers judge to support the suggestion that the manager's alleged prior activities would cast a pall over the operation of a Ford dealership in Fort Saskatchewan in the future.

26 The ultimate purchaser stood ready to reopen the dealership for business upon receiving court approval of the purchase. Any deficiencies in Smith's supervision disappeared with his removal from the business. Upon the reopening of the dealership, there is nothing to suggest that Ford would not be able to carry on the commercial purpose of the dealership agreement. It would not be deprived of the benefits it was intended to receive; indeed, the sooner the sale was effected, the sooner the flow of those benefits would resume.

27 The chambers judge concluded at para. 95 of the December decision: "I am comfortable that the proposed sale of the Welcome Ford dealership will substantially cure the breaches of the [dealership agreement], of which Ford Motor complains". The proposed sale cured the effect of those breaches in that it put a financially sound, experienced person in charge of the resumed operation in the form of a new business operating outside of the receivership. The chambers judge also expressly observed that Ford's rights and remedies will continue unchanged, including the right of first refusal and the right to take steps to terminate the dealership agreement if the purchaser defaults in the future.

28 The standard of review in relation to the chambers judge's findings of fact and application of facts to the law are subject to deference absent clear and palpable error. The application of deference is amplified when, as noted above, the judge is a case management judge whose decision is part of a series of decisions. His decision that no fundamental breach of the dealership agreement had occurred was reasonable and is entitled to our deference. Indeed, had we been required to consider the issue of correctness, we would have concluded his decision to be correct. The ultimate purchaser will be able to perform the dealers obligations under the agreement such that its commercial purpose will be effected. Ford will receive the benefit the parties intended it to receive when that agreement was created.

(B) How is s. 84.1 of the BIA to be interpreted?

29 The position at common law was always that if one party breached a condition (and not a mere warranty) in a contract, the other party to that contract had an election, either to treat the contract as continuing and insist on future performance, or to accept the repudiation and bring the contract to an end. In the latter case certain obligations survived the termination depending upon the construction of the contract.

30 The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve the value of the estate as a whole, even if the contractual rights of some creditors, such as Ford in this case, are compromised. Therefore, even if Ford otherwise had the right to terminate the dealership agreement for breach of condition, and its assignment clause was not one which survived the termination, s. 84.1 nonetheless allows the trustee to apply to the Court for permission to assign the contract so long as the provisions of the statute are met.

31 Ford argues that the provisions of s. 84.1 which are prerequisite to granting permission to assign have not been met.

32 Section 84.1 reads in part:

> (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the

agreement to any person who is specified by the court and agrees to the assignment.

...

(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature ...

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and

(b) whether it is appropriate to assign the rights and obligations to that person.

33 The Appellant did not argue, nor did the chambers judge find, that s. 84.1 expressly excludes auto dealership agreements from its operation. Indeed, the word "agreement" found in that section is wide enough to cover this type of agreement. The chambers judge correctly concluded, therefore, that he had jurisdiction under s. 84.1 to order the assignment (sale) in the proper circumstances.

34 Ford argued, rather, that those proper circumstances did not exist, as discussed below.

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

35 Ford argued that whether the rights and obligations of an agreement are assignable "by reason of their nature" pursuant to s. 84.1(3) must be decided before, and independently of, any consideration under s. 84.1(4) as to whether the proposed assignee is capable of performing the obligations and it is appropriate to assign the rights and obligations. If so, it is irrelevant that the ultimate purchaser is an otherwise approved dealer and a proven performer. The issue of whether the nature of the agreement precludes its assignment would thus have to be resolved independently of any consideration of whether the agreement's commercial purpose would be achieved in the hands of the proposed assignee.

36 This interpretation is not supported by the literal words found in s. 84.1 which do not make a determination under s. 84.1(3) an independent precondition to a determination under s. 84.1(4). Legislative intent may be taken into account as an aide to interpretation only in the case of ambiguity in the words of the statute. Even if such an ambiguity existed here, and one is not apparent, Parliament's intent does not support Ford's interpretation. The chambers judge concluded that s. 84.1 should be interpreted in light of Parliament's intention that the provision be used to protect and enhance the assets of the estate of a bankrupt by permitting the sale/assignment of existing agreements to third parties for value: see Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada,* 4th ed., looseleaf (Toronto: Carswell, 2009) vol. 2 at 3-499. He purported to interpret s. 84.1 in the context of its role as remedial legislation.

37 Prior to the coming into force of s. 84.1 in 2009, a trustee in bankruptcy could not assign (sell) a contract to a third party where the counter-party to that contract opposed the assignment. As a re-

sult, a bankrupt estate was vulnerable to losing the benefit of a valuable contract to the detriment of the estate and often to the detriment of third parties.

38 The estate of a bankrupt may include various forms of property. Sometimes the most valuable property in an estate will be the contractual rights possessed by the bankrupt as of the date of bankruptcy. Those rights may be embodied in, for example, a franchise agreement, a purchase agreement, a license agreement, a lease, a supply agreement or an auto dealership agreement.

39 The clear intent of Parliament in enacting s. 84.1 of the BIA was to address this vulnerability; it made a policy decision that a court ought to have the discretion to authorize a trustee to assign (sell) the rights and obligations of a bankrupt under such an agreement notwithstanding the objections of the counter-party.

40 A statutory provision analogous to s. 84.1 is that of s. 8(2) of the *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5. It provides that, notwithstanding the legal effect of a provision in a lease purporting to terminate the lease upon the tenant becoming bankrupt, the trustee in bankruptcy may elect to retain the leased premises for some or all of the unexpired term of the lease. The trustee may then, upon payment of all overdue rent, assign the lease to a capable third party upon securing an order to that effect from the Court of Queen's Bench. The purpose of the legislation is to enable the trustee to maximize realization without putting the landlord in any worse position that it would have been under the lease before the bankruptcy: see ***Bank of Montreal v. Phoenix Rotary Equipment Ltd.***, 2007 ABQB 86 at para. 51, 72 Alta. L.R. (4th) 321.

41 Similarly, s. 84.1 of the BIA allows a court to approve the assignment (sale) of any agreement to obtain maximum benefit for creditors upon payment of any monetary breaches and upon concluding that the rights and remedies of the counter-party will be preserved.

42 Ford suggested the contrary, offering an extract from the Briefing Book placed before Parliament when it considered this amendment. The Briefing Book gives as a reason for the enactment of the language "not assignable by reason of its nature" (then subsection 3(d)) that it "is intended to provide flexibility to the court to review each agreement in light of the circumstances to determine whether or not it would be appropriate to allow the assignment". It further states, "[s]ubsection (4) provides the courts with legislative guidance as to when an agreement may be assigned. The guidance is limited to enable the court to exercise its discretion to address individual fact situations". These stated purposes are not, however, mutually exclusive.

43 Rather, to the extent that legislative intent is at all relevant, it is as described by the chambers judge as well as Justice Romaine of the Alberta Court of Queen's Bench in ***Alberta Health Services v. Networc Health Inc.***, 2010 ABQB 373 at para. 20, 28 Alta. L.R. (5th) 118:

> The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547 at 556, the Supreme Court commented:
>
> > Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take

these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

44 Ford has suggested no business reason to support its interpretation of s. 84.1(3) and (4). There is no apparent reason as to why appropriateness of the assignment or the capability of the proposed assignee would not be relevant to determining whether the rights and obligations are assignable by their nature. Rather, the opposite would appear to be true.

45 Therefore, I conclude that s. 84.1(3) is to be interpreted upon considering, among other things, the capacity of the proposed assignee and whether it is appropriate to assign the rights and obligations as set out in s. 84.1(4).

(ii)(a) *Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because the estate will not benefit from the assignment?*

46 Ford argued that a court should not exercise its discretion under s. 84.1 to override the Appellant's clear contractual rights to withhold consent to the sale of the dealership in the absence of very clear evidence that the bankrupt estate will benefit: see ***Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.***, 2005 ABQB 324 at para. 11, 382 A.R. 383; ***Kelly v. Watson*** (1921), 61 S.C.R. 482 at 490, [1921] 1 W.W.R. 958. However, unlike the Courts in these two cases, the chambers judge here was not asked to re-write or make the parties' contract by implying missing terms in the existing contract. All other rights and obligations under the assigned dealership agreement were to remain unchanged but for the change in the identity of the dealer from Welcome Ford to the ultimate purchaser.

47 Ford suggested that the chambers judge lacked clear evidence that the proposed assignment would benefit the estate. However, he described the supporting evidence at para. 52 of the December decision, which he found in the addendum to MNP's fourth report. Concluding that an assignment of the dealership agreement would benefit the creditors and enhance the value of the estate, the addendum confirmed that an *en bloc* sale of the assets of Welcome Ford which included the dealership agreement would result in full satisfaction of its indebtedness to BMO, would not prejudice Ford Credit's recovery on its secured collateral, and might make funds available for the unsecured creditors. Ford submitted that this evidence is nonetheless inadequate, criticizing MNP's method of marketing the land on which the dealership was located and the fact that the proposed sale would not, as a certainty, assure any recovery for the unsecured creditors.

48 This criticism falls far short of being persuasive given that the alternative, termination of the dealership agreement, would not generate sufficient funds to satisfy even the secured creditors. The chambers judge's conclusion that the proposed assignment (sale) would benefit the estate is therefore reasonable and deserving of deference.

(ii)(b) *Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because they are personal?*

49 The dealership agreement expressly provides, among other things, that:

(a) Ford reserves the sole discretion to determine, from time to time, the numbers, locations and sizes of its franchised dealers;
(b) The dealership agreement is personal in nature and Ford expressly reserves the right to execute dealership agreements with individuals and others specifically selected and approved by it;
(c) Ford has the right to approve or decline to approve any transfer or change in voting control of a dealer based on the character, automotive experience, management, capital and other qualifications of the acquirer of the voting control, or the equity or beneficial interest, or the dealership business or its principal assets;
(d) Ford acknowledges a responsibility to ensure that dealers are owned and operated by qualified individuals of good reputation who are able to meet the requirements of the dealership agreement and the challenges of the marketplace;
(e) The dealership agreement may be terminated upon the happening of a number of events, including any transfer or attempted transfer by the dealer of any interest, right, privilege or obligation under the dealership agreement, or transfer by operation of law or otherwise of the principal assets of the dealer without the consent of Ford which "shall not be unreasonably withheld"; and
(f) Where there is a change in voting control of the principal owners of the dealership or a transfer of the dealership business or its principal capital assets, Ford's written approval is required; in declining any such approval (not to be unreasonably withheld), Ford has the right to consider the character, automotive experience, management capital and other qualifications of the proposed acquirer.

50 Ford argued that these provisions characterize the dealership agreement as "personal" to the parties who executed it, and therefore non-assignable notwithstanding the express provision permitting assignment with Ford's permission. The chambers judge concluded otherwise. The dealership agreement was not a "personal contract" which by its "nature" could not usefully be performed by another. Instead, he described it as "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing" (para. 73). As such, it did not fall within the s. 84.1(3) exception.

51 The dealership agreement is the same type of agreement as that found to be distinguishable from an employment or "personal service arrangement" by the Ontario Superior Court of Justice in ***Struik v. Dixie Lee Food Systems Ltd.***, [2006] O.J. No. 3269, 2006 CarswellOnt 4932 at para. 69.

52 Parties to a contract cannot insulate it from the effect of s. 84.1 simply by including a clause describing it as creating "personal" obligations where the contract is, in fact, a commercial one which could be performed by many others than the contracting parties.

53 Ford correctly pointed out that s. 84.1(3) does not speak of a personal contract as being the only type of contract which contains rights and obligations that are not assignable by their nature. It

argued that the above terms of the dealership agreement evidence that it is not assignable by reason of its nature even if it is not a personal contract.

54 However, those express provisions - including those which describe it as personal in nature as well as Ford's reservation of the right to execute dealership agreements with those specifically selected and approved by it - are not sufficient to attract the application of s. 84.1(3) if other circumstances suggest the contrary. Otherwise, s. 84.1(4) would have no meaning, if a simple contractual provision to the effect that it was not "by reason of its nature" capable of unilateral assignment would be enough to make that so.

55 Ford accepted that the test to be applied to determine if the dealership agreement contains rights and obligations which by their nature are not assignable is that set out in ***Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)***, 2002 MBCA 51 at paras. 79, 81-82, [2002] 7 W.W.R. 104. At para. 82 of ***Black Hawk Mining***, the Manitoba Court of Appeal cited ***Maloney v. Campbell*** (1897), 28 S.C.R. 228 at 233 as follows:

> Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.

56 Ford argued that it requires its dealers to have special personal characteristics, including specific requirements of knowledge, capital and experience. It led evidence that the value of a dealership is based primarily on the ability of the person operating it. However, the test for "non-assignability" found in ***Black Hawk Mining*** is not that it is important to Ford who would be performing the rights and obligations of Welcome Ford in the future, but rather whether those rights and obligations cannot be performed by the proposed assignee.

57 In any event, the evidence did not support the argument that it was important to Ford to have Smith and no other act as the Welcome Ford dealer. The chambers judge relied upon the fact that there was no evidence Ford had made any inquiry in respect of Smith, the owner of Welcome Ford, before signing the original dealership agreement or its most recent renewal in 2007, even to the extent of a credit check or confirmation as to his or the dealership's financial status from their bankers. Indeed, Ford did not know that Smith had relocated to the Dominican Republic well before the receivership order was granted; there was no evidence that it monitored him or stayed in regular contact with him throughout the period he controlled Welcome Ford.

58 Ford responded that it had no ability to review the qualifications of dealers when the 2007 renewal was signed; it was the dealers alone who had the obligation of signing onto the new form or continuing with the extant form of agreement. However, Ford was presumably responsible for the drafting of the original dealership agreement signed by Smith. If it failed to provide for ongoing proof of financial and other stability, that is an indicator that Ford did not consider those factors to be important.

59 The gist of the dealership agreement is that Ford agreed to provide automobiles to Welcome Ford, who in turn agreed to purchase and pay for them, and thereafter to promote their sale and provide after-market service. The operation of this agreement unfolded in a commercial manner. The evidence did not disclose anything which Smith alone could or did provide. The conclusions of the chambers judge that nothing in the agreement rendered it unassignable, either because it was said to

be "personal" or not to be assigned without Ford's consent, are reasonable and should be accorded deference.

(iii) *Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome Ford's rights and obligations under s. 84.1(4)?*

60 Section 84.1(4) of the BIA directs a judge, in determining if an order approving an assignment (sale) is to be made, to consider whether the party to whom the rights and obligations are proposed to be assigned can perform those obligations in the same manner as the original dealer. If not, court approval of the assignment should be withheld.

61 Ford argued the chambers judge did not have sufficient evidence to be able to conclude that the principal of the ultimate purchaser, the proposed assignee, would be able to perform the dealership obligations in the same fashion as had Smith. Notwithstanding the fact that principal was already successfully operating another Ford dealership in the area, Ford argued there was no evidence before the chambers judge as to i) the financial capability of its principal (even though he was proposing to make the purchase without the need of financing), ii) a business plan for operating multiple dealerships, or iii) his ability to satisfy Ford's criteria for owning and operating multiple dealerships.

62 Presumably some, if not all, of this evidence would have been internally available to Ford, yet it led no evidence to show any disability on the part of the ultimate purchaser. The chambers judge expressly relied on unchallenged affidavit evidence from another local Ford dealer to the effect that the proposed assignee had an excellent track record in terms of operating a profitable Ford dealership and had received many national awards from Ford over the years; the quality of its business premises met Ford's standards, unlike those which Ford had permitted Welcome Ford to operate. From this, the chambers judge inferred that the proposed assignee had both the capital and relevant experience in automotive retailing to enable him to operate the Welcome Ford dealership.

63 Ford went on to argue that the "good faith" obligation imposed on the parties under the dealership agreement takes into account the particular dealer. It is akin to the duty of good faith found in an employment contract: see ***Transamerica Life Canada Inc. v. ING Canada Inc.*** (2003), 68 O.R. (3d) 457 at para. 46 (C.A.). This means Ford would have a right of action for damages where a dealer breached the duty of fair dealing in the performance or enforcement of the dealership agreement: see Frank Zaid, *Canadian Franchise Guide*, looseleaf (Toronto: Thomson Reuters, 1992) at 2-142Z.36.

64 An assignment to any third party could conceivably increase the risk of that party not honouring its good faith obligation. However, the dealership agreement will be assigned only upon the court finding the appropriate prerequisite capability, with the resulting reduction in risk that the new dealer will be less honest than the old. Indeed, in this situation where the former dealership encountered a significant problem with employee misappropriation, these risks will likely be well reduced by the proposed assignment to an existing Ford dealer who presumably operates its other dealerships under a similar "good faith" obligation.

65 Section 84.1(4) of the BIA also directs a judge, in determining if an order approving an assignment (sale) should be made, to consider whether it is appropriate to assign the rights and obligations under the agreement.

66 The chambers judge assumed, for the purposes of his decision, that "the consent of Ford Motor to the proposed assignee is required", and that the unreasonable failure to provide that consent is a consideration in determining that it is appropriate to nonetheless assign (sell) the agreement. There is nothing in s. 84.1 which expressly requires that the consent of the contracting party be canvassed as a prerequisite to the application for approval of an assignment of an agreement. The chambers judge did not find that such canvassing was required; he simply assumed it was for the purpose of his analysis. There is no reason to interpret the section as containing such an implicit prerequisite. Rather, an unreasonable withholding of consent is simply one factor to consider in determining whether it is otherwise appropriate to assign the agreement pursuant to s. 84.1(4).

67 The chambers judge found that Ford would never consent to the assignment of this dealership agreement because it would not consent to the assignment of any dealership agreement where a dealership had ceased operation. In withholding consent, Ford had not taken into account the merits of the proposed assignee. The chambers judge therefore concluded that Ford had unreasonably withheld its consent.

68 Ford argued that a wider investigation needed to be undertaken when determining the appropriateness of assigning the dealership agreement than simply one of its refusal to consent. This investigation would canvass the terms of the agreement, the departing dealer's misconduct, the Receiver's failure to continue to operate the dealership pending approval of the proposed sale, Ford's standard criteria when considering a request to assign a dealership agreement outside of an insolvency context, and the results of an analysis it had done subsequent to the closure of Welcome Ford which concluded that future direct representation of the Ford brand was not warranted in the Fort Saskatchewan area.

69 While the chambers judge described his investigation into these issues as "limited", he did consider factors in addition to Ford's unreasonable refusal to consent. Those other factors were the uncontradicted evidence that the ultimate purchaser was up to the job, his conclusion that the proposed assignment would substantially cure the breaches which Ford argued were fundamental, and that all of Ford's rights and remedies under the dealership agreement would be preserved against the proposed assignee. There was no obligation upon the chambers judge to expressly address each additional factor which Ford argued should bear on his determination. His approval of the assignment conveys the results of his assessment of those arguments.

70 Ford argued that the chambers judge should not have considered its failure to consent to any assignment as a factor at all; to do so would amount to a limitation on access to justice in a new area in which it wished to test the effects of s. 84.1 of the BIA. Even if that is so today, it does not counteract the other reasons given by the chambers judge for concluding that it was appropriate to approve the assignment.

71 In summary, the chambers judge concluded the dealership agreement was assignable by reason of its nature based on an assessment of evidence showing the proposed assignee would be able to discharge the dealer's obligations thereunder and upon concluding that it was appropriate to assign the agreement based on evidence that Ford unreasonably withheld its consent, that the effect of earlier breaches of the agreement would be remedied through its assignment, and that Ford's rights

and remedies under the agreement would carry on unchanged. That decision was reasonable; deference should be accorded to it.

CONCLUSION

72 The appeal is dismissed.

COSTS

73 The parties advised they had agreed each should bear their own costs of this appeal given that it involved the interpretation of a hitherto uninterpreted statutory provision. For that reason, the normal rule that the victor is entitled to costs will not be followed. Each party is to bear its own costs of this appeal.

K.G. RITTER J.A.
P.W.L. MARTIN J.A.
M.B. BIELBY J.A.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Court CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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